

**LIMITATION OF APPELLATE JURISDICTION OF THE
UNITED STATES SUPREME COURT**

1256 -3

HEARINGS

BEFORE THE

**SUBCOMMITTEE TO INVESTIGATE THE
ADMINISTRATION OF THE INTERNAL SECURITY
ACT AND OTHER INTERNAL SECURITY LAWS**

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

EIGHTY-FIFTH CONGRESS

SECOND SESSION

ON

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LIMITATION OF APPELLATE JURISDICTION OF THE UNITED STATES SUPREME COURT

WEDNESDAY, FEBRUARY 10, 1958

UNITED STATES SENATE,
SUBCOMMITTEE TO INVESTIGATE THE ADMINISTRATION
OF THE INTERNAL SECURITY ACT AND OTHER INTERNAL
SECURITY LAWS, OF THE COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The subcommittee met, pursuant to notice, at 10:35 a. m., in room F-39, United States Capitol, Senator Roman L. Hruska presiding.

Present: J. G. Sourwine, chief counsel; Benjamin Mandel, research director; and F. W. Schroeder, chief investigator.

Senator HRUSKA. The committee will come to order.

This is a continuation of the hearings initiated August 7, 1957, on S. 2646. We have two witnesses here today. If Mr. Rauh is present and is ready to proceed, we will start with him. And then I understand Mr. Hart will be the next witness.

Is there anything that we should incorporate into the record at this time, Mr. Sourwine, before Mr. Rauh proceeds with his statement?

Mr. SOURWINE. Mr. Chairman, since this volume of the hearing will be printed separately from the other volume, I suggest it might be desirable to place in the record at this point a copy of the bill.

Senator HRUSKA. That will be done.

(The bill referred to is as follows:)

[S. 2646, 85th Cong., 2d sess.]

A BILL To limit the appellate jurisdiction of the Supreme Court in certain cases

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) chapter 81 of title 28 of the United States Code is amended by adding at the end thereof the following new section:

"§ 1253. Limitation on appellate jurisdiction of the Supreme Court.

"Notwithstanding the provisions of sections 1253, 1254, and 1257 of this chapter, the Supreme Court shall have no jurisdiction to review, either by appeal, writ of certiorari, or otherwise, any case where there is drawn into question the validity of—

"(1) any function or practice of, or the jurisdiction of, any committee or subcommittee of the United States Congress, or any action or proceeding against a witness charged with contempt of Congress;

"(2) any action, function, or practice of, or the jurisdiction of, any officer or agency of the executive branch of the Federal Government in the administration of any program established pursuant to an Act of Congress or otherwise for the elimination from service as employees in the executive branch of individuals whose retention may impair the security of the United States Government;

"(3) any statute or executive regulation of any State the general purpose of which is to control subversive activities within such State;

"(4) any rule, bylaw, or regulation adopted by a school board, board of education, board of trustees, or similar body, concerning subversive activities in its teaching body; and

"(5) any law, rule, or regulation of any State, or of any board of bar examiners, or similar body, or of any action or proceeding taken pursuant to any such law, rule, or regulation pertaining to the admission of persons to the practice of law within such State."

(b) The analysis of such chapter is amended by adding at the end thereof the following new item:

"1253. Limitation on the appellate jurisdiction of the Supreme Court."

Mr. SOURWINE. I also offer for the record the text of the notice which was placed by Senator Eastland in the Congressional Record with respect to this hearing.

Senator HRUSKA. It is so ordered.

(The text of the notice referred to, as published in the Congressional Record of February 3, 1958, pp. 1268 and 1269, is as follows:)

NOTICE OF HEARING ON BILL TO LIMIT APPELLATE JURISDICTION OF SUPREME COURT

Mr. EASTLAND. Pursuant to resolution of the Committee on the Judiciary approved Monday, February 3, intensive hearings are to be held on the bill S. 2646, to limit the appellate jurisdiction of the Supreme Court in certain cases. This bill, introduced by Senator Jenner, would withdraw from the Supreme Court of the United States appellate jurisdiction in certain specified fields, namely, first, with respect to the investigative functions of the Congress; second, with respect to the security program of the executive branch of the Federal Government; third, with respect to State antisubversive legislation; fourth, with respect to home rule over local schools; and, fifth, with respect to the admission of persons to the practice of law within individual States.

All persons interested in testifying either for or against this bill or any of its provisions should immediately communicate their desire in this regard to me, to the chief clerk of the Committee on the Judiciary, or to the counsel of the Internal Security Subcommittee. Dates will be scheduled for these hearings so as to take care of all who wish to be heard; but, since the committee explicitly directed that the hearings be concluded in time to report the bill back to the full committee for action on March 10, it will be necessary for all persons who wish to appear and testify to make their wishes known promptly in order that time may be assigned to them.

Attention is called to the provisions of the Senate rule requiring each witness who intends to present a statement before the committee to furnish the committee with a copy of such statement at least 24 hours before the time of his scheduled testimony.

Mr. SOURWINE. Senator Jenner, who is recuperating from a rather severe illness at his home in Indiana, has asked that there be entered in the record at the beginning of these hearings a statement which is in rough, but which will soon be available. May that be put in?

Senator HRUSKA. That will be incorporated at this point in the record upon its arrival.

(The statement referred to is as follows:)

STATEMENT BY SENATOR WILLIAM B. JENNER

The objective of my bill S. 2646 is to check judicial legislation in certain fields where it has been damaging the internal security of the United States.

Utilization by the Congress, as this bill proposes, of the power conferred by paragraph 2 of section 2 of article III of the Constitution to regulate the appellate jurisdiction of the Supreme Court is the only effective way to reply to the Supreme Court's usurpation of legislative power in these fields.

This authority did not get into the Constitution by chance. It was specifically inserted, as a part of the system of checks and balances which distinguishes the Constitution of the United States. The purpose of this provision could only

have been to put the Congress in a position to divest the Supreme Court of its appellate jurisdiction when, in the discretion of the Congress, circumstances required such action. In fact, under the interpretation of this clause which has been uniform since 1790, the Congress can withhold appellate jurisdiction from the Supreme Court simply by not in terms granting it. Thus, all the appellate jurisdiction the Supreme Court has, it holds by virtue of congressional act; and of course, what the Congress has granted, the Congress may take away.

It has been said, by way of argument against my bill, that the factor of primary importance in connection with appellate jurisdiction is uniformity of decision, and preservation of stare decisis. But it is the recent decisions of the Supreme Court which have upset the principle of stare decisis and given us confusion, rather than uniformity, in decisions. This has been the result of the Supreme Court's attempts to legislate its opinions into the law of the land. By taking from the Supreme Court the right to enforce these novel items of judicial legislation, my bill would restore stare decisis and help to preserve the uniformity of decisions.

In connection with this point, we must consider the nature of the cases in which my bill would take from the Court its appellate jurisdiction. With respect to the investigatory power of the Congress, the Court never should have such appellate powers. As Mr. Justice Clark said in his dissenting opinion in the Watkins case: "So long as the object of a legislative inquiry is legitimate and the questions propounded are pertinent thereto, it is not for the courts to interfere with the committee system of inquiry. To hold otherwise would be an infringement on the power given the Congress to inform itself, and thus a trespass upon the fundamental American principle of separation of powers." Mr. Justice Clark declared that the Court majority "has substituted the judiciary as the grand inquisitor and supervisor of congressional investigations," and asserted "It has never been so."

In the field of administration of the Government employee security program, my bill does not, as some of its opponents would have us believe, strip from any employee the right to his day in court to protect his constitutional rights. The bill simply prevents the Supreme Court from stepping in and making new rules to the detriment of the security of our country. In that connection, I want to reiterate what I have said before: the right to his day in court does not give any man the right to a trial before more than one forum. Any right of appeal is a matter of grace.

Substantial portions of my bill have to do with areas involving States rights, and the performance by States of functions which are primarily of concern to the States. So it is with the matter of home rule in the administration of schools and so it is with respect to actions by State legislatures to combat subversion within the boundaries of their respective States; and so it is with respect to the powers of States to control the practice of law within their boundaries. There is no need for any national uniformity with respect to these matters. They are things for each State to decide for itself. Leaving the decisions in each State to the highest court of that State, and taking from the Supreme Court of the United States any power to step in and impose an arbitrary rule, can only be a salutary thing, a step away from regimentation and back toward freedom of the individual.

These are the basic principles upon which my bill is based. I have discussed them previously in far greater detail. It may be that I shall do so again near the conclusion of this hearing.

Mr. SOURWINE. I have nothing else to offer for the record at this time.

**TESTIMONY OF JOSEPH L. RAUH, JR., NATIONAL VICE CHAIRMAN,
ACCOMPANIED BY EDWARD D. HOLLANDER, NATIONAL DIRECTOR,
AMERICANS FOR DEMOCRATIC ACTION**

Senator HRUSKA. Mr. Rauh, you have been kind enough to furnish us with advance copies of your statement, and if it is agreeable with you, as you go along with this statement, perhaps we can raise questions that may occur to counsel, or to the chairman. Is that agreeable?

Mr. RAUH. Certainly.

Senator HRUSKA. It might make just a little more sense as we go along.

Mr. RAUH, are you here individually, or do you represent an organization? Would you tell us what your representation is, or do you in your statement?

Mr. RAUH. I do so in my statement, but I would be glad to tell you now. Mr. Edward Hollander on my right is the national director of Americans for Democratic Action. I am a former national chairman of Americans for Democratic Action, and I am presently vice chairman dealing in the field of civil rights and civil liberties. And I appear today with Mr. Hollander on behalf of the organization. These happen to be my personal views, but I am stating the views, as I understand them, of our organization.

Senator HRUSKA. What is the membership of the organization?

Mr. RAUH. Approximately 40,000 members.

Mr. HRUSKA. And how is it distributed geographically?

Mr. RAUH. Well, it is distributed throughout the country. I would say that it more or less follows where you find the preponderance of liberal opinion in America, it more or less follows that distribution. But we have members in all States, although I wouldn't claim that in the State of Mississippi we have very many members.

Senator HRUSKA. Do you think there are some States in which you have some more?

Mr. RAUH. I am sure of that. Our views on civil rights are not very well received in some areas.

Senator HRUSKA. Well, is it true--I am asking now for my personal information--are there any special parts of the country where there are greater numbers of chapters or locals, or whatever you call them?

Mr. RAUH. Yes. In the East they are principally more active, they are vigorous chapters. Our Chicago, Ill., group is one of our strongest.

Senator HRUSKA. And your appearance here is by resolution of the executive committee, or by direction of the president? Is there any official action taken by the organization to have you express their views?

Mr. RAUH. The national chairman, Robert Nathan, and I have discussed this problem, and the executive committee has at times in the past discussed the problem. I have no doubt as to their views.

Senator HRUSKA. I just wanted to know the connection between your presentation and the representation of the association.

Mr. RAUH. I believe it is highly official, Senator.

Senator HRUSKA. You may proceed, Mr. Rauh.

Mr. RAUH. At this time I would like to offer my statement and have it incorporated in the record, and then I will simply talk. It is easier than reading it, since you have had the benefit of it in advance.

Is that satisfactory?

Senator HRUSKA. That will be all right. And then proceed to outline the highpoints as you see them at your own convenience.

(The prepared statement of Joseph L. Rauh, Jr., is as follows:)

My name is Joseph L. Rauh, Jr. I am former national chairman, and presently vice chairman, of the Americans for Democratic Action on whose behalf I appear here this morning. We appreciate this opportunity to state ADA's views upon S. 2610.

I must say right at the outset that I find it somewhat strange for an organization of liberals to be the outspoken defenders of the Supreme Court while conservative groups lead the attack upon the Court. Most often in the past liberals have been on the march against the Court and conservatives have defended the Court against charges of preferring private property to human values. One may well ask, where are the people who fought against Franklin Roosevelt's "court packing" plan 20 years ago; where do they stand today on this grave new assault upon the Court?

The Supreme Court is under attack today because its recent decisions emphasizing human dignity and human freedom have gone contrary to the views of segregationist politicians in the South and security-mad politicians in the North. Instead of using the tactics of the Communists, as so many of its critics have done, the Court has recognized that the best answer to communism lies in an ever-broadening democracy; the Court's school integration decisions and its decisions enforcing the Bill of Rights are steps to that end.

Americans for Democratic Action believes that S. 2610 is a subversive bill in the true sense of that word; we believe S. 2610 subverts basic principles of American government. S. 2610 would undermine the Bill of Rights by undercutting decisions of the Supreme Court protecting Americans in the exercise of rights granted by the Constitution. It would end the independence of the judicial branch of the Government by curtailing the authority of the highest Court and threatening the authority of the remainder of the judiciary. It would raise the specter of legislative dictatorship.

One finds it ironical to have to point out to a Senate committee that the Supreme Court represents one of the great checks and balances in our governmental system and that it is upon such a government of checks and balances that our Nation has grown great. The Senate is itself the most checked and balanced parliamentary institution in the world. The small States balance the large. The filibuster checks the majority. The seniority rule gives elderly chairmen of committees a restraining hand on all proposed action. It is difficult to see how a body so well checked and so well balanced can fail to recognize the Supreme Court as the true balance wheel in our governmental system.

S. 2610 proposes to eliminate the appellate jurisdiction of the Supreme Court in five specified categories of cases in which Senator Jenner, its sponsor, bitterly opposes the course of decision by the Court.

The first category of Supreme Court jurisdiction which would be eliminated consists of cases questioning the validity of congressional investigating committee proceedings, and of actions to punish witnesses before these committees for alleged contempt. Here Senator Jenner is aiming at the Supreme Court's decision in the Watkins case.

The second category consists of cases questioning the validity of any loyalty-security program or action concerning employees of the Federal Government. Here Senator Jenner is aiming at the Supreme Court's decisions in the Cole and Service cases.

The third category consists of cases questioning the validity of State action directed at alleged subversive activities. Here Senator Jenner is aiming at the Supreme Court's decisions in the Nelson and Sweezy cases.

The fourth category consists of cases questioning the validity of public or private school regulation of alleged subversive activities by teachers. Here Senator Jenner is aiming at the Supreme Court's decision in the *Slochower* case.

The fifth category consists of cases questioning the validity of State regulation concerning the admission of persons to the practice of law within a State. Here Senator Jenner is aiming primarily at the Supreme Court's decisions in the *Schwabe* and *Koenigsberg* cases.

Americans for Democratic Action submits that S. 2610 should be rejected because:

1. The Supreme Court's decisions which S. 2610 seeks to reverse are legally right and strengthen the fabric of our democracy.

II. Elimination of the Supreme Court's appellate jurisdiction in these important areas of the relationship of the citizen to his Government threatens our constitutional system.

We turn now to deal with each of these points separately.

I. THE DECISIONS WHICH S. 2010 SEEKS TO REVERSE ARE LEGALLY AND MORALLY RIGHT AND STRENGTHEN THE FABRIC OF OUR DEMOCRACY

S. 2010 appears to be aimed primarily at eight recent Supreme Court decisions. What do these decisions hold?

The *Watkins* case holds that a congressional committee must inform a subpoenaed witness why the information sought from him is pertinent to the committee's inquiry.

Is it not a basic principle of American life that anyone forced to testify anywhere should know why he is being required to do so?

The *Cole* case holds that the Federal employees security program applies only to persons holding sensitive positions.

Is it not a basic principle of American life that the screening of our citizens should be limited to areas affecting national security?

The *Service* case holds that the Secretary of State must follow his own regulations in discharging employees.

Is it not a basic principle of American life that Government officials should be required to follow the regulations they promulgate?

The *Nelson* case holds that a State "Little Smith Act" conflicts with the Federal Smith Act and the Federal Government's paramount interest in national security.

Is it not a basic principle of American life that the Federal Government has the responsibility for protecting our security against foreign enemies?

The *Sweezy* case holds that a State legislature must, when delegating its investigative authority, do so within reasonably clear limits.

Is it not a basic principle of American life that no governmental official should have unrestricted authority to inquire into the lives of our citizens?

The *Slochower* case holds that a schoolteacher may not be discharged solely because he exercised his privilege against self-incrimination.

Is it not a basic principle of American life that no one should be punished for exercising a constitutional privilege and that a governmental agency should act only after investigating all the facts?

The *Schwabe* and *Koenigsberg* cases hold that a man should not arbitrarily be deprived of the right to practice law.

Is it not a basic principle of American life that no citizen should be deprived of his opportunity to enter his chosen profession except for sound reasons and after careful procedures?

There is nothing radical or strained in these eight decisions. What were radical and what were strained were the arbitrary actions taken in the name of national security which the Supreme Court was required to upset in these cases in reliance upon the Bill of Rights. Just how moderate these eight decisions really are is shown by the substantial unanimity of the Supreme Court in these cases. The average vote in these 8 cases for the principles enunciated above was 6 plus; the average vote against was 2. A table supporting these figures follows:

	Majority	Dissent
<i>Watkins</i>	6	1
<i>Cole</i>	6	3
<i>Service</i>	8	0
<i>Nelson</i>	6	3
<i>Sweezy</i>	6	2
<i>Slochower</i>	5	4
<i>Schwabe</i>	8	0
<i>Koenigsberg</i>	5	3
Total	50 +8	16 +8
	63½	2

Here is a Court of tremendously varied backgrounds—a former governor, 2 former Senators, a former State Judge, 2 former Federal Judges, a former Attorney General, and 2 former professors, several of whom had long and distinguished records at the bar. Their general agreement in support of these eight decisions should be a cause for congressional satisfaction, not hostility.

The civil liberties climate has improved over the last 4 years. The climate has turned away from the very McCarthyism which lies at the source of S. 2040. These Supreme Court decisions represent the best in American constitutional law and the Bill of Rights. This is no time to reverse the tide that is running for human freedom.

II. ELIMINATION OR RESTRICTION OF THE SUPREME COURT'S APPELLATE JURISDICTION THREATENS OUR CONSTITUTIONAL SYSTEM

To restrict the appellate jurisdiction of the Supreme Court in the manner proposed by S. 2040 would be both revolutionary and retrogressive. The late, former Justice Owen J. Roberts has written that preservation of the Supreme Court's appellate jurisdiction "in all the cases which, traditionally, it has dealt with as final appellate body under the Constitution . . . is the core of the Court's fulfilling its independent functions in our system of government" (Roberts, *Now Is the Time: Fortifying the Supreme Court's Independence*, 35 A. B. A. J. 1 (1941)).² The eminent lawyer and president of the American Law Institute, Harrison Tweed, agrees with Justice Roberts that proposals to restrict the traditional appellate jurisdiction of the Supreme Court, such as those embodied in S. 2040, threaten to "destroy our governmental framework and abandon the philosophy of the Constitution calling for three balanced departments of government" (Harrison Tweed, *Provisions of the Constitution Concerning the Supreme Court of the United States*, 31 B. U. L. Rev. 1 (1951)).³

S. 2040 purports to let the jurisdiction of the lower Federal courts alone and does not in any way affect the jurisdiction of the State courts. But if appellate jurisdiction is taken away from the Supreme Court in these five categories of cases, can the inferior Federal courts and State courts, who presumably are given the final word, be relied upon to vindicate constitutional rights in these cases?

Even with the best of intentions on the part of the State and lower Federal judges, no uniform interpretation of the Constitution would be possible under these circumstances. An individual's rights would depend upon the irrelevant circumstance of where he happened to bring his case. This violates the most fundamental notions of equal justice.

So far as the inferior Federal courts are concerned, it must also be remembered that Congress' control over them under the Constitution is even greater than it is over the Supreme Court. The Constitution itself creates the Supreme Court and merely authorizes the Congress to "ordain and establish" inferior courts. The judicial power of the United States is vested in the Supreme Court and such inferior Federal courts as are established by Congress. And a Congress which did not hesitate to retaliate against the Supreme Court because it disagreed with the way the Court was interpreting the Constitution would hesitate even less to move against the lower Federal courts for the same reason. Passage of this bill, therefore, would be a thinly veiled threat to the lower Federal courts to disregard the Supreme Court's decisions in the five categories of cases in question or else be the next object of Congress' wrath. No matter how courageous the lower Federal judges might be in resisting this threat, their independence would be jeopardized by the very fact that Congress made the threat by passing this bill.

Neither can the State courts be relied upon to vindicate constitutional rights under our Federal system, once the Supreme Court's appellate jurisdiction is taken away. Although article VI—the supremacy clause—of the Constitution declares the Constitution to be "the supreme law of the land," binding upon all State judges, there would be no way to determine whether the State courts were in fact following this supreme law—or even what it required—if Congress forbids the Supreme Court, as S. 2040 would do in the third, fourth, and fifth categories of cases, from entertaining appeals from the judgments of the highest State courts allegedly infringing upon constitutional rights. Nor under existing law is there any provision for appeal to the lower Federal courts.

² See appendix II.

In *Martin v. Hunter's Lessee* (1 Wheat. 304 (U. S. 1816)) Mr. Justice Story explained the motive of the Founding Fathers for granting appellate jurisdiction to the Supreme Court from decisions of the State courts—a motive “perfectly compatible with the most sincere respect for State tribunals”—as follows:

“That motive is the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the Constitution. Judges of equal learning and integrity, in different States, might differently interpret a statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the Constitution of the United States would be different in different States, and might, perhaps, never have precisely the same construction, obligation, or efficacy in any two States. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the Constitution. What, indeed, might then have been only prophecy, has now become fact; and the appellate jurisdiction must continue to be the only adequate remedy for such evils.”

Since the founding of the Republic, it has been recognized that constitutional rights can be guaranteed only by providing for such appeal to the Supreme Court, the arbiter in our system of Government of the relations between State and Nation and the protector of the fundamental liberties of our people. This is why Justice Holmes once said he thought the Union would be imperilled if the Supreme Court could not declare laws of the several States unconstitutional and void. “For one in my place,” Holmes said, “sees how often a local policy prevails with those who are not trained to national views”—(Holmes, *Collected Legal Papers* (1920), 293-290). One would have thought that this issue raised again by S. 2610, had been resolved once and for all by the Civil War. The fate of the Union still depends on its remaining resolved the same way.

The proposed bill is not only clearly undesirable but also threatens our constitutional system. I am aware, of course, that article III of the Constitution specifies only the cases in which the Supreme Court shall have original jurisdiction and says that in all other cases the Court shall have appellate jurisdiction “with such exceptions and under such regulations as the Congress shall make.” I am aware, too, that frequent statements can be found in Supreme Court opinions that Congress has unlimited power to regulate the jurisdiction of the lower Federal courts and the appellate jurisdiction of the Supreme Court.

It may be argued, too, that there is precedent for S. 2640. In 1803, the Radical Republican Congress withdrew from the appellate jurisdiction of the Supreme Court review of certain judgments of the United States circuit courts in habeas corpus proceedings, in order to frustrate a Supreme Court determination of the validity of post-Civil War reconstruction legislation. Even though the case had already been argued and was under consideration by the Supreme Court when the 1803 act was adopted, a unanimous Supreme Court held in *Ex parte McCordle* (7 Wall. 506 (U. S. 1853)) that Congress had deprived it of its authority to decide the case.

Nothing like the McCordle case, wrote Justice Roberts, “has ever been attempted, but it was done for political reasons and in a political exigency to meet a supposed emergency” (Roberts, *op. cit.* at 3). Some writers have sought to explain the case on the ground that the Supreme Court itself was undoubtedly relieved to be rid of the responsibility of having to decide the case. Be that as it may, no one can predict whether the present Supreme Court would read *Ex parte McCordle* as holding that the appellate jurisdiction of the Supreme Court is entirely within the control of Congress and therefore would decide that S. 2610, if it became law, was not unconstitutional. Harrison Tweed maintains that it is fair to say that “the Founding Fathers did not intend that the power given to Congress to make exceptions and regulations should be used so broadly as to deprive the Court of appellate jurisdiction on the very questions and at the very times when the existence of that jurisdiction would be vital” (Tweed, *op. cit.* at 38). No one can deny that the existence of this jurisdiction is vital if one ponders the kinds of questions which the Supreme Court would be deprived of handling by S. 2610 and the paramount need of our time, so far as domestic policy is concerned, to reconcile the demands of freedom and security.

And so I do not think it unreasonable to suggest that the Supreme Court has not yet definitively determined how the provision in article III giving Congress power to make exceptions from the appellate jurisdiction of the Supreme Court

can be reconciled with the provision in article III vesting in the Supreme Court and such inferior Federal courts as Congress may establish the "judicial power of the United States," which extends to "all cases, in law and equity, arising under" the Constitution.

Chief Justice John Marshall intimated in *Durousseau v. United States* (6 Cranch 307 (U. S. 1810)),¹ that Congress should not constitutionally deprive the Supreme Court of all its appellate jurisdiction. But can it constitutionally deprive the Supreme Court of all its appellate jurisdiction, except a little that doesn't really matter?

One of the country's foremost students of our Federal system, Prof. Henry M. Hart, Jr., of the Harvard Law School, has suggested that the Constitution must not be read as authorizing its own destruction and that, therefore, article III cannot reasonably be interpreted to permit Congress to make such exceptions from the appellate jurisdiction of the Supreme Court as will "destroy the essential role of the Supreme Court in the constitutional plan." (Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts*, 66 Harv. L. Rev. 1302, 1365 (1953).¹ Professor Hart points out that the McCordle case did not involve such an exception because even after the 1868 act was passed, the Supreme Court itself could still, in accordance with other statutes, entertain a petition for a writ of habeas corpus which was filed with it in the first instance. In fact, following the McCordle case, a petition for habeas corpus seeking to test the constitutionality of the reconstruction acts was filed in the Supreme Court under the original Judiciary Act of 1789. This was the famous case of *Ex parte Yerger* (8 Wall. 85 (U. S. 1869)),¹ in which the Supreme Court held that it had jurisdiction to grant the writ. A decision was again prevented, but this time only because Yerger was released from the challenged military custody and the case became moot.

It should be noted that as a result of cases falling within categories (1) and (3) of S. 2046, individuals may be imprisoned. It should also be noted that S. 2046 does not purport to interfere with the Supreme Court's authority under title 28, United States Code, section 2241, to grant writs of habeas corpus. Indeed, article I, section 9, clause 2, of the Constitution expressly provides that "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Now, if the present Court should follow *Ex parte Yerger* and *Ex parte Bollman* (4 Cranch 75 (U. S. 1807)), in which the Supreme Court granted a writ of habeas corpus to pass on the legality of a commitment by a lower court, even though no appeal from a conviction had been authorized by Congress, S. 2046 may, to this extent, be saved from a judgment of unconstitutionality, but only by being thwarted in its apparent purpose.

Similarly, some category (1) and (2) cases may still be reachable by the Supreme Court under title 28, United States Code, section 1252, which is not touched by S. 2046. To this extent, too, S. 2046 would fail of its purpose.

But neither title 28, United States Code, section 2241 nor section 1252, would reach cases in categories (4) and (5). Yet the importance of guaranteeing constitutional rights in cases involving a person's right to earn a livelihood in the profession in which he has been trained is as great as when a person's very life and liberty are at stake. To deprive the Supreme Court of appellate jurisdiction in these cases is to deprive it of its "essential role" in the "constitutional plan."

So, if S. 2046 becomes law and the Supreme Court decides that every possible way of getting to it is closed to individuals involved in cases coming within the few specified categories, I very much doubt that it would hold S. 2046 to be constitutional.

But even if I am mistaken in this view, I dare say that most professional opinion would agree that the bill, at the very least, is anticonstitutional, because it violates the basic assumption of the rule of law which is the essential characteristic of a free government—an independent judiciary. Led by the late former Justice Roberts, the Association of the Bar of the City of New York, the New York State Bar Association, and the American Bar Association, long before the decisions which provoked S. 2046 were rendered, went so far as to propose that the Constitution be amended to deprive Congress of its authority to make exceptions from the appellate jurisdiction of the Supreme Court in cases arising under the Constitution (Roberts, op. cit., 34 A. B. A. J. 1072 (1948), 74 A. B. A. Rep. 438 (1940), 75 A. B. A. Rep. 116 (1950)).

¹ See appendix I.

So even if S. 2040 should be deemed constitutional, that merely imposes an even greater responsibility upon the Congress to protect the essential, constitutional role of the Supreme Court, which, as Judge Learned Hand recently explained, is "to keep the States, Congress, and the President within their prescribed powers."

An example in a noncontroversial area may help to clarify the point I am trying to make. The fifth amendment to the Constitution provides that private property shall not be taken for public use without just compensation. But the doctrine of sovereign immunity says that the Government may not be sued without its consent. If Congress withheld this consent, private property could be taken with impunity and the constitutional claim for just compensation could be defeated. Congress, however, has recognized its responsibility and there has been a standing consent to this kind of suit (28 U. S. C. secs. 1346 (a) (2), 1401 (1) (Supp. 1952)). A congressional withdrawal of consent would clearly be unconstitutional, if not unconstitutional.

S. 2040 plays an old tune. Throughout its history, the Supreme Court has been subjected to violent attack for decisions with which powerful forces in the country have disagreed. And different methods have been attempted to discipline the offending Justices. In 1801-05, the Jeffersonians instigated the move to impeach Supreme Court Justice Samuel Chase whom they accused of harboring "dangerous opinions." John Marshall was their real objective, but first the effort against Chase had to succeed. Six of the Jeffersonian Senators, however, broke with their party and joined with the Federalists in voting Chase's acquittal on all counts. The Senate thereby settled it as a matter of practical political construction of the Constitution that a Federal Judge may not be impeached because of his "political opinions, his conceptions of public policy, or his interpretation of the laws" (Hurst, *The Growth of American Law* (1950) 130). In spite of some recent posturing, no serious attempt has been made since to impeach a Federal Judge for any of these reasons.

Of more recent memory is President Roosevelt's 1937 court-packing plan, which was directed against the Supreme Court Justices who were accused of usurping the function of the legislature in deciding economic and social policy for the country. Whether or not one agreed with the decisions which provoked the court-packing plan, and I certainly did not, there was little question that substantial opinion throughout the country feared that the plan would destroy the principle of judicial independence. Though the court-packing plan was undoubtedly constitutional in form, because the Congress may, under the Constitution, determine the number of Justices on the Supreme Court, by defeating the plan, Congress settled it as another point of practical, political construction of the Constitution that the number of Justices may not be increased solely to change the course of constitutional decision. As one student of the Court has said, "by assuring tenure and undiminished pay, the Constitution clearly meant that the members of the Supreme Court should enjoy the independence to be wrong" (Hurst, *op. cit.* at 127).

And, for the same reason, all the many previous efforts to limit the appellate jurisdiction of the Supreme Court have failed, except in 1807 (Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-fifth Section of the Judiciary Act*, 27 *Am. L. Rev.* 1, 161 at 3-4 (1913)).²

I am not trying to argue that the decisions of the Supreme Court are or should be above criticism. But I do agree emphatically with Professor Hart that "the deepest assumptions of the legal order require that the decisions of the highest court in the land be accepted as settling the rights and wrongs of the particular matter immediately in controversy" (Hart, *op. cit.* at 1300). I was glad to read in the February issue of the *American Bar Association Journal* that Mr. Charles S. Rhyne, president of the American Bar Association, has urged the legal profession to draw this very distinction between allowable criticism of the Supreme Court's decisions and impassioned personal attacks upon Judges and upon the Supreme Court as an instrument of government (Rhyne, *Defending Our Courts: The Duty of the Legal Profession*, 44 *A. B. A. J.* 121 (1958)). The question Mr. Rhyne poses and the answer he gives goes to the heart of the problem raised by S. 2040. "Is our first concern," he asks, "that every decision be correct, important as this is?" "The answer," he says,

² See appendix II.

"is clearly no." "It is more important that we have independent Judges, free to decide unfettered by outside pressures. If unpopular decisions can result in loss of appellate jurisdiction or impeachment of Judges, how can we hope that fear of consequences of decisions—or what is even worse, political corruption—may not seep into and rust the scales of justice" (p. 122).

I am certain that the Congress is aware of its constitutional responsibilities and will not permit S. 2046 to pass.

I am sure that it will agree with the noble words spoken by Mr. Justice Cardozo in 1921. Justice Cardozo said that "The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders. By conscious or subconscious influence, the presence of this restraining power, aloof in the background, but nonetheless always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith" (Cardozo, *The Nature of the Judicial Process* (New Haven, 1921) 92-94).

MR. RAUH. Mr. Chairman, at the outset, I would like to say that the situation has been reversed in regard to liberal and conservative groups and the Supreme Court of the United States.

It is unusual to find an organization of liberals acting as one of the most outspoken defenders of the Court. History shows that it has always in the past been the conservative interests in America who have defended the Supreme Court against liberal attack. We have had, for example, a 180-degree switch since Franklin D. Roosevelt's "court packing" plan in which the liberals in America, or many of them, were supporting the plan, and the conservative interests were opposed to the plan. And today I would say the reversal of that situation is somewhat strange.

I don't make anything of this point except to note that it is an interesting historical parallel, and it may warrant the deduction that any time you go after the Court because of your personal views on decisions, a dangerous point has been reached, and that liberals, they have been wrong at times in the past when they went after the Court for decisions reached.

Not that the Court is above criticism, but that it should be above any threats to its independence.

Now, it seems to me the Court has come under attack today because of a new emphasis on human dignity and human freedom which has gone contrary to the views of segregationist politicians in the South and security-mad politicians in the North.

Now, the Court in recent times has made what I believe will be historic decisions on the side of human dignity and human freedom.

MR. SOURWINE. May I interrupt just a moment?

MR. RAUH. Certainly.

MR. SOURWINE. Those epithets are your own, are they, or are they epithets of the Americans for Democratic Action?

MR. RAUH. Those are my own. I wrote the statement, Mr. Sourwine. Whether another member of Americans for Democratic Action would have used stronger words or weaker ones, I don't know. I don't see how you could have used a weaker word than "segregationists."

I think, indeed, if the Senators from the South were here, they would all happily subscribe to that title.

Mr. SOURWINE. So that we may know what you are talking about, what is a security-mad politician?

Mr. RAVEN. I would say it is one who, in large measure, caused the actions which the Supreme Court reversed in the eight decisions to which I will come. I would put in that category the actions which the Supreme Court—and I would like to come to that in detail and show the unanimity of the Supreme Court on this—which the Supreme Court reversed in the eight decisions, which I understand S. 2646 opposes. Now, it seems to me—

Mr. SOURWINE. You mean a security-mad politician would include anybody that had anything to do with the decisions that the Supreme Court reversed?

Mr. RAVEN. No, I didn't say that, Mr. Sourwine. I said that I thought it was a type of person who had been in on the general conduct which the Supreme Court reversed. I don't say that every person in every situation would be in that category. And I am sure reasonable men could differ on some of them.

Some of the cases were close, though most of them were not.

Mr. SOURWINE. You mean some explicitly approved the conduct that the Supreme Court in its decision reversed?

Mr. RAVEN. Yes, I think so.

Mr. SOURWINE. Would that include the members of the courts of appeal who wrote decisions which the Supreme Court reversed?

Mr. RAVEN. No. I think the members of the courts of appeal were making a deference to Congress in that respect. I don't think any of them agreed with what was going on. I think they felt—and it is not unusual for courts of appeal and district courts to feel that they ought not reverse action of Congress, let's say, and I think that the Supreme Court, composed of men who have been Senators, governors, and so on and so forth, has a little less temerity about that kind of action.

Now, if I may proceed, sir.

In all due respect, we feel that S. 2646, which is before this committee, is a subversive bill in the true sense of that word, which is that it subverts basic principles of American Government.

Now, it would do that, it seems to me, in these three respects. First, it would undercut the decisions of the Supreme Court sustaining the Bill of Rights in important areas of American life.

Second, it would end, or at least weaken, the independence of the judicial branch by curtailing the authority of the highest court and threatening the authority of the remainder.

Third, it would raise a specter of legislative dictatorship, in that if the Courts are to have their jurisdiction tampered with because Congress does not agree with the position taken by the courts, then no court can be truly independent.

And I might say at this point that if you will look at article III of the Constitution, which is the judicial section, the judicial article of the Constitution, this fairly cries out with a demand for judicial independence. I think if there was one thing the Founding Fathers believed in it was judicial independence. And that is why you have, for example, Mr. Chairman, lifetime tenure. That is why you have the fact that Congress cannot even cut the salaries of the judges at the time they cut everybody else's salaries. And it seems to indicate that the Founding Fathers very wisely favored independence.

Senator HRUSKA. In that connection, of course, you would also have to recite, in all fairness, that portion of the Constitution which says that Congress may prescribe the jurisdiction of the Supreme Court. Now, to the extent that that negates all these other things, what comment would you have?

Mr. RAUH. Oh, very specific comment. And I will come to that now instead of where I have it in my statement.

Senator HRUSKA. You can come to it later. But if you raise these points, there are points in that document that expressly give the Congress the power and the right to limit the jurisdiction of the Supreme Court.

Mr. RAUH. Since you raised it, I will come to it without waiting. Article III, section 1 of the Constitution provides that—

The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

This section 1 refers to the judicial power of the United States.

Section 2 goes on and states where that judicial power is, and refers to all the cases arising under this Constitution, the laws of the United States, and so forth.

Then comes the sentence to which you referred:

In all the other cases before mentioned—

that is, after giving the Supreme Court original jurisdiction, it goes on to say, as you have indicated---

In all the other cases before mentioned, the Supreme Court shall have appellate Jurisdiction both as to Law and Fact, with such Exception, and under such Regulations as the Congress shall make.

Now, in a true sense, the sentence I have just read is in conflict with the earlier sentences. In other words, it seems to me that the Constitution gives powers to the Supreme Court in sections 1 and 2, and seems to take them away to a degree in the sentence about exceptions by Congress. In my opinion—and I base it on the study I have made, and I base it also on a magnificent article by Prof. Henry M. Hart, Jr., at 66 Harvard Law Review, 1362,¹ written before this particular controversy arose—that what “exceptions” means is exceptions within the general framework of Supreme Court review.

In other words, you might very well take away some minor or specialized jurisdiction of the Court.

Senator HRUSKA. Where does it say “minor”?

Why do you read the word, “minor,” in there?

Mr. RAUH. Because the Congress also set up a *Supreme Court*. The only court referred to in the Constitution is the Supreme Court. And I would say that it is inconsistent that you set up a Supreme Court and give it jurisdiction and then turn around and say Congress can take it all away.

Senator HRUSKA. It might be inconsistent, but it is a fact. And what I am asking is, where do you find the word “minor” in there? Is it in the book?

Mr. RAUH. I read the word “minor” or “specialized” into the Constitution on the theory that the Founding Fathers didn’t do incon-

¹ See appendix I.

sistent things, they didn't set up, in my judgment, a Supreme Court and then say you could take its jurisdiction away.

Senator Hruska. But, Mr. Rauh, you just got through telling us that they did that.

Mr. RAUH. I am saying, I interpret the sentence removing the jurisdiction as a limited sentence. I interpret it as not allowing the destruction of the Constitution by permitting Congress to take away the Supreme Court's jurisdiction and thereby the independence of the judiciary. In other words, it seems to me that the spirit of the Constitution is one of 3 branches, and that no 1 branch can so weaken the other 2 branches as to take away the basic checks and balances. Were you to take away substantial jurisdiction from the Supreme Court in important areas of American life, you would be going contrary to the spirit of the Constitution and to the jurisdiction of the Supreme Court.

Senator Hruska. Of course, you have put your hand on the very reason why this bill has been introduced, as I understand the introducer thereof. I am trying now to portray as well as I can his views on it. But it is because of the transgression upon the area of activity of the Congress depriving it of its independence and coordinate status by the Supreme Court in its decision, it is because of that that the bill is here. And now we find you—and logically so, in the view you have taken—saying you can't trample on the Supreme Court.

But that has not been done, or any effort to do it made until the Supreme Court has trampled on the Congress.

Mr. RAUH. Senator, I don't think the eight cases—and I will get to them promptly—I don't think they warrant that generalization.

Senator Hruska. I don't want to get too argumentative about that, but it just occurs to me that when the framers of the Constitution are held to be such intelligent men, as you hold them to be and as I hold them to be, and you make the statement that they didn't intend to set up a Supreme Court and then take the powers away from it, I say that I would like to accord to these men the intelligence and ability to see what they did here, and if it is that apparent to you and to me, I have an idea that that apparent conflict and the apparent taking away of the powers of the Supreme Court which they created was also apparent to them, and yet they saw fit to leave it there.

Mr. RAUH. I think it was apparent on the assumption that I believe they were making, that the exception power was a limited power and the grant power was an overall power.

Senator Hruska. And that, I might say, if we may get back again to the category of liberal and conservative, that is a strange concept for one who is known as a liberal, to put that kind of a strained and narrow construction on constitutional language.

Mr. RAUH. Senator, you have to put the strained and narrow construction either on the first sentence and on the basic philosophy of checks and balances, or on the sentence dealing with exceptions. I put a narrow construction on the sentence dealing with exceptions because I put a broad construction on the first sentence and on the basic philosophy of the Constitution in favor of checks and balances.

Senator Hruska. Very well.

Mr. RAUH. As a matter of fact, may I make the point here, I would just like to make this one point—

Mr. SOURWINE. First, perhaps we ought to take up the point you just made before we leave it. Can't you conceive that this power in the Congress to make regulations and exceptions with respect to the Supreme Court's appellate jurisdiction is itself one of the checks and balances which was explicitly written in the Constitution?

Mr. RAUL. I don't think that would be a check or a balance, Mr. Sourwine, I think that would be a termination of the Court's independence.

Mr. SOURWINE. Do you read, Mr. Raul, that particular clause as giving all the judicial power of the United States to the Supreme Court?

Mr. RAUL. And such inferior courts as Congress may ordain, yes.

Mr. SOURWINE. It does not, then, expressly give all of the judicial powers to the Supreme Court, it gives all of the judicial power to the judicial system, which includes on the one hand a Supreme Court and on the other hand such inferior courts as the Congress may establish.

Now, it is not in conflict with that theory for the Congress to decide which courts shall have certain appellate powers, is it?

Mr. RAUL. Yes, it is, Mr. Sourwine, where the bill is aimed at reversing the decisions of the Supreme Court in an area basic to American life, namely, the relationship of the citizen to the State and the Nation.

Mr. SOURWINE. But you do not claim that the clause of the Constitution which you read gives the Supreme Court all of the judicial power?

Mr. RAUL. No, sir.

Mr. SOURWINE. You do not?

Mr. RAUL. No, sir.

Mr. SOURWINE. All right.

Mr. RAUL. I must say it is somewhat ironical, not only are the liberals and the conservatives on different sides than usual, but here I am in a Senate Chamber defending checks and balances. And now, the Senate, in my judgment is the most checked and balanced parliamentary institution in the world. The small States balance the large States. The filibuster checks the majority. The seniority rule gives a longtime elderly chairman a restraining hand on all proposed legislation.

I didn't come here to argue the wisdom or the lack of wisdom of that situation. I simply came here to point out that it is true, that here you have a checked and balanced Senate—it has been the history of this body—and I think that the Senate should well think of its own checks and balances before it goes ahead and removes a very important intratripartite check and balance.

Now, with that introduction, in coming to the five specified categories which Senator Jenner's bill is intended to deal with, I don't know that there would be any dispute among us on that, that is, I think the language is fairly clear, and that it indicates that Senator Jenner was intending to remove the jurisdiction from the Supreme Court in an effort to reverse eight cases.

Now, there may be one or two that he didn't think was in, and there may be one or two that he intended to go in. But I think that it not unfair that the bill was aimed at eight decisions of the Supreme Court. And I would like to go into those eight.

But before I do, I would like to say that my testimony will be under two general headings, some of which have already been alluded to in the questioning.

First, Americans for Democratic Action takes the position that the Supreme Court decisions which S. 2616 seeks to reverse are legally right and strengthen the fabric of our democracy.

Second, elimination of the Supreme Court's appellate jurisdiction in these important areas of the relationship of the citizen to his Government threatens our constitutional system.

I would like to turn first to the part of our statement that deals with the fact that the decisions which S. 2616 seeks to reverse are legally and morally right and strengthen the fabric of our democracy.

Mr. SOURWINE. At that point, Mr. Rauh, is it your conception that this bill would reverse any decision of the Supreme Court?

Mr. RAUH. Yes, Mr. Sourwine, it is. And it would reverse them in this way. It would be a statement to the court of appeals, which has been reversed in many of these cases—I can just quickly go through and tell you how many of the eight cases they were reversed in.

They were reversed in *Watkins*, in *Cole*, in the *Service*, not in *Nelson*, in *Sweezy*, in *Slochower*, in *Schwartz*, and in *Koenigsberg*. In 7 out of the 8 cases the court of appeals or the State supreme court held contrary to the Supreme Court. Only in the *Nelson* case did the Pennsylvania Supreme Court take the same view as the Supreme Court of the United States, or, in reverse, did the Supreme Court of the United States take the same view that the Supreme Court of Pennsylvania had taken.

It seems to me that this bill would be a statement to the court of appeals, or the supreme courts of the States, to go back to the decisions which they had taken before the Supreme Court action.

Mr. SOURWINE. At least it would be an inducement to them to go back?

Mr. RAUH. Yes, Mr. Sourwine, we can agree on that.

Mr. SOURWINE. But the decision, the explicit decision, for instance, in the *Smith Act* cases would stand—the defendants who were ordered dismissed and who are now free for subversive activity would remain free, *Sweezy* could not be put in double jeopardy, or *Watkins*, could they?

Mr. RAUH. You are quite right.

Mr. SOURWINE. So it is not the cases, it is the trend?

Mr. RAUH. It is the principles. Can we agree on that?

Mr. SOURWINE. We would get back to the principles on which the court of appeals had acted before the Supreme Court took these new positions.

Mr. RAUH. Precisely.

Mr. SOURWINE. All right, Mr. Rauh.

Mr. RAUH. Coming first to the *Watkins* case, which I had the privilege of arguing in the Supreme Court, and which may be the most controversial of all the cases here. What does that case hold? The *Watkins* case holds that a congressional committee must inform a subpoenaed witness why the information sought from him is pertinent to the committee's inquiry.

Mr. SOURWINE. You think everything else in the *Watkins* case is a dictum?

Mr. RAUH. I don't want to answer that quite that way because I have got some court cases I am arguing on the subject.

Mr. SOURWINE. But you say all that it held?

Mr. RAUH. Correct, all that it held.

And now, the question that that raises, Mr. Sourwine, is whether some of the others are sufficiently authoritative dictum that they should bind the lower courts.

I would say to you that the rest is dictum, yes. I only wanted to preserve on the record that I think some of it is such binding dictum as I think some of the lower courts should have followed.

For example, on the question of vagueness, I think they meant that the House committee's resolution was too vague. The court of appeals, incidentally, has already held the contrary. They have held in the Barenblatt case that the House resolution is not too vague, and that the Watkins decision didn't hold it was.

So I think it is fair to say, with you, Mr. Sourwine, that all that the Watkins case holds is that the committee must tell the witness why it needs the information.

And I would say that is a basic principle of American life, that anyone forced to testify anywhere should know why he is being required to do so.

Mr. SOURWINE. You do not think the case goes so far as to require that the witness understand to his own satisfaction the pertinency of the question?

Mr. RAUH. Not to the witness' satisfaction. I would say it would have to be clear enough so that a reasonable man could know. For example, if the committee gave a completely unintelligible answer that a reasonable man could not understand, so that he would not have known what they meant, then I think the Watkins case applies.

If you are asking me, if you give an honest, clear statement, the mere fact that the witness is either stupid or recalcitrant should not permit him to refuse to answer.

Senator Hruska. And yet upon his refusal, the effect of his refusal is such that it renders the power of the Congress and the committee totally impotent, does it not?

Mr. RAUH. No, Senator, I wouldn't exactly say that.

Senator Hruska. As a practical matter, now—theoretically, not, but if he just sits there and says, "I don't think that question has any relevancy to the subject under legislative inquiry," that is final for all practical purposes, and the congressional committee has nothing that it can resort to except to go to the Supreme Court and say, "Is this all right, or isn't it?" and then come back and resume the questioning, whereupon he can say again, "I don't think that second question is relevant."

Now, is there someone who contends along that line? Is there any merit to that contention?

Mr. RAUH. I don't think so, Senator. Suppose I am testifying before the committee, and you are the Senator, and I say I don't see the pertinency, and you give me an answer that a reasonable man would know was an explanation and I persist, and I just say, "Senator, I am not going to answer your question."

Well, I go to jail. The next fellow won't do that, because a refusal to answer—

Senator HRUSKA. How do you go to jail? I can't quite get that? Who sends you to jail?

Mr. RAUH. I presume that if anyone refuses to answer and they have no defense for that, they get prosecuted.

Senator HRUSKA. Who determines whether or not there is a defense? Is it the Senator, or is it the witness? Under the Watkins case who is it that decides it?

Mr. RAUH. Clearly the Federal district judge in the first instance and the appellate courts thereafter. But it seems to me that the Watkins case requires no more than that the committee give a fair explanation of pertinence, and that if the committee gives that, then a witness who still is obstinate would be sent to jail under rulings of the court, and that as long as there is no infringement on any other rights, first-amendment rights, there would be no defense at all. I don't think it is a defense by a witness before a congressional committee to say, "I don't understand the reason you are giving me for pertinency" the only defense would be, a reasonable man would not understand.

Senator HRUSKA. That is all very fine in theory, but I still suggest that in actual practice that does not happen and that is not the result.

Mr. RAUH. May I say—and I think we can agree on this, Senator—that there is no case yet determining this, there has been no prosecution since Watkins which would indicate whether a man who was obstinate after a fair answer had been given by the committee would have a defense.

My interpretation of the Watkins case, I don't believe he would have a defense.

Mr. SOURWINE. Are you saying that Congress isn't the judge of the pertinency, but under the Watkins decision the Supreme Court is in each instance, and therefore, as soon as he raises a pertinency—

Mr. RAUH. Yes; I am saying that, but I am pointing out that there is always a judicial issue as to pertinency in all of these cases. It is tried in the district court every other day. Indeed, I think Mr. Sourwine will recall that he and I were engaged in such a trial.

Mr. SOURWINE. What you are saying is that all questions of pertinency are jurisdictional?

Mr. RAUH. I wouldn't want to use the word "jurisdictional" there. I would say that an issue of pertinency is always raised as a defense in a contempt case, and it is always for the Court to decide. If that is what you meant by jurisdictional; yes.

Mr. SOURWINE. I don't mean to halt you if you want to say more about the Watkins case, but when you are through with your treatment of the Watkins case, I have one more question.

Mr. RAUH. I am through.

Mr. SOURWINE. Don't you see that, in the Watkins case, the Supreme Court has sought to interfere and to assert the right to interpret and control, not merely acts of Congress, but the actions of the Congress?

Mr. RAUH. I do not, Mr. Sourwine. It seems to me that some of the committees of Congress—let's take the House Un-American Activities Committee—had themselves enroached upon the executive and judicial branches, and that was up to the Court, the Supreme Court,

to right that balance. I feel toward the Supreme Court the way the dean of the Harvard Law School did in a recent article in the Harvard Law School Bulletin. He said, "In the last analysis the Supreme Court is the umpire."

And I think that is right.

Mr. SOURWINE. Didn't the Supreme Court in the Watkins case say that it was going to umpire the question of whether a congressional committee was effectively carrying out the mandate of its parent body?

Mr. RAUH. No; I don't think it said that. I think it said it was going to umpire whether the citizen was getting a fair shake before the congressional investigating committee. I do think it said it was going to umpire that. But as to the dispute between the citizen called by subpoena before a congressional committee and the committee itself it said:

We will umpire that, because that citizen has a Bill of Rights claim, and we will umpire the need of Congress for the information against the Bill of Rights claim of the citizen.

And I see no way out of having such an umpire.

Mr. SOURWINE. You say—you are undoubtedly as familiar with the Watkins case as anyone—you say that the Watkins case did not involve any assertion by the Supreme Court of the right to determine whether a committee was effectively and properly carrying out the mandate of the parent body?

Mr. RAUH. Insofar, Mr. Sourwine, as it was necessary for the citizen, in determining whether he was required to answer, to see whether the resolution was sufficiently clear so that he could tell what Congress intended by it, only in that respect. But in that respect, the answer to your question would be "Yes."

Mr. SOURWINE. Mr. Chairman, I ask permission to insert at this point in the record a Court excerpt from the Watkins decision directly bearing on this point.

Senator HRUSKA. Permission is granted. It will be inserted.

Mr. SOURWINE. So that the record will show what Mr. Rauh and I are talking about.

Senator HRUSKA. Very well.

(The excerpt referred to is as follows:)

EXCERPTS FROM THE OPINION OF THE SUPREME COURT OF THE UNITED STATES IN THE CASE OF JOHN T. WATKINS, PETITIONER, v. UNITED STATES OF AMERICA, DECIDED JUNE 17, 1957

The controversy thus rests upon fundamental principles of the power of the Congress and the limitations upon that power * * *. No inquiry is an end in itself; it must be related to and in furtherance of a legitimate task of the Congress * * *. It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action * * *. The Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure. Nor can the first-amendment freedoms of speech, press, religion, or political belief and association be abridged * * *. In the decade following World War II, there appeared a new kind of congressional inquiry unknown in prior periods of American history. Principally this was the result of the various investigations into the threat of subversion of the United States Government, but other subjects of congressional interest also contributed to the changed scene. This new phase of legislative inquiry involved a broad-scale intrusion into the lives and affairs of private citizens. It brought before the courts novel questions of

the appropriate limits of congressional inquiry * * *. It was during this period that the fifth-amendment privilege against self-incrimination was frequently invoked and recognized as a legal limit upon the authority of a committee to require that a witness answer its questions * * *. A far more difficult task evolved from the claim by witnesses that the committees' interrogations were infringements upon the freedoms of the First Amendment. Clearly, an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly. While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of law-making. It is justified solely as an adjunct to the legislative process. The First Amendment may be invoked against infringement of the protected freedoms by law or by law-making * * *. The mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of governmental interference * * *. Accommodation of the congressional need for particular information with the individual and personal interest in privacy is an arduous and delicate task for any court * * *. The critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness. We cannot simply assume, however, that every congressional investigation is justified by a public need that overbalances any private rights affected. To do so would be to abdicate the responsibility placed by the Constitution upon the judiciary to insure that the Congress does not unjustifiably encroach upon an individual's right to privacy nor abridge his liberty of speech, press, religion or assembly * * *. The theory of a committee inquiry is that the committee members are serving as the representatives of the parent assembly in collecting information for a legislative purpose. Their function is to act as the eyes and ears of the Congress in obtaining facts upon which the full legislature can act. To carry out this mission, committees and subcommittees, sometimes one Congressman, are endowed with the full power of the Congress to compel testimony * * *. An essential premise in this situation is that the House or Senate shall have instructed the committee members on what they are to do with the power delegated to them. It is the responsibility of the Congress, in the first instance, to insure that compulsory process is used only in furtherance of a legislative purpose. That requires that the instructions to an investigating committee spell out that group's jurisdiction and purpose with sufficient particularity. Those instructions are embodied in the authorizing resolution. That document is the committee's charter. Broadly drafted and loosely worded, however, such resolutions can leave tremendous latitude to the discretion of the investigators. The more vague the committee's charter is, the greater becomes the possibility that the committee's specific actions are not in conformity with the will of the parent House of Congress * * *. There is a wide gulf between the responsibility for the use of investigative power and the actual exercise of that power. This is an especially vital consideration in assuring respect for constitutional liberties. Protected freedoms should not be placed in danger in the absence of a clear determination by the House or the Senate that a particular inquiry is justified by a specific legislative need * * *. An excessively broad charter, like that of the House Un-American Activities Committee, places the courts in an untenable position if they are to strike a balance between the public need for a particular interrogation and the right of citizens to carry on their affairs free from unnecessary governmental interference. It is impossible in such a situation to ascertain whether any legislative purpose justifies the disclosures sought and, if so, the importance of that information to the Congress in furtherance of its legislative function * * *. Absence of the qualitative consideration of petitioner's questioning by the House of Representatives aggravates a serious problem, revealed in this case, in the relationship of congressional investigating committees and the witnesses who appear before them. Plainly these committees are restricted to the missions delegated to them, i. e., to acquire certain data to be used by the House or the Senate in coping with a problem that falls within its legislative sphere. No witness can be compelled to make disclosures on matters outside that area. This is a jurisdictional concept of pertinency drawn from the nature of a congressional committee's source of authority. It is not wholly different from nor unrelated to the element of pertinency embodied in the criminal statute under which petitioner was prosecuted. When the definition of jurisdictional pertinency is as uncertain and wavering as in the case of the Un-American Activities Committee, it becomes extremely difficult for the Committee to limit its inquiries to statutory pertinency * * *.

Mr. RAUH. Turning to the second of the eight cases, we have the Cole decision, which would be reversed in effect by the second section of the bill. And now, all that the Cole case held was that the Federal employee security program should apply only to persons holding a sensitive position.

Mr. SOURWINE. Mr. Rauh, that is not quite it. What the Cole case held was that that was the intention of the Congress.

Mr. RAUH. That is correct.

Mr. SOURWINE. Not that it had to be, not that as a matter of right there should be such a limitation, but only that it was the intention of the Congress that the right to fire be so limited; isn't that right?

Mr. RAUH. That is absolutely right. And all I am saying is that they held that it holds that the Federal employee security program applies only to persons holding sensitive positions, that is correct. Now, if you want to say that the reason behind this was that they said that that was Congress' intent, that is true, that should be added to it.

And now, all I would say is that that was the most sensible holding that one could possibly make. What is the sense of screening people who have nothing to do with security?

Mr. SOURWINE. Well, Congress has the right to ascertain and make a judgment as to what it considers security, isn't that right?

Mr. RAUH. But applying it to an inspector in the Food and Drug Administration, which Mr. Cole was, is hardly my judgment of security.

Mr. SOURWINE. You are arguing there with the judgment of Congress. If the Congress intended—as the Supreme Court said it did not, but as the lower court said it did—if the Congress intended to make its authority applicable to such a case as Cole's, then the argument whether the Congress was wise in that intent is not a basis for reversal of the Congress, is it?

Mr. RAUH. I would say it was.

Mr. SOURWINE. You think that is why the Supreme Court reversed it, because they thought Congress was not wise?

Mr. RAUH. No.

Senator HRUSKA. Would you like to have the Supreme Court exercise the power of saying that it was wise or not wise?

Mr. RAUH. No, I would not.

Mr. SOURWINE. Just one more question. The Congress therefore has the power clearly and is doing no violence of any right of the Supreme Court, if the Supreme Court interprets the argument in such a way as to say that Congress did not intend to pass the legislation so as to make clear what the intent was in this, isn't that right?

Mr. RAUH. That Congress can pass the legislation?

Mr. SOURWINE. Yes.

Mr. RAUH. It can pass new legislation. Such legislation is pending on the floor of the House of Representatives at the present time.

Now, I would just like to say a word about this. I think that legislation is unconstitutional. It seems to me that for Congress to apply security screening to nonsecurity jobs is arbitrary and unconstitutional, because it gives the Government the duty to screen for security, to look into the past lives of people, when there is no need from a security standpoint to go into that screening.

Therefore, it would be my contention—if the bill is passed, it will be my contention—that that bill, insofar as it provides for screening

of nonsensitive positions for security purposes, in fact is unconstitutional. I think that in a sense that underlay the Cole decision. That is why I didn't want to agree entirely with your analysis, although I agree with most of it, Mr. Sourwine.

I think the Court had a certain feeling that if, in fact, it was this broad it would raise serious problems, and therefore they said, "We do not believe Congress intended to make it that way."

Senator HRUSKA. Isn't that tantamount to saying that the Supreme Court would be the one to decide what is sensitive or not and what is wise or not with reference to the classification of positions as sensitive or insensitive?

Mr. RAUH. No, I wouldn't say that, Senator. It seems to me clearly that Congress can say what is sensitive.

Senator HRUSKA. They can say a janitor holds a sensitive position if they want to, can't they?

Mr. RAUH. But they cannot in my judgment say a janitor in a very nonsensitive agency does.

Senator HRUSKA. What is a nonsensitive agency, and who is to say so?

Mr. RAUH. I think, within reasonable limits, Congress can, but there are many, many areas of nonsensitivity, and if you just say everybody is in a sensitive position, that I don't think you can say, because I don't believe everybody is in a sensitive position.

Senator HRUSKA. That gets back to my original question. Isn't that tantamount to saying that the Supreme Court is the one that will say, with whatever degree you might want to put on it, they are the ones who say what is sensitive and what isn't?

Mr. RAUH. No, I can't agree with that, Senator.

Let me try to make myself clearer than I did last time. Congress will say in the first instance what is sensitive and what is nonsensitive. As long as there is any possible basis for that, the Supreme Court will undoubtedly uphold it. It is only when Congress says everything is sensitive that I believe the Supreme Court will say, in the case involving Mr. Cole, a food and drug inspector, that this goes so far from sensitivity that we cannot uphold it.

Mr. SOURWINE. What you are saying is this, that the Supreme Court has the right, when, in its judgment, Congress has made an unreasonable definition of what is sensitive, to say that that is an unreasonable decision and overthrow it?

Mr. RAUH. Precisely.

Mr. SOURWINE. In other words, the determination of Congress with regard to what is sensitive is subject to Supreme Court review?

Mr. RAUH. But only for unreasonableness or arbitrariness.

Mr. SOURWINE. But only for what the Supreme Court feels unreasonable or arbitrary?

Mr. RAUH. Yes. But that is true of everything in this world, Mr. Sourwine, that the Supreme Court is thoroughly reviewing Congress' action as to whether the thing is so arbitrary or unreasonable as to be a violation of the due process concept. The whole concept of due process of law in America is whether the action of the Government against the citizen is so arbitrary and so unreasonable as to constitute a violation of due process. And whether it is in the area

of a line between sensitive and nonsensitive, or any other area, if Congress goes beyond the area in which the Supreme Court feels is a permissible area of reasonableness, the Court acts.

Senator HRUSKA. In the case of the bar association, which we will get to after a while, I suppose, there is not the same, there is not the pronouncement, that everyone who has Communist affiliations, Communist sympathies, or a record of subversion and so on, that they are persona non grata. As I remember the case which originated either in New Mexico or California, it simply said that that type of person is, in the judgment of the legislature of that State, a man who should not be entitled to admission to the bar. And the Supreme Court goes in and says, "That is not true, we will say what is wise and what can be done, it is our judgment." And that is why I repeat my question, isn't it tantamount to saying and placing in the hands of the Supreme Court that power of actually legislating in the place and in the stead of Congress in matters of policy?

Mr. RAUH. I think not, Mr. Chairman. And I would like to put it this way. I am trying to think of how many years this Government has been going on—let's say 170 or so, whatever it is—the Supreme Court has been doing exactly that for the corporations of America.

And I think rightly in a sense—I may disagree with their judgment in a particular case—but what the Supreme Court has been saying is that arbitrary and unreasonable action by the Congress against private property or against corporations must be upset.

I agree with that principle. But the minute you accept that principle, then you recognize that the Supreme Court is reviewing the action of Congress not for the wisdom, because they have always agreed as to that, but when the Congress has gone beyond what the Supreme Court deems the reasonable limits of action, and finds something arbitrary and unreasonable.

And all that has happened here is that the Supreme Court has applied its basic principles which it has always applied in corporation law, in private property, to human rights.

I don't see why we should suddenly get excited about the Supreme Court's action in applying these principles in the area of human rights when it has always applied these same principles in the area of private property.

Mr. SOURWINE. Mr. Rauh, is arbitrariness always subject to sanction, is it always bad, in law?

Mr. RAUH. That is a pretty broad question, Mr. Sourwine. I am trying to think of some situations in which it has been upheld.

Mr. SOURWINE. I will put it this way. Being arbitrary only leads to a reversal when it interferes with a right, isn't that correct?

Mr. RAUH. Yes.

Mr. SOURWINE. There is no right to Government employment, is there?

Mr. RAUH. Now wait a minute. Now, we have hit a new field here.

Mr. SOURWINE. No, that is not new, that is a very old question.

Mr. RAUH. There is a right in America to fair treatment. And I think Justice Clark—and he is hardly one of the radicals on the

Supreme Court, so to speak—I think Justice Clark was absolutely right in the Oklahoma School Teachers' case when he said:

We do not stop to determine whether the "right" to be a schoolteacher is a right or a privilege, it is enough to say that in this great country of ours a human being who wants to be a schoolteacher is entitled not to lose that right arbitrarily or to lose that privilege arbitrarily.

And I would say that if you would just look at that unanimous decision written by Mr. Justice Clark, you will see that there is really little left of the argument whether a thing is a right or a privilege.

Mr. SOURWINE. Don't you think that the Congress if it wanted to, in its wisdom or unwisdom, could repeal all the civil-service laws and make Federal hiring and firing a matter for the decision of the Federal head of department or agency in each instance, without cause, without hearing, or, if he wants to, without reason?

Mr. RAUH. It might, Mr. Sourwine, be able to do that, and I think there is much to be said for the argument that it could do that.

Mr. SOURWINE. That would be rather an arbitrary thing.

Mr. RAUH. But it couldn't do that and then take some categories and have their treatment special, it couldn't do part of that.

Mr. SOURWINE. Couldn't the Congress provide that all members of the security forces of all departments had to be at least 6 feet tall?

Mr. RAUH. I would like to, if I had a Government job at the moment, I would like to challenge discharge on the ground that I am 6 feet 2, Mr. Sourwine. In fact, there is a sentence in the Mitchell opinion—that is the Government employee workers' opinion—there is a sentence in there leaving no doubt that any regulation by, I think it is either by Congress or by an executive agency, so as to bar all redheads, Negroes, or Jews, would be unconstitutional, there is a sentence in the Mitchell case squarely on that, Mr. Sourwine.

Coming next to the John Stewart Service case, which I think is the third of eight which S. 2646 would overrule, all that that case held was that the Secretary of State must follow his own regulation in discharging employees. Is it not a basic principle of American life that Government officials should be required to follow the regulations they promulgate?

The Nelson case holds that a State "Little Smith Act"—

Mr. SOURWINE. Before you get to the Nelson case, the one you just talked about—

Mr. RAUH. The John Stewart Service case?

Mr. SOURWINE. Yes. Didn't that case involve the determination that the Secretary could by Executive order divest himself of a specific power which Congress by act of Congress had granted to him?

Mr. RAUH. Yes, it did, Mr. Sourwine. It said he not only could divest himself of the power, but that he had vested himself of the power.

Mr. SOURWINE. Now, Congress could pass a law granting a specific power to one of the heads of the executive branch and in that law declare that he should not have the power to divest himself of it, couldn't they?

Mr. RAUH. Just a moment. I think yes.

Mr. SOURWINE. So that if the Congress should want to pass another provision of the same nature all that would be involved in litigation would be the question of whether Congress intended to provide that

the head of the department should not have the right to divest himself of the power granted?

Mr. RAUH. Almost I can agree with that, but not quite, because I think that if—suppose Congress said, he may not divest himself of that power, but nevertheless the Secretary of State did issue the regulations illegally because Congress had told him not to issue regulations, I still think the citizen would be protected in the fact that he could rely upon the regulations of the Secretary.

Mr. SOURWINE. We are getting a little afield, but you think he would not be charged with notice of the statute?

Mr. RAUH. It is a good question and a close question. I am not sure we are competent—we now are beyond any case I had ever considered, Mr. Sourwine.

The Nelson case holds that a State "Little Smith Act" conflicts with the Federal Smith Act and the Federal Government's paramount interest in national security.

Is it not a basic principle of American life that the Federal Government has the responsibility for protecting our security against foreign enemies?

Senator HRUSKA. To which I would answer "No," it is not an exclusive right, nor an exclusive responsibility, and I would very much dislike to see that principle contended to the extent that States would be totally absolved from being alert and vigilant in that regard. As long as you ask the question, I presume to answer, Mr. Rauh.

Mr. RAUH. I am happy to have your views, sir. I would suggest that the day the State of Pennsylvania starts protecting me from the Soviet Union, I think I will stop being as confident as I am of the outcome when the Federal Government does it.

Mr. SOURWINE. Are you a Pennsylvanian, Mr. Rauh?

Mr. RAUH. No; but I feel the same toward all the other States that have an interest—I feel that the Federal Government is responsible for dealing with international communism and I would leave it to them. I think it is just as silly for the State of Pennsylvania to deal with this problem as it would be to raise an army to go and fight. The armies have got to be Federal armies, and I think this is a Federal problem, and indeed espionage, which we are all fighting, and sabotage, are quasi-military problems. The thing we are worried about is that Russia is going to steal our secrets, and these acts through the States are not going to help solve that problem any more than they are going to get us the troops to do the job.

Mr. SOURWINE. Those are your own opinions, that is not what the Court held in the Nelson case, is it?

Mr. RAUH. I think it is behind that.

Mr. SOURWINE. Well, the Court didn't say so, did it?

Mr. RAUH. Yes, it did.

Mr. SOURWINE. You think the Court in the Nelson case said that this was a Federal responsibility and should be a Federal responsibility, that the State should not go into the matter, and that that is why they were overthrown here?

Mr. RAUH. It said that the Court held that Congress had preempted the field.

Mr. SOURWINE. And that is all it held?

Mr. RAUH. That is all it held. But the discussion made clear the belief in the Federal Government's responsibility in this area. There

was a great deal said about Federal Government responsibility in this area.

Mr. SOURWINE. You think that is why the Court made this decision in the Nelson case, because it felt that this was a Federal responsibility?

Mr. RAUH. That was a supporting reason, yes, sir.

Mr. SOURWINE. Do you think that it was proper for the Court to determine what was a responsibility?

Mr. RAUH. Certainly.

Mr. SOURWINE. When the Congress had already determined it?

Mr. RAUH. There is no area, Mr. Sourwine, in which the Court is a more important balance wheel than in the area of Federal and State responsibilities. If there is one thing that the Supreme Court has to do, it is the umpiring of State versus Federal. Indeed, this was exactly Justice Holmes' statement which we quote in here at a later point.

Mr. SOURWINE. Mr. Rauh, the Congress can preempt the jurisdiction in any field when it desires to do so, can it not?

Mr. RAUH. Sure.

Mr. SOURWINE. In any field in which the Congress can legislate it can preempt that field and prevent the States from legislating?

Mr. RAUH. That is correct.

Mr. SOURWINE. It is a matter for Congress to determine in each instance whether it desires to do so, isn't that correct?

Mr. RAUH. That is correct.

Mr. SOURWINE. It is not for the Supreme Court to decide whether the Congress should preempt the field or whether it should be held in the field of Federal activity, and it is for the Congress to decide, and it is on that basis, is it not, that the Supreme Court in the Nelson case said it was the intention of Congress to preempt this field.

Mr. RAUH. That is correct. But you have to add to that fact that Congress' views on these subjects are not written in black and white. They do not say, "We hereby preempt the field."

Senator HRUSKA. I would like to ask this question. Would it be competent for the Congress to say under your construction of what the basis of that Nelson case is, would it be competent for the Congress expressly to say, "There is concurrent jurisdiction permissible in this field."

Mr. RAUH. Yes, that would be perfectly competent, but—

Senator HRUSKA. Than what is the sense of the breakdown that leads to the basis for the Nelson decision?

Mr. RAUH. Well, in determining the unexpressed view of Congress, which the Supreme Court had to do in Nelson, Senator, the Supreme Court considered the issues of policy which it assumed that the Congress had considered.

These things are not written out for the Supreme Court. It makes decisions as to what Congress intended. And in making decisions as to what Congress intended, it considers the policy considerations which it assumed Congress considered, and therefore if you didn't consider that, then the Supreme Court was wrong in thinking you had considered it. But they thought that Congress would have considered the idea that security was a Federal responsibility.

And I would just like to finish my answer to Mr. Sourwine's question, Senator. It is this. Congress certainly can say, the State shall have concurrent jurisdiction as to security, there is no question about the authority of Congress to do that. But a lot of the actions of the State in this security area might very well be unconstitutional for other reasons, Bill of Rights reasons.

And that leads me to the next case of the 8, which is the Sweezy case, that is the fifth of the 8. That is the New Hampshire investigating case. And all that was held there actually was that a State legislature must, in delegating its investigating authority, do so within reasonably clear limits.

And there in my statement I asked the rhetorical question, is it not a basic principle of American life that no governmental official should have unrestricted authority to inquire into the lives of our citizens. And I think even if you gave concurrent jurisdiction to the State of New Hampshire, that wouldn't do away with this problem. That is all I wanted to add.

Senator HRUSKA. There wasn't any question of unrestricted authority, as I remember it, in the Sweezy case. Again we come back to that question of who shall determine the propriety of certain acts, to the extent that they may be reasonable or not reasonable. And when you do that, you get into questions of policy, and it is the contention of some people that Congress determines policy, or rightfully should, rather than the Supreme Court.

Mr. RAUH. In my judgment, Congress determines policy within the limits of reasonableness and arbitrariness; and, when action it takes is deemed unreasonable or arbitrary, then the Supreme Court is the final umpire in this area.

Mr. SOURWINE. You mean by this area, in whichever area the Supreme Court deems the action was unreasonable or arbitrary.

Mr. RAUH. Yes, Mr. Sourwine, the rule since the institution of our Government for corporations and private property, and it is now the rule for individual rights as well.

Mr. SOURWINE. You are, then, saying that the Supreme Court, in any area with respect to any act of Congress, may overthrow that act of Congress if, in the judgment of the Supreme Court, the Congress was either unreasonable or arbitrary?

Mr. RAUH. That has been the rule of law since we started the game in this country. And if you want the corporate decisions on this, I would be happy to supply them for insertion in the record at this point. The number of actions by States against corporations and private property which have been knocked out by the Supreme Court on the grounds that they were arbitrary and unreasonable is legion. And all that has happened here is that the same basic principles are being applied in this area, in which there seems to be more public discussion, and at the moment more public controversy.

Senator HRUSKA. Proceed.

Mr. RAUH. The first of the last 3 cases of the 8 is the *Slochower* case. The *Slochower* case holds that a schoolteacher may not be discharged solely because he exercised his privilege against self-incrimination.

In our statement, we asked the rhetorical question: Is it not a basic principle of American life that no one should be punished for ex-

exercising a constitutional privilege and that a governmental agency should act only after investigation of all the facts?

The *Schwartz* and *Koenigsberg* cases, the last two, hold that a man should not be arbitrarily deprived of the right to practice law.

Is it not a basic principle of American life, our statement asks, that no citizen should be deprived of the opportunity to enter his chosen profession except for sound reasons and after careful procedures?

We submit that these eight decisions were not radical or strained. The radical or strained action was the action taken which the Supreme Court was called upon to reverse in the name of the Bill of Rights.

I have put in our statement a chart or a table showing the votes in these eight cases. And if you will permit me a fractional vote by a Supreme Court Justice, 6 and a quarter votes were cast on the average in favor of the principles enunciated above; only 2 were cast the other way.

In other words, on a Court that consists of such varied backgrounds as a former governor, two former Members of the Senate, a former State judge, two former Federal judges, a former Attorney General, and two former professors of law, several of whom had long and distinguished records at the bar, the vote came out on the average of over 3 to 1 in favor of these principles. I think some deference ought to be paid to such a degree of unanimity on so significant public questions.

Just in conclusion on this point, I would like to say that the civil liberties climate has improved over the last 4 years. I think that everyone on both sides is happy at this improvement. And I would like to say further that the very climate of McCarthyism, which I believe lies at the source of S. 2646, has turned against the situation as it existed 3 or 4 years ago.

Senator HRUSKA. I should just like to observe that when any proponent or opponent of a measure resorts to that general type of characterization, the very type of characterization which they condemn in McCarthyism, so-called—whatever that might mean, then I have some reservations as to the strength in their own minds of the case which they present.

Mr. RAVI. If you know, sir, a better way for describing what went on from about 1950 to 1955 than "McCarthyism," I would be happy to use it.

I meant the general climate of opinion in which the rights of American citizens are trampled upon.

If there is a shorter word than "McCarthyism," I would be happy to adopt it.

Senator HRUSKA. As you well know, that word means many, many things to many, many people. And I would just like to have the record contain the observation that anyone who has to resort to that type of comment in the opinion of many condemns the very type of reference that is made here with reference to other names, I have some reservations as to the strength of the case that is being presented.

Mr. RAVI. These Supreme Court decisions, the eight decisions to which I have referred, represent the best in American constitutional law and the Bill of Rights.

This is no time to reverse the trend that is running for human freedom.

Now, in the remaining 10 minutes which I have agreed to conclude in, Mr. Chairman, I would like to discuss again the problem we took up earlier on the question of the Supreme Court's appellate jurisdiction, and the power of Congress to deal with that. We feel that the elimination or restriction of the Supreme Court's appellate jurisdiction threatens our constitutional system.

I don't know whether one should say that eliminating the Supreme Court's jurisdiction in these areas is unconstitutional or anticonstitutional. The fact is, I don't know what the Supreme Court would say if the case came up to it tomorrow. I don't know whether it would hold that Congress did have the power to limit its jurisdiction or not.

There is one case—and I would like to set that case to rest—there is one case in Supreme Court history where this kind of action was upheld by the Supreme Court.

A man by the name of *McCardle* was a southern editor. He edited a newspaper down in Mississippi—I believe.

Senator IRUSKA. For the purpose of the record, will you cite the case?

Mr. RAUW. It is *Ex parte McCardle* (7 Wall. 506). He was a newspaper editor down in Mississippi during the reconstruction period. And he had very little use for the Federal Armed Forces, and he wrote some highly inflammatory, incendiary, and libelous statements about the Federal Armed Forces. So they took him into custody. And he took out a writ of habeas corpus in the circuit court of Mississippi. He lost, and he appealed to the Supreme Court of the United States.

While his case was pending in the Supreme Court of the United States, the act of March 27, 1868, was adopted, removing the jurisdiction of the court.

That act was passed by Congress, vetoed by President Johnson, and passed over his veto. Then it came to the Supreme Court. And the Supreme Court upheld this statute, and refused to consider the case.

The Supreme Court, however, made reference in this very case to the fact that there was jurisdiction through another route, and, in fact, in a later case, in *Ex parte Yerger* (8 Wall. 85), the Supreme Court took jurisdiction of a similar situation.

In other words, in the only case in American history where the Supreme Court has accepted the congressional deprivation of jurisdiction—and, indeed, this is the only time that Congress ever tried to deprive the Supreme Court of jurisdiction—the Court permitted that, but only after noting that there was a secondary method of appeal.

I do not know whether the *McCardle* case would be law today. I rather doubt whether the *McCardle* case would be law today. And I would like to insert in the record, although I am really not trying to clutter it up, and I will leave that to you, I would like to have inserted in the record a copy of Mr. Hart's article at this place.

That is entirely up to you. This copy doesn't belong to me, but if I produce another copy you could put it in here.

Mr. SOURWINE. I respectfully suggest that not only the article but the article cited in the printed statement might be put in. And the purpose is to inform the Senators as fully as possible.

Mr. RAUH. That would be very fine. There is a great deal of learning that would be available.

Mr. SOURWINE. We can get that photostated and returned to you if you can't get another copy.

Mr. RAUH. It is in the Library of Congress. I suppose they could provide you with it. It would be the easiest way.

Senator HRUSKA. These two articles will be inserted in the appendix of the record.

(The articles referred to will be found in appendix I.)

Mr. RAUH. Now, it doesn't seem to me—

Senator HRUSKA. Before we leave the McCordle case, didn't that statute apply particularly and exclusively to the McCordle case?

Mr. RAUH. It applied to appeals from habeas corpus actions of a particular type. It was not solely to McCordle, but it was to a class of cases of which McCordle was the first that came up.

Senator HRUSKA. But the limitations were so great that it was not likely that it would be applicable to any other case except McCordle?

Mr. RAUH. That is correct.

Senator HRUSKA. When was the statute repealed?

When was that repealed?

Was it repealed?

Mr. RAUH. Now you have got me. I don't know, sir.

I would have to check that. It might have—it might have simply expired by its own limitations.

Senator HRUSKA. And that would furnish small basis for the observation made in the latter case you referred to, isn't that so?

Mr. RAUH. No; the latter case is almost immediately afterward. The Yerger case is in the 8 Wall.; this is in 5 Wall. And what happened in Yerger after the Supreme Court took jurisdiction was that they let him out of jail and avoided Supreme Court jurisdiction by that action.

The Yerger case was never decided either. The Supreme Court had taken jurisdiction. He was then released by the military authorities, and, of course, that rendered the case moot.

Mr. SOURWINE. Mr. Chairman, would the chairman like to order that in editing these hearings, the committee staff should make a note to include that case?

Senator HRUSKA. Yes; as to the repeal of the statute; and if it is not too extensive, the text of it.

Mr. RAUH. It would be very helpful.²

We have, from pages 4 to 9 of our statement, at great length gone into positions taken by responsible conservative influences in America against weakening the traditional appellate jurisdiction of the Supreme Court.

² EDITOR'S NOTE.—The McCordle case involved a writ of habeas corpus. Authority for the Supreme Court to exercise appellate jurisdiction over such writs was contained in the Judiciary Act Amendment of February 5, 1867. The 40th Congress withdrew this authority by providing "that so much of the act approved February five, eighteen hundred and sixty-seven, entitled 'An Act to amend 'an Act to establish the judicial courts of the United States,' approved September twenty-fourth, seventeen hundred and eighty-nine' as authorizes an appeal from the judgment of the circuit court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court on appeal which have been or may hereafter be taken, be, and the same is, hereby repealed." This act was vetoed and passed over the veto on March 27, 1869.

Authority of the Supreme Court to exercise appellate jurisdiction in habeas corpus cases appears to have been restored by section 763, Revised Statutes, approved June 22, 1874.

For example, Mr. Justice Roberts, who was the most conservative member of the Court in his last years on the bench, and who was formerly counsel to the Pennsylvania Railroad and other large business organizations, has not only fought against any such suggestion, but he recommended that this provision of the Constitution be eliminated, that this question be clarified.

Indeed, the American Bar Association, with which I am not too often in agreement, takes the position that the Constitution should be amended to protect the appellate jurisdiction of the Supreme Court.

MR. SOURWINE. Can you cite the American Bar Association's action in that regard?

MR. RAUH. 34 A. B. A. J. 1072 (1948), 74 A. B. A. Rep. 438 (1949), 75 A. B. A. Rep. 116 (1950).

MR. SOURWINE. Those citations were in your statement, but I thought they ought to be here, too.

MR. RAUH. Thank you.

So it seems to me that whether you call it unconstitutional or anti-constitutional, the independence of the Supreme Court is a most important factor, a most weighty and significant factor, in American constitutional life, and that nothing should be done which would weaken that, and certainly the Jenner resolution, S. 2646 would do so.

Now I would just like to make two points in concluding. First, the Supreme Court, through its history, has been under attack, but every time the attack has been beaten down. First came the Jeffersonians who were aiming at John Marshall, and had they impeached Samuel Chase, undoubtedly would have impeached John Marshall. But Jeffersonian senators took the floor of the United States Senate to defend Chase, and thereby make the independence of the judiciary real.

And this fight went on year after year. The Court has been criticized by one side or the other. I am not saying who was right, historically, whether the liberals were right or the conservatives. The fact is, the Court has won out each time. The Court won out, the last time, in 1937. It does not matter whether you like the decisions the Supreme Court rendered before 1937 or you did not. I happen to be one who did not. The fact is that Congress stood by the Court there and pointed out by their action that you could not change the Court just by adding numbers. Congress stood firm for the Court. I hope Congress is going to stand firm for the Court this time.

Secondly, there is one additional thing in this bill that I did not include in my statement and that I want to refer to. It involves civil rights, the third section. I do not say this was intended, but I say this is the effect. The third section of this bill could end the operations of the NAACP in the Southern States.

Again, I say I am not here arguing or suggesting that it was so intended—it would have that effect.

The third section provides that there shall be no Supreme Court jurisdiction of "any statute or executive regulation of any State the general purpose of which is to control subversive activities within such State."

Now I want to give you a case: In Florida a State legislative agency is seeking to harass and drive the NAACP out of the State through an investigative agency claiming that it is a Communist-controlled body.

I believe that under this section the Supreme Court would have no authority to review the decision of the Supreme Court of Florida, which will undoubtedly uphold the action of the legislative committee.

Senator HRUSKA. In spite of its power under this arbitrary and unreasonable thing which you discussed a little while ago?

Mr. RAUH. I am saying if this bill were passed.

Senator HRUSKA. Even if it were, you see, in the bar association cases, those bills were passed and the Supreme Court said you cannot hold a man from being a member of the bar association because——

Mr. RAUH. I am making two assumptions here, Mr. Chairman; first, that this bill is passed, and second, that this bill is held constitutional by the Supreme Court. I was making both of those assumptions.

Senator HRUSKA. Even so, even if it is constitutional——

Mr. RAUH. If this is constitutional, then the Supreme Court would have no jurisdiction to review the action of the Supreme Court of Florida. That was the point I was making.

Senator HRUSKA. I see.

Mr. RAUH. But if this bill is passed, if this bill is held constitutional, all that the supreme courts of the Southern States have to do to avoid review of their action against the NAACP is to put it on the ground of security, and indeed, as I was pointing out in Florida, that is exactly what they were doing in Florida.

Now let's take a case that is pending in the Supreme Court of the United States from Alabama. The State of Alabama, in its efforts to drive the NAACP out of the State and thereby prevent integration, fined the NAACP—a judge of the State there fined the NAACP—\$100,000 for refusing to put up its membership list. That case is presently pending, and is being argued in the Supreme Court of the United States.

If this were passed, all that Alabama would have to do is say, "We need those lists for security purposes," and there would be no review. I believe it would not be any Senator's desire, particularly those who supported civil rights the last term of Congress, to provide that the Supreme Court should not have the power on appeal from State courts to reverse harassing action by the southern segregationist States of the organization which has done the most to promote integration throughout the Nation, and yet, this section, if passed, would have that effect.

I have completed my statement, and I would be happy to answer any questions. And I did make it in my 15 minutes.

Mr. SOURWINE. I have two questions, Mr. Chairman.

Senator HRUSKA. Yes.

Mr. SOURWINE. Is your prediction of the action which you say will be taken by the Florida Supreme Court based upon your opinion as to the merits of the case involved, or are you charging that the Florida Supreme Court has predetermined the decision it will make without regard to the merits of the case?

Mr. RAUH. I know of no decision by the supreme court of a segregationist State which has protected the NAACP. I know of cases in the Supreme Court of Virginia, decided as late as 2 or 3 weeks ago, where the same contentions that are being made in Florida were overruled without even permitting counsel for the organizations or the individuals to be heard. I think it not an unreasonable prediction

to say that the Supreme Court of Florida will uphold the harassment action as the Supreme Court of Alabama has done, and as is presently pending in the Supreme Court of the United States.

Mr. SOURWINE. Now with regard to the effect of the Nelson and Sweezy decisions, the effect of those decisions was to invalidate, in the first instance, the antisubversive laws of 42 States; and in the second instance, to foreclose investigation in the subversive field by the legislative committees of the States. Isn't that right? In other words, Nelson said a State cannot pass an act in this area, and Sweezy said State legislature does not have any interest in this area?

Mr. RAUH. No. I agree on Nelson, but I cannot agree on Sweezy, Mr. Sourwine. Sweezy was much more limited, at least in my judgment, than your interpretation—

Mr. SOURWINE. Sweezy said, "We cannot comprehend that the State of New Hampshire has any interest in this matter"?

Mr. RAUH. Even that, I think, goes too far. My understanding of Sweezy is, all they held was that this resolution was vague, that there were not any bounds placed by the legislation upon the Attorney General.

Mr. SOURWINE. Now, in the Nelson case, the Supreme Court said because Congress had acted via the Smith Act in this area, all of your State laws are invalid?

Mr. RAUH. Right.

Mr. SOURWINE. Now, the Supreme Court has, since that time, as a Federal judge in California phrased it, "made a shambles of the Smith Act." That is, the Supreme Court has ordered dismissals under the Smith Act and has, by interpretation of the Smith Act, made the organizing section inapplicable to any present situation, and it has made conviction under the teaching and advocating section a practical impossibility.

Will you concur in that?

Mr. RAUH. It made it very hard.

Mr. SOURWINE. Pardon?

Mr. RAUH. It has made it very hard.

Mr. SOURWINE. Yes. So we have a situation in which the Supreme Court said the States cannot act because the Congress has, and then they invalidated the congressional action, in effect; so there is no effective law, State or Federal, in the antisubversive field today.

Mr. RAUH. That I could not agree with, Mr. Sourwine.

The Supreme Court was very careful not to overrule the Dennis case. The Dennis case—erroneously, in my judgment—upheld the constitutionality of the Smith Act. It seems to me, as it did to many people at the time, that the Smith Act was unconstitutional. The Dennis case went contrary to that view. And, incidentally, I would just like to point out that the Supreme Court is not always deciding the questions in favor of these civil-liberties purposes.

Every civil-liberties organization in America urged the Supreme Court to decide that the Smith Act was unconstitutional, and yet it upheld the Smith Act. The Supreme Court decisions, if I may use the word—it has been overused in the past—are essentially moderate ones, and they have taken a middle course. And it is a little hard for me to see why it is not recognized, particularly in the unanimity of their action, that this has been a middle course.

Senator HRUSKA. All right. Thank you very much for your statement, Mr. Rauh.

Mr. RAUH. Thank you very much for your time and for the helpful questioning.

Senator HRUSKA. Mr. Hart, will you come forward, please?

The Chair would like to say that we are sorry that we did not get to you sooner. It was not altogether Mr. Rauh's participation in this, Mr. Rauh's testifying that is responsible for that, however. I imagine counsel and the chairman had a part in taking up a lot of the time.

You may proceed, Mr. Hart.

STATEMENT OF MERWIN K. HART, PRESIDENT, NATIONAL ECONOMIC COUNCIL, NEW YORK CITY, N. Y.

Mr. HART. Mr. Chairman, anyone who appears before a congressional committee has to take his chances. I realize that fully.

Senator HRUSKA. Do you appear here—do you cover it in your statement—as a representative of any organization or as an individual, Mr. Hart?

Mr. HART. I appear here as president of the National Economic Council, which is a committee-membership corporation not organized for profit, and incorporated in 1930 under the laws of the State of New York. Our objectives are stated in our charter as being to support private enterprise and American independence, and we have always opposed socialism and communism.

Senator HRUSKA. What is your membership? What is the membership of the organization?

Mr. HART. We always say our membership is upward of 1,600 in all States of the Union.

Senator HRUSKA. And do you appear here by reason of formal action taken by the governing body of that organization?

Mr. HART. Generally, formal action, but following, in this specific case, conferences with members of our committee.

Senator HRUSKA. Very well. You may proceed.

Mr. HART. The National Economic Council strongly favors Senator Jenner's bill, S. 2646, to withdraw certain appellate jurisdiction from the Supreme Court. We believe that such a bill is absolutely necessary, if we are to preserve our republican form of government.

The Constitution in section 1 of article I grants "all legislative power" therein "granted" to the Congress. It is clear from a reading of the Constitution that, while the framers intended the three branches, legislative, executive, and judicial, to be in a kind of balance, yet it is a fair inference that they intended the legislative power to be the most powerful of the three.

The provisions of the Constitution respecting the Congress and its powers occupy more space than all of the other parts of the Constitution—exclusive of amendments—put together. The fact, too, that the provisions respecting the Congress came first in the Constitution would seem to confirm this view.

The fact that the Constitution gives the Congress, through impeachment, the power to remove a President or any member of the judiciary, while, certainly, neither the President nor the Supreme

Court has power to remove a Member of either House of Congress, seems to be further confirmation.

Yet the Supreme Court, by some half dozen cases, 7 or 8, I believe, decided in 1957, has undertaken, in effect, to write laws itself, thus usurping the powers of the Congress, if they have not also usurped the power of amendment of the Constitution itself, which power is reserved by the clear provisions of the Constitution solely to the Congress and States.

We can think of no legitimate argument that can be advanced against this bill, unless the person who advances such a view is willing to see our form of government completely changed. We do not see how the Congress, with the respect that it must have for its own prerogatives and for the duties imposed upon it by the Constitution, can be satisfied until some such bill as this has been written into law.

We are the more ready to urge the enactment of this bill because of the mounting likelihood—in fact, the substantial evidence available—that there are those in this country who are willing to take the United States into some form of world government, under which the American Republic would completely lose its sovereignty, and the American people would be compelled to submit to the rule of 60 to 80 other countries, most of them smaller and relatively unimportant.

Under such circumstances, of course, the United States, as we have known it, would disappear into history.

The resources and wealth of the United States would then be drawn away for the benefit of the peoples of other lands. We would be reduced to what, for the people, would be regulated poverty. Nothing but a bloody revolution, in which the odds would be heavily against the American people, could restore our lost liberties.

The particular decisions of the Supreme Court which have prompted this bill are designed to concentrate power in the central government, to build up the power of the Supreme Court, and to strike down important parts of the power of the Congress. Such concentration of power is definitely in the interest of those who would turn the United States over to a world government.

I call the attention of the committee to Economic Council letter 423 of January 15, which we published, written by Mr. Norman Dodd, who was director of research for the Reece committee of the House of Representatives, which in 1953 and 1954 undertook to investigate the large foundations. And, Senator, with your approval, I would like to ask that this letter be incorporated in the record.

Senator HRUSKA. It will be received and incorporated in the record.

Mr. HART. Twenty-two hundred words.

(The letter referred to is as follows:)

[From the Economic Council Letter (Letter No. 423), January 15, 1958]

WHO FINANCES SOCIALISM AND COMMUNISM?

(By Norman Dodd)

This description of a few of my experiences may help to clarify the progress of our national breakdown. Those which I shall describe span some 30 years. They stem from an effort which, personally, I found necessary to make to discover a rational answer to the question; Why should we Americans, a people educated to revere freedom, tolerate the abridgement, by institutions whose

capital has been created by private enterprise, of the rights upon which that freedom is based?

By "a rational answer" I mean one which would not require my becoming antagonistic toward anyone, in either thought or action. The result has been to find that, in spite of our revered education, we were not taught how to meet the attacks which have now long been made upon these rights. As a consequence, our present experiences are nothing more than proofs of this failure—of our inability to understand what caused the failure, and of our determination to do the best we can under the circumstances which exist because of the failure.

The efforts which enabled me to draw these conclusions were stimulated by studious explorations in the field of American history, which had been a long-standing interest of mine, as well as by my exposure to the original findings of such laymen as the late William Churchill, A. Paul de Saas, Thomas N. McNiece, Elbert O. Kelsey, the late Orlando Weber, Charles Williams, Paul M. Allen, and the late Wilford S. Conrow, which, when considered as a whole and combined with my own findings, indicated beyond any reasonable doubt that—

(1) There was no excuse for education's failure to prepare us successfully to defend the rights upon the exercise of which our freedom rests.

(2) Even now, this failure could be overcome were it not for some of us and some of our educators who bristle at adverse criticism of established custom, proper or improper. Persons who profit by this failure adjust to current conditions and brand as incomprehensible or unwarranted any suggestion for change.

In retrospect, these findings, and the justification for action in accordance therewith, were dramatically highlighted upon an occasion when the basis for them was being explained by me to a small group in my own living room. One of the gentlemen present suddenly arose, stalked across the room to the hall, and asked me to step outside. There, shaking with anger, he informed me that he was one of probably a very few persons who appreciated the significance of the premises from which I was speaking—that his life was dedicated to seeing that these premises "never gained circulation"—and that, were he for any reason forced to "hear me out," he would not be responsible for what happened to me—or to any member of my family. At that time, this man was a close adviser to the Secretary of the Treasury of the United States, and to one of our more important banking houses. Subsequently he was a key figure in the development of United States governmental control of atomic energy.

Not long afterward another experience gave me food for thought. This time my guests included a figure outstanding in the field of social engineering who was then active in the area of national planning. When the explanation of my thesis reached the point where it could be drawn upon to support the actions of our Founding Fathers and their advocacy of the Constitution, this man was vehement in his statement that such a thing could not be permitted because the future of the United States lay in socialism—socialism administered with characteristic American efficiency.

To me it is significant that none of the 250 men and women to whom, over a 10-year period, I presented the idea of an educational failure in our country, could accept it. They admitted that it was beyond their power to grasp, or they became as angry as good manners would permit.

Ten more years of study that followed made it more and more apparent that the answer to our difficulties lay in the cultural realm of our national life. And creeping through these years of study grew the sinister feeling that this realm had been tampered with deliberately, and to the point where it would no longer serve us in our hour of need. Subsequently I was to be presented with an opportunity to confirm this conviction through my experiences with the Reece committee and its investigation of our tax-exempt foundations.

Looking backward, two experiences stand out among the many which were to fill that year in Washington. One involved conversations with the officers of one of our largest foundations wherein they explained to me that its activities were being guided by three documents: the Sermon on the Mount, the Declaration of Independence, and the Constitution of the United States. They said that during and after World War II, the majority of its officers had worked with the Office of Strategic Services, the State Department, and the European Economic Administration—under directives which called for an alteration of the social structure of the United States so as to make coexistence with the Soviet Union possible. They said further that their foundation grants would, thereafter, be directed to this end; the inference being that therein lay our hope for a peaceful future, with all the benefits which this implied. Their wonder was

that, having such a laudable objective, the foundation should have experienced such a bad press—and that the Congress should wish to investigate it.

When I suggested to these gentlemen that the foundation explain publicly that its grants were made to further this purpose—and thus dispel the confusion in the minds of the American people which their past grants had created—their answer was a horrified "No. Such a move would be unthinkable."

It did not seem to occur to them that, while legally the foundation was privileged to operate as its officers saw fit, such disagreeable consequences as a bad press and a congressional investigation could hardly be avoided unless the public were informed of what it was doing—and why. Rather than risk the candor of a clear statement of policy in the light of which its grants would at least appear logical—if not acceptable—they apparently preferred to rely upon an effort to control the press and thwart the Congress.

At a meeting with the officers and counsel of another large foundation to whom I had written, requesting answers to questions about grants made by it since the early 1920's, they explained that the records which would produce the answers were in storage. They suggested that, instead, I or a member of my staff examine their minute books, beginning with the inception of their foundation. Through this medium I was afforded the opportunity to learn that in this country some men of prominence had been influential and bold enough to use the wealth at their command to involve the United States in war for the purpose of removing the traditional differences between itself and the nations of Europe—and thereafter were powerful enough to transform their first successes into a permanent involvement of our people in the affairs of others. Apparently these officers had never read the early minutes themselves.

These experiences will illustrate what we should now know: That what has happened to us as a people was condoned by privately owned wealth and for this condition to continue, it is necessary that this knowledge be kept from us. We can anticipate that the power of wealth will continue to be employed for this purpose. And since these foundations are tax exempt, thereby placing an added burden on all other taxpayers, it means the whole people are being forced to contribute to the project of the destruction of the American system of private enterprise.

These happenings served me as clues. They indicated that the destructive ideas and deeds chargeable to essentially able men were simply their thoughtlessly undisciplined references to what the late Col. E. M. House referred to as the fact that the social structure of the world had been wrongly organized to begin with. That such is the case becomes even more obvious in the light of what education in the United States should have embraced, assuming it had remained loyal to its obligations to develop citizens able "to secure the blessings of liberty to themselves and their posterity."

Meanwhile such experiences and continued study made it clear to me that the defection of the people of the United States from their original course as set forth in their Declaration of Independence and their now obvious inability to return to it—can be accounted for by their lack of knowledge regarding the use to which American wealth has been and is being put. It also becomes evident that, in the absence of this knowledge, the natural forces to which the affairs of men are subject would compel us to indulge in practices such as I have just exposed.

In brief, the significance of contemporary events is that they testify to our having become dependent upon these harmful practices inimical to our common good. They also testify to the existence of evil pressures which must be recognized and terminated. Pending these difficult accomplishments, we can expect to continue down the road we are now traveling, driven by the power of our own wealth. We can also anticipate the time when this wealth will resort, in its own short-term interest, the centralized controls for which socialism calls, and will continue to finance the development of such controls.

For the moment, in the minds of certain of these foundation leaders, these practices need to be disguised—made difficult to detect. We have not yet reached the point where we would countenance them if we knew them for what they really are or recognized why they have become so important a part of our national life.

It is not easy to realize that we ourselves are our own enemy. As I said in my report to the American people:

"Behind events in history lie changes in the practices by which men endeavor to live in harmony with one another and with their environment.

"Behind the changes lie ideas which created the change.

"Behind the ideas lie the persons who formulated the ideas.

"Behind these persons lie 'others' who see in the application of these ideas a means of demonstrating man's independence of God.

"And behind these 'others' lies the power inherent in productive wealth."

The regularity with which this sequence occurs, the similarity of the influences set in motion as a result, and the equality of circumstances to which these influences give rise—are discoveries of importance to be made by the historian of the future. They should be of inestimable worth to him because at last he will be able to explain historic phenomena in terms of impersonal cause and effect, and will provide him with a basis for judgment of ideas and practices free from the conflicting opinions which have so far prevented men from achieving either unity or peace.

Properly defined, capitalism is "wealth engaged in the production of more wealth;" but we are busily engaged in the suicidal practice of making money out of money—and in adjusting ourselves to the consequences. We have relinquished the rights with which we have been endowed by our Creator—once guaranteed to us by our Constitution—for a mess of pottage composed of social security, welfare benefits, subsidies, and the like.

Communism, socialism, internationalism, and world federalism are diversions designed by the powers of finance at the behest of those few capitalists who exploit us to hide their identity and insure benefits to themselves. As long as we permit them to remain unidentified and to operate, they will develop and continue to support an education to justify the results of their actions, and will finance this development. No educator will be able to resist the consequent pressures which our stupidities have released.

It is important, therefore, that we understand that the art by which we are attempting to live is not capitalism, but conformism. We must understand that communism is little more than a modern art designed to frighten us into conformity; that socialism is only a philosophical excuse for both; and that our drift toward one-worldism is the logical consequence of pressures exerted by these exploiters to secure and exercise political power on a worldwide scale.

The seriousness of our toleration of these fallacies which deny the sanctity of private property becomes evident when we recall that our Founding Fathers, who were the advocates of liberty, knew that this sanctity was essential if the people were to protect themselves from tyranny. For to them property was the tool for the production of wealth. They presumed that, in return for the benefits of liberty, people would willingly assume the responsibility which accompanies ownership, would insist upon administering their own wealth, and that they would equip themselves educationally to do so.

History reveals that a civilization rises when its members demonstrate an ability to develop capital and falls when they do not; that their liberties expand in proportion to the willingness of the individual to assume responsibility for the productivity of the capital which he owns; and they contract when he refuses to accept that responsibility. Advancing materialism and our inability to understand or unwillingness to accept these historical facts must end in bondage for us all.

Because education has neglected to inform us regarding these matters or to equip us to acquire this knowledge from experience, we hesitate to undertake such a prodigious step. We continue to rely upon the temporary benefits which materialism and irresponsibility seem to produce; and we try to convince ourselves that progress is being made.

An alternative to present practices cannot be proposed with any degree of logic until our property rights are returned by those who now exercise them, supposedly in our behalf. We are therefore challenged by the problem of how this is to be done and how civilization can be kept from destroying itself. The answers lie in a determined and purposefully organized effort to overcome our ignorance of the natural causes of human events. Procedures will be difficult because they must be based upon a concept which is not familiar to many of us today—the concept that men are governed by natural law, or, as our forefathers expressed it, "by the laws of nature and Nature's God."

Men must realize that capitalism, as exemplified by the use of it by certain foundations, and communism, respectively, are subjective and objective manifestations of unbridled power.

Our recognition of this fact is Nature's way of awakening us to a danger that threatens our very existence as a people.

Mr. HART. In this letter, Mr. Dodd tells of a conference held by him with the officers of one of the largest foundations, in which these

leaders readily admitted that their foundation grants had been and would continue to be directed to produce—

an alteration of the social structure of the United States so as to make coexistence with the Soviet Union possible.

This investigation was squelched in the House abruptly under circumstances which themselves should be investigated.

If the investigation of the foundations had continued, it is likely that the American people would have learned that some of these great foundations are among the forces that are supplying the brains and the money toward robbing the American people of the independence their ancestors won in 1781.

Perhaps a suitable committee of the United States Senate would see to it that a real investigation of these foundations be made.

In this connection, a Canadian newsletter entitled, "News Behind the News," in its issue of May 1957, as well as an article by Paul Stevens in the American Mercury for July 1957, told of a secret international conference held February 15, 16, and 17, 1957, at St. Simon's Island off the coast of Georgia. This, apparently, was the third or fourth conference of practically this same group.

Representatives of other countries were there, including Holland, Britain, Poland, Denmark, Mexico, Germany, Norway, and Sweden.

Seventy persons signed a hotel register. According to the American Mercury, at least 12 others refused to do so.

Among those the Mercury reported present were: Justice Felix Frankfurter; Arthur Hays Sulzberger, of the New York Times; Paul G. Hoffman; Dean Rusk, president of the Rockefeller Foundation; Thomas E. Dewey; David Rockefeller, chairman of the Chase Manhattan Bank of New York; Senator Alexander Wiley; Gabriel Hauge, Assistant to the President on Economic Affairs. Obviously, it was an important meeting.

I find few among the names listed who are known to be opposed to world government. Many of them—and perhaps all of them—are in favor of world government.

It is not likely that this conference took action to further another summit conference, for instance, now so much agitated by liberals and leftwingers—between the United States and Soviet Russia, which, if held, would probably be even more disastrous for the American people than even the Yalta Conference in 1945?

Since some of the foundations—and some of them were represented in this meeting—are shown by many of their grants to be in favor of merging the United States in world government, it is a fair inference that one purpose of the meeting was to further world government.

Should not some of those who took part in the St. Simon's Island conference be called to testify on this pending bill?

Mr. SOURWINE. Mr. Hart, what would that have to do with this bill?

Mr. HART. I think it would have this, Mr. Sourwine: A great many things have happened in the last 20 or 30 years and perhaps at an accelerating rate, all of which are tending to place more and more power in the administration, whatever the administration might be here in Washington, and the purpose of that, it is feared by many people, is to make it more easy to merge the United States in world socialism. Statistics have been published of polls taken in this country showing already, under the stimulus of a tremendous amount of

agitation, there is a growing belief among people, unthinking people, that this is desirable for the United States.

Mr. SOURWINE. Do you see this bill, S. 2646, as a countermove to what you say is the trend toward world socialism?

Mr. HART. I do. Most decidedly.

Mr. SOURWINE. All right.

Mr. HART. There can be no question, although the Supreme Court might choose to make further attempts to suppress the proper functions of the Congress, that this pending bill is entirely within the provisions of the Constitution.

It is quite clear from section 2 of article III of the Constitution that this is so.

And then I quote this section :

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

We of the National Economic Council believe that only by conspiracy of certain agile minds, and due to the apathy of millions of our citizens, this country has been taken far along the road toward the loss of its independence.

But it's still not too late to turn back. The passage of the Jenner bill might well mark a turning point in bringing the control of their own country back to the American people—under the Constitution.

We ask the Congress to pass this bill.

Senator HRUSKA. Any questions, Mr. Sourwine?

Mr. SOURWINE. I have no further questions, sir.

Senator HRUSKA. If not, we want to thank you, Mr. Hart, for having appeared before the committee in the fashion that you did.

Mr. HART. Thank you, sir.

Senator HRUSKA. The record will be added to by the editorial from the Omaha World-Herald of February 18, 1958, at this point.

(The editorial referred to reads as follows:)

[From the Omaha World-Herald, February 18, 1958]

THE LEGISLATING COURT

Senator Jenner's bill, on which hearings are now being held by a Senate Judiciary subcommittee, would forbid the Supreme Court to take appellate jurisdiction in the following fields:

The investigative functions of Congress.

The security program of the executive departments.

State anti-subversive legislation.

Home rule over local schools.

Admission to the State bar.

In all five instances, the curbs were proposed because of Supreme Court decisions which, in the opinion of Senator Jenner—and of a good many other people—have usurped the legislative power.

Clearly Congress has the power to curb the Court's authority to hear appeals. Article III, section 2 of the Constitution says explicitly that the Supreme Court shall have appellate jurisdiction "with such exceptions and under such regulations as the Congress shall make."

Legal historians say Congress has used the power only once—in a reconstruction measure following the Civil War. It is, in fact, a power which could destroy the court, and therefore should be used only with great care.

Judge Learned Hand, retired chief judge of the United States court of appeals and one of the most respected legal minds in America, said at Harvard a couple of weeks ago that while "it was not a lawless act to import into the Constitution"

the doctrine of judicial supremacy in legislative-executive-judicial disputes within the Federal Government, the use of such judicial supremacy is "no doubt a dangerous liberty, not lightly to be resorted to."

Judge Hand went on:

"On the other hand, it was absolutely essential to confine the power to the need that evoked it: that is, it was and always has been necessary to distinguish between the frontiers of another 'department's authority and the propriety of those choices within those frontiers. The doctrine presupposed that it was possible to make such a distinction, though at times it is difficult to do so."

In this and in two companion lectures, Judge Hand went on to voice his doubts about the Court's motives, saying that in the segregation cases "It seems to me we must assume that it did mean to reverse the 'legislative judgment' by a new appraisal."

He confessed he could not frame a definition "that will explain when the Court will assume the role of a third legislative chamber and when it will limit its authority to keeping Congress and the States within their accredited authority. Nevertheless, I am quite clear that it has not abdicated its former function, as to which I hope that it may be regarded as permissible for me to say that I have never been able to understand on what basis it does or can rest except as a coup de main."

In other words, the distinguished Judge is saying that the High Court does legislate. And that conclusion is quite like the premise on which Senator Jenner has based his bill to curb the Court in five fields.

Senator HRUSKA. Have you anything further?

Mr. SOURWINE. Mr. Chairman, there are communications here bearing on the bill, which probably should go in the record.

Would it be thought of the Chair that these should go in daily as they come along, or that the written communications should all go in one section?

Senator HRUSKA. Subject to the judgment of the chairman of the committee, my own thought is that it should probably go in a separate section.

Mr. SOURWINE. That can readily be done. We can have an appendix and, as a part of it, can put in all of the communications from outside.

Senator HRUSKA. Very well.

Off the record.

(Discussion off the record.)

Senator HRUSKA. We will recess until tomorrow at 10:30.

(Whereupon, at 12:15 p. m., the committee adjourned, to reconvene at 10:30 a. m. Thursday, February 20, 1958.)



LIMITATION OF APPELLATE JURISDICTION OF THE SUPREME COURT

THURSDAY, FEBRUARY 20, 1958

**UNITED STATES SENATE,
SUBCOMMITTEE TO INVESTIGATE THE ADMINISTRATION
OF THE INTERNAL SECURITY ACT AND OTHER
INTERNAL SECURITY LAWS, OF THE COMMITTEE ON THE JUDICIARY,
Washington, D. C.**

The subcommittee met, pursuant to recess, at 10:45 a. m., in room 457, Senate Office Building, Senator Roman L. Hruska presiding.

Present: J. G. Sourwine, chief counsel; F. W. Schroeder, chief investigator.

Senator HRUSKA. The committee will come to order.
We will resume the hearings on S. 2646. And your first witness this morning is Homer Brett, Jr.

TESTIMONY OF HOMER BRETT, JR., CHEVY CHASE, MD.

Senator HRUSKA. Mr. Brett, have you a statement? I might ask preliminarily if you are making this statement on your own behalf or on behalf of an organization?

Mr. BRETT. I am making this statement primarily on my own behalf, although I must inform you that I am a member of the American Legion, and that I speak for myself and not for the Legion.

Senator HRUSKA. And does your statement give a little background about yourself, personally, that will be of interest to those who will read this testimony later?

Mr. BRETT. No, sir.

Senator HRUSKA. Would you care to give us a brief background as to your profession and your activities in your profession, and so on? I assume you are a lawyer?

Mr. BRETT. No, sir; I am not a lawyer. I am the son of a Foreign Service officer who served his country for 30 years; I lived with him most of my life. I am a graduate of the University of Virginia; I am a naval officer, lieutenant commander in the Naval Reserve, which I am proud of.

I have been selected for promotion to commander in recent weeks. I have served with the Department of State and other departments of Government abroad, and I have recently, in December, resigned from the Government service to return to my life as a private citizen. I am now managing my own estates, and hope in the future to manage other people's estates as an investment counsel, if I can get started in that business.

Senator HRUSKA. Very well. You may proceed with your statement.

Mr. SOURWINE. Might we have the witness' address, Mr. Chairman?

Mr. BRETT. 3513 Leland Street, Rollingwood, Chevy Chase, Md.

Senator HRUSKA. Very well.

Mr. BRETT. May I read the statement, sir?

Senator HRUSKA. You may proceed.

Mr. BRETT. I request the privilege and honor of testifying that, in my opinion as a loyal citizen of this Republic and as a former employee in the executive branch of the Federal Government of, by, and for these 48 sovereign, but inseparably federated, States of the United States of America, I oppose at this time the power of appellate jurisdiction of the Supreme Court in the area of congressional investigative activities even though I recognize that the Court has had such power historically and for good reason as long as the Court, in the words of Cook, "conserves the law," and does not attempt to create law without the consent of the governed.

Senator HRUSKA. Mr. Witness, we ought to have a little consideration for the reporter here. Will you slow up just a little bit.

Mr. BRETT. It is my conviction, however, that the Court is misusing such power to create new principles of government and morality, whereas the power was given the Court in order to protect the rights of specific individuals and specific cases where injustice might have been done. The Court's prerogative was not created to give it power of nullification over the carefully and well considered acts of Congress as attorneys, well versed in the common law and vested directly with untransferable powers by the electorate of the whole of the Nation.

Over the past 25 years I have slowly come to the conclusion that Thomas Jefferson was correct in stating that the Supreme Court has a strong tendency, under a strong and willful executive force or power, to become a handmaiden of the executive branch of Government in carrying out dubious programs of social reform and change without the consent of the authorized constitutional representatives of the people.

The authorized delegates of the people of the United States as a whole, and in part, are the Congress. Neither the Court nor the executive branch of Government reflect anywhere nearly as well the opinion of the unorganized individual citizen as does the Congress. Wherefor, then, should the subordinate powers of the Federal Union attempt to control and dominate the considered action of what Jefferson termed the "key branch of the Government"—the power paramount, Congress, which may be checked only momentarily by the subordinate powers—in order to make Congress think twice and seriously—but cannot be permanently blocked by either the judiciary or by the executive?

It is inconceivable that pressure groups and vested interests could ever control completely the whole of Congress. Yet this cannot be so truly said of the subordinate branches of the body politic. We citizens must not forget that we have entrusted our delegates with powers so precious and so delicate that we have through the centuries instructed these self-same delegates that their power may not be delegated by them to any man or organization.

When then should we allow their power to be mutilated by the envious? When the power of Congress, Senate and House, to investigate, and to gather information, in any field at any time, are destroyed by any other power of the Nation, the eyes and ears of the citizenry have been blinded and deafened and in all probability the electorate has been reduced to dumbness, for few executives appreciate criticism of those actions which they may full well believe to be in the interest of the State.

The thinking, however, does not make it so. The Almighty gave us voices that we might warn our kind when we were hurt, for only He among all executives prepared even our bodies to protest against the scourges He might wittingly or inadvertently send against us.

Destruction of the investigative power of Congress leads inevitably to license and corruption by the more hierarchial and authoritarian elements of Government which constantly in the history of mankind, and sovereignty over Him, attempted to relegate the role of the individual's common law to abysmal oblivion.

The authoritarian element has always espoused the Platonic theory that only an "elite"—whatever its brand might be—is capable of understanding what James I and Charles I chose to refer to as the "mysteries of the state." It did not take Sir Edward Coke very long to point out to England's commoners, our ancestors, that most of the "mystery" involved how much money Buckingham as Assistant King was squandering on the pearls he tossed on the ground to enjoy the sight of his fellow countrymen groveling at his feet.

Did Sir Edward Coke, in Parliament ever call for the mutilation of the investigative power of the Commons, or even of the Lords? Certainly not. His life was dedicated to enlarging the power of Parliament to look into the "mysteries" of the Crown.

Plato's hearts of gold soon turn to hearts of lead when the commoners' laws and attorneys are flouted, usually upon the theory that laymen are incapable of understanding the fine reason and philosophy behind the actions of appointive magistrates and courtiers whose advancement depends upon the grace of myriad lords temporal acting out the role of lord marchers on the frontiers of the American social and political system.

Let it never be forgotten that these same lord marchers were not above making private alliances with Welsh princes against the interests of the English gentry and stout yeomanry. It would appear that as of several days ago one such lord marcher is now seeking a new terrain for his operations, having discredited himself first in his home counties and then in the Federal service, where he assumed improperly a royal prerogative, flouting like Buckingham the Nation's tried Minister of State.

For 25 long years, 14 of which I have served with the executive branch of the Government, I have seen the minions of the Executive—sometimes against the will of the President—reach out for more and closer control over the Nation's private life.

Each move was made on the ground that without the new powers being sought, the objectives of the Executive could not be carried out successfully. Laws made by Congress were reread into them. Reinterpretations were made at great cost to suit official planners.

Throughout all this, Congress and the Senate were often not only criticized but reviled when their decisions did not suit the interest of the bureaucrat.

When, on the other hand, Congress was weak enough to be cozened into acting as a rubber stamp it was not thanked; it was patronized, as Charles I patronized Parliament, up to the time he was made to sign the petition of rights.

Do the judiciary and the executive branch work together in combination to frustrate and to limit the activity of Congress? It is my opinion from my own past observation and reading that they do, particularly in that stratum of government where the petty politician and so-called career officer are indistinguishable from each other, the area of the GS-16, GS-17, and GS-18 grade levels.

It is also my impression and personal conviction that at this level there are strong and clever left-wing influences—probably not Communist, but nonetheless quite tolerant of and susceptible to Communist ideology—which are dedicated to the creation of a fictitious dragon, called “Chauvinistic reaction against the centralized internationalist welfare state and peaceful cooperation with socialist democracy of Soviet republics,” which they feel must be eliminated from “reasonably” inclined councils of state.

I first felt that I recognized such groups forming inside the executive branch during our alliance with Soviet Russia. The group had little influence during the early part of the war, when I can remember that most of my peers and seniors were rather openly anti-Communist. As of December 1958, anticommunism is, generally speaking from my observation, rather unfashionable and anti-Communist talk is liable to leave the unfortunate impression that one is necessarily a McCarthyite, “a supporter of the DAR” or “the American Legion,” or worse yet, according to these political philosophers, not interested in putting a stop to the “terrible scandal” of the “Un-American Activities Committee” investigations.

Naturally, everyone does not take this attitude, but I can say with utter conviction of sincerity and truth that no man who values his advancement will openly or loudly disagree with the aforestated attitude. I, for one, know nothing of McCarthy, but I do respect the other three, and am proud of my association with the American Legion, and equally proud of the job done by the Un-American Activities Committee.

It is interesting to note that today the “pitch” pushed by the left is not combating communism but vigorous crusading for “true democracy”; not attacking Soviet Russia, but attacking anti-Communist dictatorships because if we allow them to ally with us we will be vulnerable to Soviet criticism in the eyes of the “democratic” world.

Thus the Soviet may use any ally it chooses, yet we must use only such allies as are not vulnerable to Soviet propaganda. This policy leaves little room for choice. Fortunately, our aid to Communist nations is not presently under fire by Moscow; thus, in this area at least we are able, according to the left-wing clique, to “found” stable “friendships” for “the future.” The present form of “double thinking” is beyond my mental accomplishment, and therefore I now speak as a private citizen, interested only in the stability and the security of this Nation.

My comments do not reflect in any way on the loyalty or political orientation of the vast majority of silent, docile, and inoffensive career employees up to and generally including grade 15. However, Congress might well study whether or not some officials in grades 16, 17, and 18 are really apolitical or not.

My conviction is that they should be, but are not always so. In fact, in many cases the very nature of their jobs prohibits their being apolitical, and from their "career" positions play politics with those organizations which would strengthen the Communists' position in our Nation.

My own none too deep inquiry and observation of the Government scene has led me to the personal conclusion that at the present time there is a well-organized "group toleration of Marxism," "free thinking," or "opportunistic" connected with both the judiciary and the executive who are opposed to all forms of national sentiment.

This group, moreover, would appear to favor all forms of internationalism and collectivism. Such utter prejudice against nationalism and in favor of internationalism would appear to violate the common concepts of commonsense; for such precarious positions, fine though they may sound to the ear, lead to an inevitable *reductio ad absurdum*, that is, all nationalism is bad and all internationalism is good.

From such fallacies the myths of salvation through doctrinaire philosophies are developed to produce "incorruptible men of reason," such as Robespierre, who was willing to build his version of democracy upon the blood of innocents, a mighty poor foundation.

The investigative activities of Congress have seldom been attacked except when they drive into the left-wing political arena favoring Soviet Russian connections. Investigations of crime, corruption, big business, fascism were all encouraged by the press, pressure groups, and even the other branches of the Government.

Despite this public approval of congressional investigations there has always been raised a tremendous propaganda barrage against congressional investigations of communism or radical left-wing pro-Communist or pro-Soviet activity. In other words, there is always strong protection of those who would upset or jar rather than stabilize and ameliorate our existing American system of law, justice, and order.

Were I to fail to inform this august body of the Nation's own representatives what my impressions of the political milieu is at the present time, I would fail in my duty to my fellow citizens, and to their one and only genuine and legal representatives and attorneys. Does what I have said condemn completely the executive and judicial branches of the Government? It does not. If a patient suffer from a small tumor which could grow and become malignant, one does not slay the patient. One attempts to help him by endeavoring to remove the cause of his misery and suffering.

Under our parliamentary system of self-government both the executive and the judiciary are under the law just as Coke pointed out that the Crown was under, and not over, the law.

That there is an organized left-wing group within the executive and the judiciary, I now do not doubt for one moment. That this group is dedicated, well organized, and equipped to inspire its opposition, I do not doubt. That a part of this group is wittingly pro-Soviet in sentiment I do not doubt.

The latter nucleus is most clever in claiming to be the leaders of the battle against "Stalinist dictatorship." The movement paints Khrushchev as moderate, tolerant, and willing to cooperate in the fight against dictatorship throughout the world. Now that Stalin is dead the real threat to world peace is not Soviet Russia, according to this group, but the remaining dictatorships of a reactionary and chauvinistic nature.

Upon these the left wing would like to have us aid hammerlike blows irrespective of their anti-Communist positions. Thus, the Soviet Union may ally itself with dictators, but must not be criticized for this. Such action would, according to the left, disturb world peace. We must, they say, limit our military alliances to those nations which are so pure and socially minded that the U. S. S. R. will not be able to use our association with them as food for anti-United States propaganda.

This may explain to some extent our aid of millions of dollars to Soviet Russia's satellites. There has apparently been no Soviet objection to such aid, far less than the objection to aiding these governments which have not the same form of government as ourselves, but which oppose communism.

The investigative activities of Congress are in my opinion being attacked today by the Supreme Court because of the latter's inability to recognize the fact that the opposition to congressional investigations is mainly concerned with the determination of pro-Soviet elements, as well as others, to protect the liberty of operation of their coreligionnaires.

This is one area in which Congress should surely have a free hand to investigate rather than be obstructed.

Congress has so far done a magnificent job of ferreting out the Communist operations in this country, and is naturally hated for its success by that element, who are not helpless either financially or politically.

How much criticism did we hear from the leftwing of the congressional investigations of Fascists and Nazis during World War II? None. Yet the element I refer to was then well organized and demanded more and more action, including the investigations of officials of the State Department, who they presumed, falsely, to be pro-Fascist. All one heard from the groups I speak of were cries, cheers, and exhortations for more action. Now the shoe is on the other foot. Must investigation now cease?

Congress should not allow its investigative power to be diminished in any field at any time. Today our national security calls for congressional investigation of communism. Twenty years hence the very men who oppose the present investigations may be again exhorting Congress to carry out a "no holds barred" investigation of some other enemy of their own. At that time, if the Court maintained its present position, it would fall, one might assume, under heavy attack by its present "friends."

There is no power which has the right to prevent the people of the Nation from exercising their prerogative of maintaining liberty through eternal vigilance. A self-governing people have the power to police themselves without hindrance by their own servants who sometimes act as though they would be masters.

The electors and their delegates have in the past, and should in the future, always taken precedence over the appointive official's views as

to where the Nation should go politically and socially. If the electorate does not demand socialism, for example, it is not up to the officeholder to insist upon it. Sovereignty resides in the public and the public is not represented fully by any other than its representatives in Congress. Congress turns the common law into statute law and statute law is over the Crown, not under it.

I thank you.

Senator HRUSKA. Mr. Sourwine, have you any questions?

Mr. SOURWINE. Just one or two clarifying questions.

Did I understand you correctly when I thought I heard you express the view that among the three branches of the Government, the Congress, the legislative branch is supreme?

Mr. BRETT. That was the concept of Thomas Jefferson, according to my understanding, and he made every effort, as I recall from reading Thomas Jefferson, to strengthen the Congress so that its powers would not be sapped by the other branches of Government.

Mr. SOURWINE. You use the phrase, "wildly irrational patriotic organizations," as applicable to the DAR; what did you mean by that?

Mr. BRETT. I did not mean that as my own comment. I am a respecter of it.

Mr. SOURWINE. You were indulging in satire or sarcasm at the same time?

Mr. BRETT. Let me see—sometimes I confuse the meaning of the two. I was referring to what other people's statements say.

Mr. SOURWINE. You similarly spoke of the activities, the House Un-American Activities Committee, as a scandal. That was not an expression of yours?

Mr. BRETT. That was not mine. I was referring to that as the propaganda which is aimed at those enemies of congressional investigation.

Mr. SOURWINE. And you stated the Soviet Union must not be criticized. Again, that was not your view?

Mr. BRETT. That was not my view. My view is that the Soviet Union should be criticized by us, and fully, when it is to our advantage.

Mr. SOURWINE. Mr. Chairman, I have no other questions.

Senator HRUSKA. Thank you very much, Mr. Brett, for your appearance here this morning.

The next witness is Dr. Harold Malin.

STATEMENT OF HAROLD MALIN, CUMBERLAND, MD.

Mr. MALIN. My name is Dr. Harold Malin, and my address is 128 Union Street, Cumberland, Md.

Senator HRUSKA. Do you appear here as an individual, or do you represent an organization? Tell us a little bit about yourself in either alternative.

Mr. MALIN. Sir, I appear here as an American, as an individual representing no organization, just wishing to express my own personal views.

Senator HRUSKA. Very well. Will you give us a little of your background, academic and professional and otherwise?

Mr. MALIN. Sir, I am a graduate of Allegheny School in Cumberland, Md., a graduate of Lincoln Chiropractic College in Indianapolis, Ind. I am a trainer in the athletic department schools in Cumberland and I practice chiropractic.

Senator HRUSKA. You may proceed with your statement.

Mr. MALIN. First of all, I would like to say that I, among a lot of people I know, am worried, extremely upset, about what we feel to be the danger to our American way of life posed by the Communist Party. We feel that the Supreme Court in recent decisions has been very, very lenient to communism. We feel that, if that continues, it will accelerate the progress of Communist subversion and the collapse of our American way of life. I was raised as an American, I like the American policy, I like the American philosophy, and I am going to do all that is in my legal power to maintain the American way of life.

But it will be endangered if the Communist Party continues to have the free rein it has, as it was exemplified in Cumberland, Md., on December 4, 1957, whereby officials of the Soviet Embassy in Washington, D. C., appeared in Cumberland. They made statements which I feel violated the promise of the Soviet Union not to go around the country making misstatements and spreading their Communist propaganda. These officials appeared in Cumberland and had the audacity to speak before the high-school students who were in the Jaycees sponsored contest, "I speak for democracy."

I also believe that when men of that type appear before a group of people, they have, in the eyes of the students who are inexperienced in such things, a lot of prestige. If you tell a person a lie, if that person has a sufficient amount of prestige and manner, there are a percentage of people who will believe what they are telling them is the truth. And you will weaken—they will fall for the line that has been foisted upon them by the officials of Russia that appeared in Cumberland.

Now, just for example, I would like to read to you what they said. You can judge for yourself, you know as well as I know what is going on in the Soviet Union. The article from the Cumberland paper is as follows [reading]:

Two officials of the Soviet Embassy yesterday traded views with members of the Cumberland Lions Club and the Junior Association of Commerce. Among the things they discussed were business and labor, domestic politics, education, and religion. That was held at the All Ghan Shrine Country Club in Cumberland, Md.

Education in the Soviet Union is completely free and without discrimination of any kind. Vladimir S. Lavrov, counselor of the Soviet Embassy in Washington, told the Cumberland Junior Association of Commerce last night at the All Ghan Shrine Country Club, and there were those high-school students there who naturally would be inclined to believe what he was saying.

But before he spoke, William Alebaugh, a Fort Hill High School senior who won the recent Voice of Democracy speech contest sponsored by the Jaycees, gave his 5-minute talk in which he stressed why "I speak for democracy."

Six of the eight participants in the speech contest attended last night's meeting, although all said they had received a number of telephone calls, most of them anonymous, urging them not to attend the meeting where the Russian diplomat was the principal speaker.

The people, who called and tried to keep those students from going, advised them they did not want our good Americans to sit down,

break bread, and listen to the brainwashing that we felt they would be subjected to. [Continues reading:]

Six of the eight participants in the speech contest attended last night's meeting, although all said they had received a number of telephone calls, most of them anonymous.

They all seemed to think it was educational to actually see and hear a Russian, and they obviously did not agree with many of the things he said.

Young Alebaugh said he was proud to be an American, "where we are permitted to worship in a way permitted only in a free land."

In the course of his remarks concerning youth in the Soviet Union, Mr. Lavrov said that his country also permits freedom of speech, freedom of assembly, and freedom of religion.

The Russian, making his third speaking engagement before a Cumberland audience, said his country has a 10-grade school system which has eliminated illiteracy in 40 years since the 1917 revolution. Under the Czars only 25 per cent could read, he said.

People in Cumberland are supposed to believe that there is no illiteracy in Russia today. [Continues reading:]

Mr. Lavrov said the 10-grade school system has an obligatory curriculum which all boys and girls must take. The courses have been selected by the authorities as those to give the students all their necessary basic knowledge.

All students then have a right to continue their free education in technical institutes or universities but only those with the best grades on entrance examinations are allowed to enroll. During the 4 or 5 years they attend these institutes, the students receive stipends from the government to provide for their needs.

Those majoring in electrical engineering, for instance, must participate in a mass-practice program at a factory where they get practical knowledge on its operation. There is not time for theoretical knowledge in these institutes. This program is successful in eliminating unemployment, he said.

Gentlemen, I feel that I have read enough of that to give you an idea of what they have been telling the children in Cumberland. If it is desirable, I shall be glad to continue, or I will leave it with the committee for their perusal.

Senator HRUSKA. That would seem to be typical. If you have other material in the statement, that can be submitted for the record.

Mr. MALIN. I have the material in the statement that could be submitted.

(The material referred to was placed in the subcommittee file.)

Mr. MALIN. I have a comment on the Junior Chamber of Commerce of Cumberland and the Lions Club in Cumberland, Md. [Reading:]

The junior chamber of commerce and the Lions Club in Cumberland, Md., had a yen to know what life in the Union of Soviet Socialist Republics was really like, so they invited a man familiar with the scene to tell them. They learned that in Soviet Russia freedom of speech, of assembly, and of religion are strictly protected; that the Russian people live 14 times better than they did before the revolution; that the launching of sputnik testifies to the productivity of men who know that they labor for themselves; that the people are delighted to be ruled by the Communist Party because they "trust the party." The expert assured the elders of Cumberland that the so-called satellite nations are entirely independent of Soviet Russia and that the party has no desire to communize the world. To whom had the junior chamber of commerce and the Lions Club turned to hear the truth about the U. S. S. R.? To Vladimir Lavrov, counselor to the Soviet Embassy in Washington.

There was a letter sent to the Cumberland News in comment which I would like to insert—which, by the way, they did not publish. [Reading:]

Clips from many newspapers and magazines from coast to coast and many foreign countries frequently are sent to this office. Among the many which we

received, we cannot help commenting upon a story which appeared on December 5 in your publication, headed "Soviet Officials Compare Life in Russia and the United States." The Jaycees national contest, "I speak for democracy," met with Soviet acceptance and participation at the local meeting reported here.

I might say here that of all the editorial brainwashing I have read, this should take the prize for the year 1957—and I would suggest a prize (if the Soviets would cooperate) a nice, long vacation in Russia, not a guided tour, but a trip into the interior, into the slave camps of Siberia, where thousands of political prisoners—corrected, millions—languish in this "freedom" which the Communist, "making his third appearance before a Cumberland audience," said persisted in Russia.

You seem to live truly in editorial isolationism—what else would permit a "journalist" to report a meeting in such a way as to give the impression that Mr. Communist was telling the truth about freedom. If you are interested at all in the facts and truths about communism (certainly not reflected at least in this story), we should be glad to send you some authoritative material from inside or outside of Russia by those who know and have seen the Communist brands of "freedom."

That is an example of the things that develop, in my opinion, through the laxity of the Supreme Court in their control of the Communist threats.

One added thing: In the same article in the same paper there is an article by Bob Considine concerning an interview with Mr. Bill Hearst with Mr. Khrushchev in Russia, in which they admitted they did not have freedom in Russia.

If there are any questions, I would be glad to answer them.

Senator HRUSKA. Are there any questions, Mr. Sourwine?

Mr. SOURWINE. I have no questions.

Senator HRUSKA. Thank you very much for appearing.

We will recess until tomorrow morning at 10:30.

(Whereupon, at 11:20 a. m., the hearing was recessed, to reconvene at 10:30 a. m. February 21, 1958.)

LIMITATION OF APPELLATE JURISDICTION OF THE SUPREME COURT

FRIDAY, FEBRUARY 21, 1958

**UNITED STATES SENATE, SUBCOMMITTEE TO INVESTIGATE THE ADMINISTRATION OF THE INTERNAL SECURITY ACT AND OTHER INTERNAL SECURITY LAWS OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D. C.**

The subcommittee met, pursuant to recess, at 11:40 a. m., in room 457, Senate Office Building, Senator Roman L. Hruska presiding.

Also present: J. G. Sourwine, chief counsel; Benjamin Mandel, research director; and F. W. Schroeder, chief investigator.

Senator HRUSKA. The committee will come to order.

This is a resumption of the hearing on S. 2646.

Our first witness will be Robert Morris, of Point Pleasant, N. J.

TESTIMONY OF ROBERT MORRIS, POINT PLEASANT, N. J.

Senator HRUSKA. Mr. Morris, the role is just a little bit reversed this time. You used to sit with the questioners, now you will be the witness and be questioned.

Mr. MORRIS. I am happy to be here, Senator.

Senator HRUSKA. You may proceed, Mr. Morris. We are glad to have you here.

Mr. MORRIS. Shall I go on through with the statement?

Senator HRUSKA. Yes; or you may file the statement, and make such comments as you wish, and we can follow that procedure with the other witnesses.

Mr. MORRIS. Senator, what I have done is just try to condense this into two pages. May I read it, and then you can ask your questions?

Senator HRUSKA. All right; we will proceed that way.

Mr. MORRIS. The Constitution of the United States provides that the Supreme Court shall have appellate jurisdiction "with such exceptions and under such regulations as the Congress shall make."

It is clear from this article of the Constitution that the Supreme law of the land provides that Congress has not only the power but the duty to regulate and to make exceptions to the appellate jurisdiction of the Supreme Court whenever necessary. This is an obligation that Congress cannot take lightly or dismiss.

The check-and-balance system of the Constitution must be affirmatively preserved and Congress cannot abdicate where its responsibilities are so clearly defined.

Mr. SOURWINE. Mr. Morris, do you believe that this particular provision of the Constitution that you have read was put in there as a part of the check-and-balance system?

Mr. MORRIS. It seems to be an essential cornerstone of the check-and-balance system.

Senator Hruska. Would you say that the language to which you referred in your opening sentence, "with such exceptions and under such regulations as the Congress shall make," was intended to be limited to minor exceptions and to procedural matters, or would you say that it would go to the substance and to the real matter of things?

Mr. MORRIS. Well, reading and rereading the Constitution, Senator, would give you the impression that these things are put in with an express purpose, that none of them is put in lightly, and none of them can be dismissed as procedural. This is substantive. And I think particularly what the Founding Fathers had in mind, Senator, is just what Judge Learned Hand pointed out in the Oliver Wendell Holmes' lectures, that you can have such things as excesses of judicial authority, that is as despotic as excesses of executive authority, which was the primary motivating force in bringing about the creation of the Constitution.

This committee, in considering S. 2040, is clearly performing the duty set forth in article III of the Constitution when it holds hearings to assess the records of the Supreme Court with a view toward determining whether "regulations" or "exceptions" to the appellate jurisdiction of the Court are necessary. Congress in doing this is performing its constitutional duty. The fact that this elemental activity draws criticism is proof that some sectors of our political life expect Congress simply to play dead—and from my experiences in Washington, here, Senator—they number at least 7 years—I find that more and more Congress is abdicating in its role of living up to its fundamental and elemental duties.

More and more people expect that Congress should just go along with the executive branch of the Government, and now this trend again is being reflected when it is expected to go along with the judicial branch of the Government.

I think that under the framework of our Constitution the dominant partner in the tripartite partnership is the Congress. That is my assessment of the Constitution.

And I think that now, because of the developments in recent years, that you have a realignment, and that Congress is no longer the dominant of the 3 members of the 3 branches of the Government, but rather is the least of the 3 in leading the country at this particular perilous time.

The activity in these hearings is to be strongly commended, since it marks a reversal in the pattern of performance of past Congresses. Past Congresses have consistently retreated in the face of encroachments on their duties and powers by aggressive judicial and executive authority. These retreats have been particularly distressful in view of the encircling perils that are besetting our country. At a time of great crisis to which we are drawing nearer every day, we need the full benefit of our check-and-balance system.

Because Congress has not dutifully and courageously performed its investigatory duties with respect to the serious underlying deficiencies in our executive branch, these deficiencies have been concealed under a blanket of complacency.

Congress has meekly accepted the finality of various Executive orders when it should have insisted on learning the underlying facts.

This delinquency has taken place while our mortal enemy, the Soviet Union, has been allowed to surpass us in vital areas of military and scientific achievement.

If the full force of our check-and-balance system had been exercised, the investigatory power of Congress would have brought into the glare of public scrutiny the executive branch's many defects that have made possible our retreat from a position of great eminence.

More recently it has been an aggressive majority on the Supreme Court that has been hastening the decline of congressional investigatory power.

I call attention to Judge Learned Hand's recent Oliver Wendell Holmes lectures where he discusses the excesses of judicial authority. I don't know whether I should offer those for the record, or whether you already have them in the record, Senator.

Senator HRUSKA. We do not have them; we have portions in reference to them, however, as of this time.

Mr. MORRIS. I know time is short, and I would not develop that, Senator.

In the Watkins case, Chief Justice Warren has undertaken to preclude congressional inquiry into the organized Soviet conspiracy here on the contention that there is a "first-amendment freedom of association" that Congress must respect in questioning witnesses who have participated in the conspiracy. Since the whole Communist cabal against us is a network of associations, how is Congress to arrive at the underlying fact antecedent to legislation? As Justice Clark has pointed out in dissent, there is no precedent either in the Constitution or in judicial precedent for this "first-amendment freedom of association."

Of course, the Chief Justice states in that Watkins case that if you get into this area, then what the Senate or the House of Representatives must do is to get an express grant of authority from the whole body. Well, Senator, I know, and I am sure you know, what an impossibility and an unrealistic thing that would be.

As soon as you come into a new area of investigation, you would have to stop your investigations and get a grant of authority from the Senate of the United States to proceed.

When I was a counsel to the various committees down here, Senator, I found very often that to get a broad original grant of authority sometimes would take weeks and months, and to get a grant of authority for a particular area of investigation with the Senators, as busy as they are, is an utter impossibility.

It has always been baffling to me that this protective judicial device which shelters Khrushchev's advance agents here was explained for the first time when Soviet power was very high and threatened to eclipse the civil liberties of us all. I mean if Soviet power was not as formidable as it is.

These people are now taking fixes on our very coastlines here, and at this particular time we are creating new law, new judicial precedents, in order to protect the advance agents of Khrushchev, and that, to me, just does not make sense, Senator.

At the same time the Court expressly applies a double standard when it states that the protection it gives to Communist agents does not apply when Congress is investigating businessmen or financial forces.

I think you will find, Senator, that is an express statement of the fact that there is a double standard being applied by the Court.

But the extraordinary judicial development of the Watkins decision was the fact that a wholly new judicial function was being performed. No longer was the Supreme Court restricting itself to declaring unconstitutional an act of Congress, after the precedent of *Marbury v. Madison*, but it was now undertaking to declare unconstitutional an activity of Congress, that is, its investigatory function. Such an encroachment must be resisted.

S. 2646 would, among other things, restrict the appellate jurisdiction of the Supreme Court in any case where there is drawn—this is the first provision—into question the validity of any function or practice of, or the jurisdiction of, any committee or subcommittee of the United States Congress, or any action or proceeding against a witness charged with contempt of Congress.

Now, I address myself for the most part to that particular one, Senator, because, if this were passed, this would be an assertion, on the part of the Congress, to preserve its basic existence, because Congress cannot function if it cannot learn the facts of the day.

You do not want a Congress to take action that does not know the reality of the day, it has to investigate first. And if it investigates and knows the facts, then it can legislate intelligently.

As I say, this is elemental. For the judiciary to challenge the function, the practice, or the jurisdiction of the Congress is encroachment on legislative power. Congress must, when this condition prevails, exercise its constitutional powers and duties to resist this encroachment.

The enactment of S. 2646, therefore, would provide a healthy assertion of constitutional power under the Constitution at a time when many students of constitutional law have begun to despair of Congress' dutifulness in upholding the Constitution.

I recommend to the committee Senator Herbert O'Connor's recommendations as chairman of an American Bar Association committee which made a report to that body last year in London.

I think if the committee will read the serious tenor of Senator O'Connor's questions and recommendations, that this particular report will clearly show that the American Bar Association is intensely concerned by the prevailing judicial drift.

Senator HRUSKA. Any questions, Mr. Sourwine?

Mr. SOURWINE. I think just one, Senator.

Judge Morris, you speak of the judiciary challenging the functions and the practices of the jurisdiction of Congress.

Actually, S. 2646 would not remove the right of an individual to make a judicial challenge against what he might assert to be a congressional excess or an unreasonable or arbitrary action; would it?

Mr. MORRIS. No; it would just deny the appellate jurisdiction to the Supreme Court.

Mr. SOURWINE. In other words, no individual's day in court is being taken away from him?

Mr. MORRIS. Quite the contrary, you will find in most of these cases, very often you have 2 or 3 judicial determinations and judicial reviews. What it simply does is take away the fact that the Supreme Court should be again the final arbiter on these things. Every man is

going to have his day in court, every man is going to have his right of judicial review.

These things are not being interfered with by this bill in any sense of the word.

Mr. SOURWINE. Is there any right of judicial review, Judge, or isn't that a matter of grace, in each instance?

Mr. MORRIS. It is a matter of grace, but still, Mr. Sourwine, under this—

Mr. SOURWINE. When you say "right of judicial review," you mean the right to have a court pass on the matter in the first instance.

Mr. MORRIS. That is right.

Mr. SOURWINE. Not the right to go on through appeals and appeals.

Mr. MORRIS. It is not a right of judicial review, the opportunity of judicial review.

Mr. SOURWINE. I have no other questions.

Senator HRUSKA. Thank you very much, Judge Morris, for your appearance here. I am sure that the testimony you have given will be very helpful.

Mr. MORRIS. Thank you very much, Senator.

Senator HRUSKA. The next witness is Mr. Latimer.

TESTIMONY OF IRA H. LATIMER, CHICAGO, ILL.

Senator HRUSKA. Mr. Latimer, the committee is a little short on time, there are other commitments which have both preceded and which will follow this. I wonder if we could consider this statement submitted for incorporation into the record and be considered as read, and then you cover briefly the high points in it narratively.

Can you do that?

Mr. LATIMER. Yes. I think at the beginning of the fourth sentence it should be corrected to say that when I began working.

Senator HRUSKA. Very well. That correction will be made.

Mr. LATIMER. And I have made another correction or two and I will submit this as the corrected copy.

Senator HRUSKA. If you submit that to the reporter, he will include that in the record as corrected by you.

Mr. LATIMER. All right.

Mr. Chairman and members of the committee, my name is Ira H. Latimer and I reside at 5013 South Dorchester Avenue, Chicago, Ill. My occupation is public-relations consultant and I am presently executive vice chairman of the Illinois Right-to-Work Committee.

I have also been the executive secretary of the Chicago Civil Liberties Committee since 1936. This was formerly a local affiliate of the American Civil Liberties Union. When I began working for the CCLC, strictly as a humanitarian, I found known Communist Party members on my board, as part of then popular and widely accepted "united front." It is difficult for people to realize now how popular this was in the thirties and forties. Through the years after 1936, I was often sent to this or that office or meeting where I saw known Communists. I did so, and a year and a half were enough for me. In 1947-48 I took the CCLC away from party control.

For this brief period I was, therefore, a member-at-large, supposedly under the discipline of the Communist Party in Chicago. I subsequently cooperated with the FBI from 1949 to 1954 by furnishing it,

at its request, with information concerning individuals assigned to it for investigation. Furthermore, when requested by the Department of Justice, I testified before the Subversive Activities Control Board in May 1954 as a witness against the National Council for American-Soviet Friendship and its Chicago affiliate, which, in accordance with my testimony, was found to be subversive.

I am qualified by experience and training to speak in support of S. 2040 as proposed legislation to protect the "Union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." To fight the Communist conspiracy you have to have a firmly fixed goal, you have to have convictions, and the courage of your convictions. The Communists are a fanatical and dedicated conspiracy devoted to class war and a social revolution which will utterly destroy all the constitutional principles just enumerated.

If unchecked, they will cheerfully outfight, outlive, and outdo all of us. To find a parallel in western civilization you have to go back to the time of the early Christians. No Christian martyrs were possessed of more devotion to their cause than are present-day, hard-core Communists. The faith of the Communist in man outshines the faith of Christendom in God. Communism is a new golden calf, worshipped with passionate idealism by passionate materialists.

To the ignorant and underprivileged, it can have a Messianic glow. Ultimately faith in God is greater than faith in man—this will be proven. But meanwhile we may all suffer the fate of ancient Israel and Judea, overrun by pagan forces. The average American had better face this: he, too, could suffer the fate of the lost tribes of Israel.

The day may well come when, as was the case for many centuries with the Jews and their synagogues, respect for individual personality survives only in churches and synagogues. It may be possible nowhere else to speak the truth and worship God. And the court decisions, which are sought to be remedied by S. 2040, have brought that day a lot nearer.

You might say, so to speak, that I was a "civil liberties fellow traveler" and a "peace fellow traveler" with the Communists for two decades of "united front" popularity.

I had been led into the Marxist ideology and front organizations during my student years by highly respected professors, clergymen, lecturers, and writers. Such was the end product of the "social gospel" preached in so many places. I found it at last to be the end of the road for American ideals.

I "broke" with the Communist Party and with Marxism when I discovered for myself by hard, direct experience, through a closer-up examination of the party and its methods, by the events in Eastern Europe after V-E Day, and by the ruthless destruction of liberals and socialists by the Soviet Union in Eastern Europe at the end of World War II in Europe, that the Communists and socialists were fakers and phonies in regard to civil liberties and peace and social idealism.

I learned the hard way. Whereas earlier I had fought hard hand in hand with the Communist Party for civil liberties, since 1948 I have year by year fought increasingly hard against the Communists, Socialists, and entire united front of political liberals who are the de

facto advance running dogs of communism, though the traditionally optimistic Americans can hardly see this.

The pretended defense of civil liberty in our courts by the Communists and their allies is an important part of the class war and social revolution run by the Kremlin dictatorship to destroy our political liberty and our civil liberties.

S. 2040 is aimed at sounding the alarm to the Nation and to the individual States that our courts are being used by the Communist conspiracy to subvert and destroy our freedoms from within.

I can testify to many illustrations of this. But my testimony—like, for example, that of Dr. Frederick Charles Schwartz on the House side—seems to fall mostly on deaf ears.

I have thought a great deal about this phenomena of popular American disbelief in the dirt and murder of communism. It is so striking that I have tried to delve deeply for an explanation.

I think there are two religious and philosophical foundations involved. In my case, I have been cured by experience from relying on these false foundations. I would not want to prescribe for others my own bitter experiences, but I am afraid the "cure" of millions of my fellow Americans is going to be the hard cure also. Their refusal to believe how evil communism can be has the same two foundations that I relied on in the days before I broke with the party.

The first foundation is the optimism of Americans who have been trained and conditioned by more than two centuries of successful conquest of man and nature to believe that in the end they will always win.

Americans believe that sooner or later everything progresses in the right direction. Therefore, they refuse to take seriously the murderous threat of the Communist International. And if this threat becomes successful, it will be in large measure because of the average American's pride and optimism. "Pride goeth before a fall."

The second foundation, upon which the acceptance or tolerance of communism rests, is a belief in the natural goodness of man. Our forefathers did not so believe. They were profoundly skeptical of the trustworthiness of any man or men, themselves included. Therefore they wrote a Constitution full of checks and balances and limitations. Thomas Jefferson may possibly have been a semioptimist about human nature, but the rugged drafting work of Madison, Hamilton, and others was imbued with the religious conviction of original sin. Anglo-Saxon Protestantism, at least, seems largely to have forgotten this.

I can find it occasionally in the writings of Reinhold Niebuhr and Arnold Toynbee, but I have not encountered it much anywhere else in contemporary Protestantism. Of course, it is deeply rooted in the traditional statements of the major Protestant churches.

A simple illustration would be from paragraph 67 of the Methodist Discipline:

Original sin * * * is the corruption of the nature of every man * * * whereby man is very far gone from original righteousness, and of his own nature inclined to evil, and that continually.

Some of Dr. Niebuhr's public statements lead me to believe that he does not share this view very fully, though I think Toynbee does.

Father Richard Ginder, editor of *Our Sunday Visitor*, the Rev. John E. Coogan, S. J., and Prof. Sylvester Petro have recently given

voice to the Catholic interpretation of this phase of Christian doctrine as applied to labor problems.

Of course, Father Edward A. Keller's book, the Case for Right to Work Laws, is the contemporary Catholic classic on this subject.

But let us return from this excursion—which I assure you covers ground of profound importance for the bill before you—to something nearer home. The United States Supreme Court went out of its way to take jurisdiction of the Schwabe (N. Mex.) and Koenigsberg (Calif.) cases—and in these instances to compel the admission of ex-Communists or fifth-amendment Communists by the States to practice law.

I am not aware that either of those individuals has an active anti-Communist record. The meaning is clear to the party and its allies—you are more sure of legal protection if you defend the party by keeping quiet about past or present party affiliations than if you cooperate with either the legislature or the executive in exposing and prosecuting the Communist conspiracy. This policy of the Supreme Court of the United States is a grave threat to the civil liberties of the American people and the adoption of S. 2646 would help correct this subversive policy.

Although I consider my own bitter personal experiences in my home State grossly unfair and to be a miscarriage of justice as to both the law and the facts, and although I would be glad to have any lawyer examine them objectively, nevertheless, even though the rule would have been against me, I am bound to support section 1258 (5) of this bill, which limits the appellate jurisdiction of the United States Supreme Court as to—

any law, rule, or regulation of any State, or of any board of examiners, or similar body, or of any action or proceeding taken pursuant to any such law, rule, or regulation pertaining to the admission of persons to the practice of law within such State.

There is no question but that the Communists, Socialists, Marxists of other splinter groups, and their fellow-traveling Liberals and Laborites, have deeply infiltrated both the State and Federal courts in many cases, so that this bill, S. 2646, will not automatically solve the problem of subversive legal decisions in the field of antisubversive legislation and administration.

The National Lawyers Guild, the American Civil Liberties Union, and the National Association for the Advancement of Colored People are allied with the whole legal apparatus of the Communist Party, which is on the offensive against every governmental measure or act to defend the political and civil liberty of the American people against the takeover by the Marxist conspirators. I stand ready to support this statement under oath.

But as Judge Robert Morris noted in his introduction to Outlawing the Communist Party: A Case History, the Communists and their allies in this country have persisted through the years in their interpretation of the laws until they have won. Cooperative Government witnesses (David Greenglass and Harry Gold) languish in prison while Communist Party leaders are released and given the green light.

Consequently, it is hard to volunteer testimony of the kind I am offering and hope for any peace or comfort of mind. The retaliatory apparatus starts at once and seeks to destroy your character as well as your earning power.

I know all too well about that. The whole temper of the American people is set against believing any such thing as I am saying.

People who offer such testimony, and buttress it with unchallengeable facts, become social pariahs.

They are sitting ducks for being ridiculed as alarmists and discredited in every way possible, on the ground that things could not possibly be so bad. Or else on the ground that people could not possibly be so bad. These are the two tiresomely familiar grounds which are met in every direction by those who know. These grounds are encountered in the press, in the pulpit, on the radio, and, worst of all, where it really hurts—in the efforts of such informed individuals to make a living. That's where I have met it. Those who really know from former experience how ruthless the Communist apparatus is are simply given the DDT treatment—"drop dead twice." Some of us may not be able to keep going. We may have to take the advice. But nevertheless the following is part of what I know.

So-called "minorities" are used chiefly by Communists and their idealistic dupes to create political and economic conflicts which the Kremlin then uses in its social revolutionary warfare against all Americans. The party uses a formula: Use the minorities and mass organizations as a sword and a shield—meaning, that the party manipulates racial, religious, nationality, and other so-called minorities, in any or all of their legitimate organizations, and any other mass organizations such as unions, churches, women's and youth organizations, to attack the competitive free enterprise social order of our constitutional Republic—and uses the idealism of these bodies of public opinion and political pressure for the purpose of defending the party and the Soviet Union under the guise of civil rights and peace.

The success of the Communists and their allies in capturing or influencing the majority of American voluntary citizens' organizations, and neutralizing most of the rest, has been made a matter of public record by the cross-section exposures made by the hearings and reports of the House Committee on Un-American Activities, the Senate Internal Security Subcommittee, the testimony of the FBI and other Federal security investigation agencies before congressional committees, and the records of the several State commissions investigating the Communist conspiracy as it has infiltrated and subverted citizen organizations and public life, before the Supreme Court decision outlawing State antisubversive laws.

Let me interpolate at this point, what a body blow the decision was to America. The instant result was to raise astronomically the ratio of rats to hunters.

The 100-year growth of Marxism in the world has created the greatest crisis in the history of western society.

Its poisonous ideology has been aided by the humanism—actually Protogorean paganism—of the so-called intellectuals in the seminaries and churches, which I have experienced personally, and in the channels of formal education and mass communication.

I have seen other quotations besides that from the Chief Justice of the Supreme Court, which tell me that others on the bench are humanists, and I am telling you, humanism leads to paganism which leads to communism.

I have many times reflected to myself that there is no ultimate defense for this country except the religious. Unless the churches recover some measure of the skepticism about human nature, entertained by great "doctors" of the Catholic Church like St. Augustine, or by Protestants like Calvin, Wesley, and Jonathan Edwards, I fear we are all comfortably resting in the shooting gallery for Communist materialism.

In the end, the most logical humanist is a Communist. I speak as a minister of the Gospel, from experience.

Only those who have seen the inexorable logic of communism, as I have, can believe this, at first. Our task is to convince the many without their having to suffer in the learning process. I do not know whether we can succeed in this or not. This may be the last generation of free Americans.

Our Founding Fathers were God-fearing men who believed in the reality of sin and the evil of a sinful world. They were skeptical of human nature and wrote into the organic law of the land the separation of powers, and sought always balancing forces, one checking another.

They fostered the ownership of private property and registration of patents to promote a competitive capitalist economic system in which economic power would be diffused as widely as possible, and a rising standard of living made possible through free commerce and the invention of labor saving machinery.

When the country was threatened by the "robber barons" in the late 1800's, it promptly passed the antitrust laws—a piece of legislation about as skeptical of human nature as you could ever hope to see.

Why we should be optimistic now about the nature of union leaders compared with others, and exempt them from these laws, I do not see. All are human, "all have sinned and fallen short of the glory of God."

Our Constitution does not repose trust and power in any man, but the modern pagans, today used as catspaws by the Communist conspirators, are turning our courts over to passionately sincere liberals who are believers in the "social gospel" or "social morality" or "social welfare state" wherein mere men, supposedly "good men," will promise to eliminate the evils of the world if they are given the power. I cannot refrain at this point from a direct quotation attributed in the press to the Chief Justice of the United States, in a speech in Indiana a month or two ago—that we are to correlate "law with history, economics, and all the social sciences available in the solution of human problems." As far as I am concerned, that is first of all humanism; second it is the same dangerous incorrigible optimism that infects America generally; but third, and worst, it is an excuse for rendering decisions not on the law as it was written but according to the latest views of the Justices on how it ought to have been written.

If that doesn't make for a completely fluid body of law, I don't know what would. And if that definition doesn't fit the attitude of the Supreme Court, in the cases intended to be remedied by this bill, S. 2646, then I am unable to define the Court's attitude in these cases.

The philosophical theory behind these Supreme Court decisions, in my opinion, is that communism and socialism should have the

freedom to overthrow the "evils" of the status quo and create a man-made utopia. This is the tacit assumption that what is, is wrong, and that may or might be, is right, or at least better.

And along with this goes the incredible, but inevitable, arrogance of humanism: "We, the Justices, know or can foresee what is better." The majority of Justices in each case appear to be believers in men—believers in inevitability of progress following the teaching of John Dewey—believers in exactly what Chief Justice Warren said—the inevitable logic of which is to believe in the Marxist doctrine that socialism is the next and higher stage of economic development of mankind.

Perhaps they are even believers in a "Christian socialism," which is tolerated in both Protestant and Catholic circles, indistinguishable in its application from the materialistic modern paganism which says that "man is the measure of all things" as Protagoras did in the fifth century before Christ; that man is the master of his destiny and can therefore breed and train the perfect man, the Socialist man (as William Z. Foster predicts), who will inexorably be the Communist man.

Those of us who have been through this Marxist summer madness realize the present decisive phase of the battle for freedom and civil liberties and the dignity of man which depends on a realization of his shortcomings. The people of the United States and world are now engaged in this. We urge the Senators and Representatives in Congress to enact S. 2646 without delay and take every other possible action to combat the believers in man and the atheist international Communist dictatorship which is a very clear and present danger to our rights and liberties, our constitutional Republic and our very lives.

I ask leave to file a supplementary written memorandum covering the six emotional tools of communism.

And I also would like to file a statement called the Emotional Arsenal of Communism, which I prepared and which may be of some use to the committee.

Senator Hruska. That will be included.

(The statement referred to is as follows:)

THE EMOTIONAL ARSENAL OF COMMUNISM

By Ira H. Latimer

The Communist emotional apparatus consists essentially of six appeals. These are to fear, hope, pride, hate, envy, and pity. Administered in suitable doses and mixtures to the human organism, and compounded into the end product of suspicion, these appeals will confuse practically anybody not protected by either calloused experience or a deep religious faith. Brute force must be applied by communism in the countries nearby Russia, like Hungary and other satellites, whose people know from experience what communism means. Where there is no firsthand knowledge of Communist brutality, these emotional intangibles are so effective that the opposition to communism practically wilts, as in this country.

Because the play on these emotions is so subtle and so skillful, and so seldom understood in America, let me give brief illustrations of each.

FEAR

The fear of being "different" is sedulously cultivated. So also is the fear of being called a reactionary or an obstructionist or a pessimist, or "anti-social" or even just "odd." Pressures like those described in William Whyte's *The Organ-*

ization Man, exploit to the utmost, in the whole society, the desire to "get along." It is intimated that no "respectable" person should indulge in needless "controversy." (Of course, if you argue for freedom of speech for Communists or their fronts, that's different (that's a public service).)

This array of general pressures is skillfully brought to bear in particular cases.

In Illinois, the land of the Lincoln-Douglas debates, where large numbers voiced their opinions about slavery a century ago, there is today a fear even to discuss the new slavery of compulsory unionism. The number of organizations that have dared to take a public stand at the State level, in opposition to this, can be counted on the fingers of one hand. From 50 speeches in 40 places to 3,000 people on this subject, and endless interviews at State and county fairs and on street corners, I can assure you that the home State of the "great debate" on freedom and slavery is still afraid to debate this new slavery. The corporate world hesitates. "Public relations" comes to mean to do nothing that will cause the public to argue. The passion for "conformity" and "getting along" is carried down to the youth level. The "organization man" becomes the beau ideal of American youth and, in a thousand subtle ways, fear is made to serve all too well the purposes of the Communist International. Social pressures are instantly brought to bear on dissenters or skeptics or Independents. I have seen a women's club sit utterly stone faced at a discussion of the dangers of communism.

Finally and very effectively this fear of criticism and ostracism at the intellectual level is matched at the working labor level by the fear of violence, all too frequently realized.

HOPE

The American is a chronic optimist who is always hoping for the good old times, or else the better new ones. As a rule, he believes in perpetual progress and the perfectibility of human nature. His success in "do it yourself" practices has effectively cut him off from the older and deeper tradition of ultimate distrust in human nature. As an optimist, he is a natural target for every do-gooder who assures him that by doing only a little more good, he can so achieve semiotopia and thus will be able to relax and enjoy himself. Whatever evil remains will shortly be brought under control, he is assured, and then we shall all go forward toward the new society. Probably intellectuals, and the clergy as a special branch of the intellectuals, are the most susceptible to these blandishments of the Communist arsenal. They are certainly the most vocal after they have been "taken."

PRIDE

This, rather than "hope" as in the common phrase, is the real converse of "fear" in the present context.

First, everyone wants to feel respectable in society. It becomes "unrespectable" or even contemptible to denounce certain actions, certain social and political trends, or certain decisions of the courts. Thus, you lose your respectability, and, therefore, some of your pride, if you take part in such denunciations, or tolerate or defend those who do. You "lose caste." The appeal to pride becomes the intimate companion of the appeal to fear, in order to inhibit your freedom of judgment, speech, or action.

Second, in promising individual cases, a more subtle appeal is made to the pride of particular people to be "in the know." Certain developments are coming, you know, and you are undoubtedly the right person to anticipate these developments. "Get in on the ground floor"; be ahead of the common masses. This is Hitler's appeal to the master race—the Herrenvolk. All around this fair country of ours there are individuals who have staked out for themselves some special spot in the "new society." They do not necessarily expect that it will be Communist. They merely know that it will be different, and that they are among those who have "got their fustest with the mostest." A great many of them expect that the "new society" will be better and less brutal. I can tell them differently. It will be worse and more brutal.

Third, there is the general natural pride of every American in America. This is reinforced and buttressed by the convictions that he grew up with—that all that is American is good, that every American is competent, and that America will always be ahead. To challenge these delusions is to be a traitor.

Paradoxically, the Communists successfully use these arguments to quiet the apprehensions of many "educated" Americans, while at the same time they are using exactly the opposite arguments on many others—to the effect that America is infested with bloated plutocrats, racists, reactionaries, and stupid leaders, who will sell us out to the "furriners."

The Communists long ago realized that they did not have to bother with being consistent in dealing with different persons or social groups. Few persons or groups will cross check. Feed each of them what they want to believe and they'll lap it up. That's the simple, and cynical, Communist tactic.

HATE

The formula for this is extraordinarily simple. "Go it, husband—go it, bear," just like the woman in the story. The Communists encourage every group to fight every other. Where appropriate, the Communist is in the open (as at the Highlander Folk School); or in the alternative, an agent provocateur will appear, often a completely innocent protagonist of some viewpoint, who hasn't the foggiest notion that he is furthering communism. If you are a "white American Christian" you are encouraged to attack all Jews, Negroes, and foreigners—lately even American Indians. If you are a Protestant you are encouraged to hate the Catholics. If you are a Jew, you should hate both Catholics and Protestants. If you are devoted to the Bible, you are encouraged to hate revision. If you are a Negro, you are encouraged to hate the whites. The NAACP is encouraged to hate the KKK, and vice versa. If you belong to a "racial minority," you are encouraged to hate the "native majority." If you are a laborer, you are encouraged to hate the bosses; and if you are a boss you are encouraged to despise the laborers. If you are a voter, you are encouraged to hate the politicians—and if you are a politician, you are encouraged to belittle the voters. If you are a taxpayer, you should hate the school board (and vice versa), and if you are a school administrator you should hate both. If you are a teacher, you should hate all three (and the situation in Chicago has overtones of this kind). If you are a "poor white," you should hate the "rich whites." If you live in the mountains, you should hate the city people—and vice versa. If you have nothing, you should hate society, and if you have much (and are therefore competent), you should hate the incompetent. If you are an "intellectual," you should despise the uneducated, and if you don't have a college education you should hate those who do. If you are a Taft Ohio Republican you should hate the Williams Michigan Democrats—and vice versa, and so on, ad infinitum.

ENVY

If anybody, no matter who he is, has more of what you want than you have, of course, you envy him. Most natural thing in the world. If the Communists cannot get at you through the four preceding emotional appeals, they fall back on this, and it usually works. Every gradation of society, every difference of income and property, becomes something for somebody to envy. Even in church circles, the smaller church can be encouraged to envy the larger, or the smaller denomination the larger. There is always something better than what you have, so envy it. Once you start doing this, you are promptly subject to fear, hope, pride, and hate, if you were not already so. All the phenomena above described can thus be generated indirectly through envy, if not directly. This is acutely so in a society like ours, raised to admire material welfare. A materialist society is a natural victim for dialectical materialism. By a simple but very direct paradox, admiration of baghtus can lead to admiration of communism.

To all these phenomena so far, there is, in my opinion, little ultimate defense save the religious. A person's ordinary sense of fairness and decency can be corroded after a while by the insistent impact of these bombardments. The end product, which is suspicion, comes before too long, for too many.

PITY

Now if you are a good Christian or Jew, well-trained in the law, Prophets, and Scripture, and therefore proof to all the machinations above described, there is one last thing the Communists can "get" you with, and soon make you their agent. Pity the Arabs in Tunisia. Pity the Sudetan Germans. Pity the native Okinawans. Pity the blacks in South Africa. Pity the blacks in our Deep South—or if you are in the South, pity them in our northern cities. Pity the poor whites. Pity the underprivileged children (not next door to you, of course,

but somewhere else), the downtrodden farmers, the slave laborers in the motor factories, the abused and kicked-around union organizers and business agents; in fact, pity anybody who hasn't got something and wants it--and condone the means he uses to get it. This has not yet gone as far as pitying bank robbers, but I expect this to come any day. It has certainly gone as far as pitying the poor American Communists who cannot get their voices heard and are denied free speech. This I encounter repeatedly and extensively in my travels.

Naturally the most vulnerable to the "pity" appeal are the conscientious, sincere church people. They are the most thoroughgoing objects of "pity campaigns" throughout the world. Conscience is made the tool of communism. Religious motives are made to subvert their very object, with floundering success. The Devil, indeed, quotes Scripture. Here, finally, when religious faith fails that has been proof to all other attacks, commonsense and practical experience must also be brought to bear. Even pity cannot proceed unchecked.

For the ultimate exercise of commonsense, after all the welter of emotions, America must depend on the legislatures. I know of no better training school for practical judgment than legislative work (always provided there are free elections). I wish every American could be a member of some legislature--were that true, I would have little fears for the future. Since this cannot be true, the Congress, and the companion legislatures at the State level if not devitalized by the courts, remain the last resort of our liberty. The Executive can be bullied, and the courts infiltrated, but the hard everyday practice of the legislative art is just about the best anti-Communist training in America. Take note--no Communist country has a real legislature. They have courts and an executive, but no free deliberative body. To the Congress and the legislatures and their committees, America owes its future, if it has one.

MR. LATIMER. Well, Senator, as I have indicated in my statement, I have been a member of the Communist Party and of the Marxist conspiracy, so I have something of an inside view of the ideological conflict that is going on in the United States and in the world today, of which S. 2046 is a part. This is a small battle in a big war, and the war means our utter destruction. In wartime and in war conditions people must defend themselves. The first law of nature is self-preservation.

If we would also preserve our religious heritage and our political heritage of freedom today, we must act to combat the Communists and their dupes and allies wherever they appear.

I feel deeply that S. 2046 is a step in that direction. It is an action that can be taken by the Congress to put the country on notice, and the courts, and the Executive, that here we mean to stand, and to fight, and to die, if necessary, for our principles.

I was just reading this morning the latest publication of the Communist Party in the United States, *What is Marxism*, by Emile Burns. It is a primer for college students and high-school students and clergymen and newspapermen and intellectuals who influence public opinion, to sell them on Marxism as the inevitable next stage of development in society. And it is very plausible, and a great many Americans buy it; I mean subscribe to it after being indoctrinated. And, of course, once they join a circle of friends, a party-front organization, they are surrounded by people who talk and think likewise.

This group of Supreme Court decisions, that S. 2046 is designed to combat, aid, and abet the whole Communist conspiracy to take over public opinion in the United States. I think that there is no question but what the religious people of the country, Catholic, Protestant, and Jewish, the people who believe in God, our Founding Fathers who believed in God rather than in men, would support the Con-

gress in adopting this signal piece of legislation, signaling a determination to struggle against the forces of paganism, humanism, Marxism, those who would deny God and those who would seek to build a Socialist man, and a government and an economy determined by men, so-called good men, but good men to come to power over the bodies of others.

I believe in civil liberties. I believe in political liberty. But there are limitations on the liberty of man. Man is not a perfect being, so that he can have complete freedom and liberty to do his will, which in many instances would deprive others of their rights and of their lives. And, therefore, sometimes, incompatible goals, so that people who have different judgments of what is best, must come in conflict. And I think this is one time where we are going to have to take a stand that we are going to protect the civil liberties of all the American people.

If that means that the rights of Communists to carry on a conspiracy to overthrow these rights of all the people, then those people must suffer that limitation.

Senator HRUSKA. And it is your thought, Mr. Latimer, that S. 2646 would be helpful in this regard?

Mr. LATIMER. Yes, sir.

Senator HRUSKA. Have you any questions, Mr. Sourwine?

Mr. SOURWINE. No, sir; I have no questions.

Senator HRUSKA. Thank you very much, Mr. Latimer, for your appearance.

Mr. Peigelbeck.

STATEMENT OF OLIVER PEIGELBECK, BAYVILLE, N. J.

Senator HRUSKA. Have you a statement?

Mr. PEIGELBECK. With your permission, Senator, I will be brief and read a short item here.

Senator HRUSKA. Very well.

Mr. PEIGELBECK. The bill before you now, Senator, strikes at the very root of the problem of our Government, which is the failure of the Congress to discharge its duties and responsibilities by using the authority and power vested in Congress under the Constitution to correct—

Mr. SOURWINE. Pardon my interruption. You are Mr. Oliver Peigelbeck, of Bayville, N. J.?

Mr. PEIGELBECK. Yes, sir.

Mr. SOURWINE. And you represent the Conservative Party of New Jersey?

Mr. PEIGELBECK. Yes, sir.

Senator HRUSKA. I'm sorry not to have identified you for the record sooner, Mr. Peigelbeck.

Mr. PEIGELBECK. Thank you, sir.

The matter in the minds of the man in the street and the man back home, sir, is this: The failure of the Congress to discharge its duties and responsibilities by using the authority and power vested in Congress under the Constitution to correct a usurpation of power in excess of the other two branches of Government—this is a very important thing in the mind of the man back home, that Congress is not enforcing these two positions.

Secondly, sir, while the Constitution provides for the separation of powers, it also clearly provides that the Congress, as the elected representatives of the people, shall exercise corrective control over these other two branches of the Government. This is a very important and most basic function of Congress, as it gives the people, through their elected representatives, the power to control their entire Government, and they look to Congress for this relief from time to time as the problems arise.

The Congress, in the specific bill before us, to me as a layman, sir—and I am not an attorney, I am a small manufacturer—the Congress establishes the Federal courts, at the head of which court system and a part of which court system is our Supreme Court, constitutionally provided.

The Congress provides the funds for the functioning of these courts and through the Senate approves the appointments to the bench.

And it specifically, in the Constitution, has the power to control these courts. The question of the man in the street, the man back home, is, Will Congress at this time exercise the rights and duties under the Constitution? The contents or merits of this bill before you now is a secondary consideration to the man back home.

The issue has been joined by the presentation of this bill to your body. The question back home is, What are you going to do about it?

Now, the people are asking, Will there be another congressional surrender of your duties and prerogatives that are constitutionally that of the Congress?

As a layman, I cannot properly comment on the legality of the many recent Court decisions. I can comment upon the impact upon the citizens back home. The man in the street back home has used a word that astonishes me in talking to him, because he has come to look upon the Supreme Court as "the nine legal delinquents," and feels that the Supreme Court is delinquent in protecting basic American rights.

Now, this matter has been discussed at many organizational meetings in several parts of the States. And I would like to read to you from a Memphis declaration, where 38 States were represented, and of the 38 States, 24 had legally operating and established groups concerned with this aspect of government and government function.

Item 2 says:

We deplore the growing trend toward judicial liberty on the part of our Federal courts, and we urge that the several legislatures, both State and Federal, pass or ratify legislation to curb this trend and right the judicial wrongs.

The duty of the Supreme Court is to interpret the laws and pass upon the constitutionality of the acts of Congress. We oppose the many recent decisions in which the Court has usurped a legislative authority by creating the law. And therefore we direct the Congress to enact legislation:

"(a) Directing the Supreme Court to perform only its constitutional duties;

"(b) And to repeal all antilegal, anti-States rights acts enacted by the Supreme Court in the guise of judicial decision.

"We favor the reform of the Federal judicial system by immediate congressional action and by constitutional amendment."

That, sir, is what the people back home are concerned about. Since then a statement identical to this or equivalent has been adopted in 46 States by various patriotic organizations.

This, sir, is the first time the issue has been joined.

I would like to direct the committee's attention to the Huddleston bill in the House which goes even further than the present bill, in the minds of many of the people back home, and constitutes a further requirement for congressional consideration.

Thank you for this opportunity of appearing before you, and I would like to have an opportunity of filing a statement.

Senator HRUSKA. Yes; you file that statement, if you will.

Mr. Sourwine, have you any questions?

Mr. SOURWINE. No questions, sir.

Senator HRUSKA. Thank you very much for appearing here and favoring us with your views on this bill.

Mr. SOURWINE. Thank you.

Senator HRUSKA. Mr. Sourwine, are there any other hearings scheduled on this bill?

Mr. SOURWINE. The next is at 1 p. m., Tuesday, February 25, in room 424, sir.

Senator HRUSKA. Very well, the committee will stand adjourned until that time.

(Whereupon, at 12:05 p. m., the committee was adjourned, to reconvene at 1 p. m., Tuesday, February 25, 1958.)



LIMITATION OF APPELLATE JURISDICTION OF THE SUPREME COURT

TUESDAY, FEBRUARY 25, 1958

**UNITED STATES SENATE,
SUBCOMMITTEE TO INVESTIGATE THE ADMINISTRATION
OF THE INTERNAL SECURITY ACT AND OTHER
INTERNAL SECURITY LAWS OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D. C.**

The subcommittee met, pursuant to recess, at 1:15 p. m., in room 424, Senate Office Building, Senator Arthur V. Watkins, presiding.

Present: Senator Watkins and Senator William E. Jenner.

Also present: J. G. Sourwine, chief counsel; Benjamin Mandel, research director; and F. W. Schroeder, chief investigator.

Senator WATKINS. The committee will be in session.

May I say informally that I want to apologize for being late; 1 o'clock is rather an unusual hour to set up a committee hearing. It was done with my full knowledge, however. But long-distance calls and other items that I couldn't get away from made it necessary for me to be a bit late.

The first witness will be Mr. McNamara, representing the Veterans of Foreign Wars.

Mr. SOURWINE. Mr. Chairman, while Mr. McNamara is coming to the stand, we have here a statement which was submitted for the record by Mr. R. Carter Pittman, Dalton, Ga. I offer it for the record at this time.

(The prepared statement of Mr. Pittman is as follows:)

STATEMENT OF R. CARTER PITTMAN, DALTON, GA.

This study relates to Senate bill 2046 and has particular application to the design of the bill to limit the appellate jurisdiction of the Supreme Court in cases, other than criminal cases, where the privilege against self-incrimination is involved.

Early in life I became interested in learning something about the history of the privilege as set forth in the fifth amendment. The May 1935 issue of the Virginia Law Review (vol. 21, p. 763) carries an article by me on the history of that privilege. It was soon picked up, quoted and cited by Professor Wigmore in section 2250 of his 10-volume work Evidence. Thereafter I was flattered to find it frequently cited in opinions of the Supreme Court of the United States.

In recent years my interest in the privilege has been revived or renewed largely because of the controversies growing out of the extension of it beyond that authorized by any reasonable construction of the language of the privilege as set forth in the fifth amendment, and beyond that justified by its history. Two or three years ago my interest was sharpened by an offer of a substantial sum of money by a Communist-front organization to write an article in support of the views then currently held or expressed by Dean Griswold of Harvard Law School and Justices Black and Douglas of the Supreme Court.

The bold and crude attempt to cause me to prostitute my specialized knowledge in a sordid crusade to make subversion safe, inspired me to make a new study in the search for truth. It was entitled "The Fifth Amendment," and appears as the lead article in the June 1950 issue of the American Bar Association Journal (vol. 42, p. 509).

The fifth amendment, which is now so often mentioned and misconstrued, was not written by a lawyer. It was written to be understood by laymen. It provides that

"No person * * * shall be compelled in any criminal case to be a witness against himself."

As proposed to the First Congress on June 8, 1789, the words "in any criminal case," were not in the proposed privilege. At that time the words were "no person * * * shall be compelled to be a witness against himself." On June 8, 1789, the privilege was almost exactly 14 years of age, as a constitutional privilege. For the first time in all history it acquired the dignity of constitutional status in the Virginia declaration of rights, adopted on June 12, 1776 (3 weeks before the Declaration of Independence). As then written it was:

"That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation * * * nor can he be compelled to give evidence against himself * * *"

It next went into the declaration of rights of Pennsylvania in September 1776, as follows:

"That in all prosecutions for criminal offenses, a man hath a right to be heard by himself and his council * * * nor can he be compelled to give evidence against himself * * *"

A few weeks thereafter Maryland's declaration put it this way:

"That no man ought to be compelled to give evidence against himself, in a court of common law, or in any other court, but in such cases as have been usually practiced in this State, or may hereafter be directed by the legislature."

Delaware's declaration in the same year stated the privilege this way:

"That no man in the courts of common law ought to be compelled to give evidence against himself."

Before the year was out North Carolina's declaration put it this way:

"That in all criminal prosecutions every man hath a right to be informed of the accusation against him * * * and shall not be compelled to give evidence against himself."

While Vermont was not a State at that time, she acted the part and adopted a declaration in 1777 in the exact words of the Pennsylvania declaration.

In March 1780 Massachusetts wrote the privilege into her declaration of rights, as follows:

"No subject [accused of "any crime or offence"] shall * * * be compelled to accuse or furnish evidence against himself."

In June 1784 the privilege went into New Hampshire's declaration of rights in the exact language of the Massachusetts declaration.

Thus, in Virginia, the privilege could be claimed only in "capital or criminal prosecutions"; in Pennsylvania only in "prosecutions for criminal offenses"; in Maryland only "in a court of common law," unless in equity or other courts in accordance with prior colonial practice or unless the legislature directed otherwise; in Delaware only "in the courts of common law." In North Carolina only in "criminal prosecutions"; in Massachusetts and New Hampshire the privilege could be claimed only by an accused charged with a "crime or offense."

In none of the 7 States that had set the pattern prior to 1787 could the privilege against self-incrimination be claimed before a legislative committee. There is no mention of the privilege against self-incrimination in the records of the Constitutional Convention of 1787. The first mention of it was in the Virginia ratifying convention, where it finally appeared as paragraph 8 of the proposed declaration of rights prepared by George Mason and proposed in the convention by Patrick Henry. It was in the exact language of the Virginia Declaration of Rights of 1776, which was also the product of the pen of George Mason.

By the vote of the New Hampshire ratifying convention the Constitution had already been adopted before the Virginia ratifying convention proposed Mason's Bill of Rights to the First Congress. The New York ratifying convention had Mason's proposal before it 2 weeks before its adoption in Virginia. She also proposed the privilege and limited it to "criminal prosecutions." The North Carolina convention followed suit and proposed the privilege in the exact language of the Virginia proposal except that it changed "or" to "and" between the words "capital" and "criminal." While the proposed Bill of Rights was being acted on by

the various States, Rhode Island also proposed a declaration of rights in 1790 in which the privilege was stated in the exact language of the North Carolina proposal. No other State asked that the privilege against self-incrimination be made a part of the Federal Bill of Rights. Neither Virginia, New York, North Carolina, or Rhode Island requested that the privilege be extended to any party or witness, except in judicial prosecutions that were either criminal or capital.

The privilege, as proposed by the committee of which James Madison was chairman on June 8, 1789, was as follows:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury * * * nor shall any person * * * be compelled to be a witness against himself."

While that language seemed to some to clothe the person with the privilege wherever he might be, whether in a legislative, executive, or judicial hearing, it was questionable whether it related only to trials for crimes in courts. In volume I of the *Annals of Congress*, pages 451-452, it is revealed that during the debates on that clause in the Committee of the Whole, on August 17, 1789, the following occurred:

"Mr. Lawrence said this clause contained a general declaration, in some degree contrary to laws passed. He alluded to that part where a person shall not be compelled to give evidence against himself. He thought it ought to be confined to 'criminal cases.' The amendment, thus confining the privilege to 'criminal being adopted, the clause as amended was unanimously agreed to by the Committee, who then proceeded to the sixth clause * * *."

Mr. Lawrence made it clear that the purpose of his amendment was to remove every shadow of a doubt about whether the privilege might be claimed elsewhere than in a criminal case, and to confine the privilege against self-incrimination to "criminal cases." The amendment, thus confining the privilege to "criminal cases" was "unanimously agreed to by the Committee."

The amendment, as agreed to by the House of Representatives, went to the Senate with the privilege amended to read, no persons "shall be compelled in any criminal case to be a witness against himself."

The Senate made substantial changes in many of the House proposals but made no change in the privilege and on September 24, 1789, it was adopted for proposal by the President to the States. Virginia became the 11th State to ratify, resulting in adoption, on December 15, 1791.

The reports of debates in the First Congress left much to be desired. The reporters summarized instead of making verbatim reports of what was actually said. Laws had been passed in many of the States authorizing discovery in equitable cases, and authorizing the enforced production of books and papers, as did the Judiciary Act of September 1789. But, of course, the laws of States could have no relevancy because the plain language of the proposed Bill of Rights imposed limitations and restraints on the Federal Government—not State governments. When Madison suggested a limitation on the power of States with respect to religion only the First Congress voted him down.

The words "in any criminal case" confines the privilege to criminal proceedings in Federal courts.

History explains. Philosophy confuses. John Dickinson put it this way in the Constitutional Convention of 1787: "Experience must be our only guide. Reason may mislead us."

Congressional investigations are not new. The Continental Congress conducted many during the Revolution. Without such investigations governments become contemptible, and treason profitable. Representatives of the people must know and act upon truth. Otherwise republican government must immediately fail and fall.

One of the congressional investigations during the Revolution reads as if torn from the Congressional Record of the 1830's. In August 1778, Silas Deane had two audiences with the Continental Congress in Philadelphia at the request of the Congress. In other words the Continental Congress investigated Silas Deane. His loyalty had been questioned. He was one of the commissioners serving with Benjamin Franklin and Arthur Lee in France, seeking to purchase materials and equipment for the use of our continental forces in the American Revolution. Scores of soldiers of fortune showed up in America with agreements signed by Deane entitling many of them to outrank American officers. Thomas Conway was one of them. He aspired and conspired to displace Washington as Commander in Chief. Remember the "Conway Cabal"? The Congress and the harassed Continental Army staffs were amazed and disgusted. Arthur Lee

early suspected the disloyalty of Silas Deane and both he and his brother, William Lee, also in Europe, reported certain facts and circumstances pointing to waste and possible subversion by Deane. Deane was called home to make a report of his stewardship and was displaced at his station in Passy, France, by John Adams.

It appeared to some that Silas Deane had surrounded himself with a coterie of spies, including the infamous Dr. Bancroft, who lived in the same house with Deane and Dr. Franklin, where the brilliant and suspicious Arthur Lee was unwelcome. It was suspected that it was through Bancroft and Deane that the English authorities knew everything that Franklin and Deane knew. England was able to intercept ships bound for America, and her ministers had lists of the cargoes that were found in the holds of those ships. Deane had also entered into a commercial partnership with Robert Morris and was making a nice personal profit out of commercial transactions he was authorized to execute in behalf of the United States.

One fact after another accumulated, but the Continental Congress did nothing from August until December. Deane became nervous and concluded that his best hope was to smear Arthur Lee and his three brothers, William Lee, then in Europe, and Richard Henry and Francis Lightfoot Lee, in the Continental Congress. He knew that Arthur Lee had "smelt a rat" in Passy, France. Deane opened up on the Lees and the Continental Congress with diversionary libels, consisting of insinuations and innuendoes and no facts, in the *Pennsylvania Packet* of December 5, 1778.

Thomas Paine, author of *Common Sense* and the firebrand champion of human liberty, knew the Lees well and knew that no more selfless patriots had ever given of their time, their substance, and talents to the cause of American independence. He also knew Silas Deane and Robert Morris. When the attack was made by Silas Deane, Richard Henry, and Francis Lightfoot Lee had gone to Virginia, but Tom Paine, then Acting Secretary of Foreign Affairs, answered Deane, in the *Pennsylvania Packet* of January 2, 1779. One of the telling blows delivered by Paine was:

"When Mr. Deane had his two audiences with Congress in August last, he objected, or his friends for him, against his answering to questions that might be asked him, and the ground upon which the objection was made, was, because a man could not legally be compelled to answer questions that might tend to criminate himself—yet this is the same Mr. Deane whose address you saw in *Pennsylvania Packet* of December 5, signed Silas Deane."

Two of those who rushed into the fray to defend Silas Deane were Robert Morris and M. Clarkson. Clarkson was said by Paine to be an *alde-de-camp* to Gen. Benedict Arnold, the self-styled "liberal," who was soon to become the celebrated traitor and later the bosom friend of Deane in London.

The Journals of the Continental Congress reveal nothing except the dry bones of the mighty controversy, known as the Deane Affair. The meat, muscle, and blood is in the newspaper accounts. It raged in the papers and was known all over America when it was happening during the Revolution, and thereafter. Immediate effects therefrom were the resignation of Henry Laurens as President of the Continental Congress and the dismissal of Tom Paine as Secretary of Foreign Affairs.

Gouverneur Morris, a powerful Member of the Congress from New York, and general counsel for Robert Morris, was in the middle of the wrangle on the side of Deane and Robert Morris. In the spring of 1781, it became known that Gouverneur Morris was about to leave Philadelphia with a pass from the Continental Congress and, strange to say, a pass from the British military forces, entitling him to go into New York for the stated purpose of seeing his mother. "A citizen" writing in the *Freeman's Journal* of June 6, 1781, questioned the propriety of such a trip by a Member of Congress, particularly Morris, and directed several queries "to the people of New York." The first and second queries were as follows:

"First. Whether any and which of their Delegates did urge in Congress, that Mr. Deane should give a verbal narrative of his transactions in Europe, instead of a written one, notwithstanding it was represented in opposition thereto that a verbal narrative, in case he was guilty of the abuses he was suspected of, would leave him at liberty to say and unsay to explain away and evade matters, just as it might best suit the purpose of eluding public justice?

"Second. Whether any, and which of their Delegates urged in Congress that Mr. Deane should be excused from answering questions which tended to crim-

nate himself; a purpose which implies a conviction in the author and abettors of it, that abuses had been committed, and could have no other end than to screen the party from detection?"

Those queries stung Gouverneur Morris and kept him on the American side of the battle line. They also brought forth from him a reply in the June 14, 1781, issue of *Freeman's Journal*, in part as follows:

"To the first and second queries of the citizen I make this reply. I urged and voted that Mr. Deane should be examined *viva voce* , and not be permitted to send deliberate written answers from his closet, to written questions proposed by the House; and when he prayed that he might not be bound to answer questions tending to accuse himself, I voted for granting his request. If it were to be done over, I would do the same thing even if I believed him to be a villain, which I certainly did not."

So, clearly, the Continental Congress granted the privilege to Deane as a matter of grace—not as a matter of right—in 1778.

Alas Deane was allowed to go back to Europe in 1779 for the asserted purpose of collecting documentary proofs of his innocence. Once there he never returned. While in Europe certain of his so-called private letters were alleged to have been intercepted and published that left little doubt to patriots of that day that Deane was playing the part of a loyal subject to his king and a traitor to his country. Old Tom Paine took his revenge in *Freeman's Journal* of March 13, 1782.

On March 20, 1782, the *Freeman's Journal* published a *Modern Glossary for Use of Strangers in the Capitol of Pennsylvania*. That glossary should be useful to a stranger in the Capitol of the United States today; we quote a portion:

"Deane, Arnold: Unfortunate man with good intentions, drove to despair by American ingratitude.

Love of our country: A joke.

Religion: A dream.

Morality: A farce.

Dr. Benjamin Franklin would not at first believe the treachery of Deane and Dr. Bancroft. He was a liberal philosopher lost in dreams and believed that his friends could do no wrong. The financial power of Robert Morris, the forensic power of Gouverneur Morris, the prestige of Dr. Franklin, and the machinations of American Tories were enough to break the back of Henry Laurens, Tom Paine, and the great family of Lees. (See, in general, Hendrick, the Lees of Virginia, chs. 11 and 12.)

Writing from Passy, France, on February 28, 1779, after reading Deane's letter in the previous December 5 Packet, John Adams told Samuel Cooper:

"The complaint against the family of Lees is a very extraordinary thing indeed. I am no idolator of that family or any other; but I believe their greatest fault is having more men of merit in it than any other family; and if that family falls the American cause or grows unpopular among their fellow citizens, I know not what family or person will stand the test."

Later Jefferson described Deane as . . . a wretched monument of the consequences of a departure from right."

On May 15, 1782, George Washington wrote to a friend about Deane: "I have so bad an opinion of . . . (Deane) . . . that I wish to hear or see nothing more of so infamous a character."

John Jay, of New York, later one of the contributors to the *Federalist* and the first Chief Justice of the Supreme Court of the United States, at first refused to believe Deane to be a traitor. He led the fight for Deane in the Continental Congress and displaced Henry Laurens as President of the Continental Congress in 1779 when Laurens resigned because the Congress would not censure Deane for his letter of December 5, 1778. In 1784, Jay, then Minister to Spain, was in London. Deane, hearing of Jay's presence in London, went to see the old friend who had led the battle for him in the Continental Congress. Jay refused to see him and explained why in a curt note:

"I was told by more than one, on whose information I thought I could rely, that you received visits from, and was on terms of familiarity with, General Arnold. Every American who gives his hand to that man, in my opinion, pollutes it." (*The Correspondence and Papers of John Jay*, vol. 3, p. 114).

"Guilt by association" was not distasteful to John Jay or to the any other patriots in America then. Neither is it today. No better way was known then or is known now for evaluating the character of any one than to judge him by the company he keeps. "Birds of a feather flock together."

Twenty years after the event Gouverneur Morris made apologies to Tom Paine about his part in the "Deane Affair," saying, "Well, we were all duped, and I among the rest." (See *Life and Works of Tom Paine*, vol. 10, p. 128.)

Those simple minded people who believed themselves "liberal" and "broad-minded" when loving every other country except their own, importuned the Congress of the United States for nearly three quarters of a century after 1778 in behalf of Silas Deane, to "correct the injustice" that had been done to the "Innocent," yet "Silent Silas." In 1842, the Congress succumbed to the propaganda and appropriated a large sum of money to the descendants of Deane to salve their wounded feelings and to correct the "injustice" that had been done to him.

About 25 years after the money was paid out, the secret letters of George III were published. Those letters confirmed the fact that Silas Deane was a traitor to his country beside whom Benedict Arnold was a wingless angel.

Truth crushed to earth does not always rise again. Most of the encyclopedias and history books still paint Silas Deane as an American patriot who suffered a great injustice. They accept the gesture of Congress as the final verdict. None of those accounts refer to the letters of George III, the last edition of which was published in 1932. After reading a few of those letters, when first published, Charles Francis Adams, the New England historian, asserted in 1874:

"It appears certain that Deane was more or less in the pay of the government (meaning England) during the war."

But many so-called American "historians" close their eyes to truth and perpetuate cherished fables.

While the Revolution was raging, on March 3, 1781, George III wrote to Lord North requesting him to let Silas Deane have 3,000 pounds in goods for America in return for Deane's services in seeking to bring about discord among the Confederate States of America and restoring their allegiance to him. "Divide and conquer" was the plan then, as in all ages, and Deane was the tool. On July 10, 1781, George III wrote to Lord North expressing fear that Deane was showing his hand in his "private letters" that were being intercepted so regularly, and giving "too much appearance of being connected with this country." In another letter, George III stated to Lord North that Deane's letters, which were being published in the American newspapers, were "too strong in our favor to bear the appearance of his spontaneous opinions." George III then outlined the kind of letter he thought Deane should write for publication in America.

The only way for Deane apologists to deal with the letters of George III is to ignore them. That is what they do. (In general see, Hendrick, the Lees of Virginia, pp. 314, 315.)

Now let us go back to the floor of the First Congress under the new Constitution, on August 17, 1789. Many members of the Continental Congress before whom Silent Silas appeared in 1778, Richard Henry Lee and Oliver Ellsworth for example, were in the Senate. Elbridge Gerry was in the House with a copy of George Mason's original draft of the Bill of Rights in his pocket. So were many others who remembered full well the treachery of Silas Deane—because they felt it. The one who felt it most, perhaps, was George Washington. He could never think of Valley Forge without thinking of Silas Deane.

Is it any wonder that when Congressman Lawrence, of New York, proposed that the privilege against self-incrimination should be limited to criminal cases no one arose to suggest language that would enable another traitor to hide behind the privilege against self-incrimination at some other congressional investigation in some other age.

Neither before nor since 1789 has the English Parliament permitted persons to claim the privilege against self-incrimination in parliamentary inquiries. Parliament recognized then and recognizes now the principle upon which witnesses are excused from incriminating themselves. The rule of Parliament was then and is now that incriminating evidence given in the Parliament may not be used out of doors except with the permission of the Parliament, which is never granted (Cushing, *Lex Parliamentaria Americana*, sec. 1001 2d edition 1866, cited by C. Dickerman Williams in 24 *Fordham Law Review*, p. 32).

What has happened to the fifth amendment, so deliberately limited by the Founding Fathers to "criminal cases"? A Supreme Court, writing and deciding without research, reason, or restraint has usurped and now exercises the power to amend the Constitution by striking the Lawrence amendment solemnly adopted in Congress on August 17, 1789, and approved by the representatives of the people on December 15, 1791. The Court now holds that under the fifth amendment, as amended by the Court,

"A witness in any proceeding whatsoever in which testimony is legally required may refuse to answer any question, his answer to which might be used against him in a future criminal proceeding, or which might uncover further evidence against him" (Constitution of the United States, revised and annotated (Government Printing Office, 1952) p. 841).

In *Quinn v. United States*, *Enapak v. United States* and *Bart v. United States* (349 U. S. 115, 190, 210 (1951)) the Supreme Court, in the plenitude of its usurped power, extended the fifth amendment privilege to congressional investigations. In *Stochever v. Board of Education* (350 U. S. 551 (1956)) the privilege was extended so as to protect traitors in hearings before State school authorities. Since the fifth amendment is only binding upon the Federal Government, in order to make the privilege in the fifth amendment available to protect Communists in New York schools, the Supreme Court had to (1) amend the privilege by striking therefrom the Lawrence amendment, or the words "In any criminal case," (2) convert the "privilege" into a "right," (3) write into the 14th amendment a clause saying in effect: "By virtue of this amendment, all of the provisions of the first 10 amendments are applicable to the nations of the States and subsidiary forms of governments; as well as to the Federal Government and (4) hold, as a matter of fact, that to be a Communist and to refuse to admit or to deny it has no reasonable relation to the character and competence of one whose business is teaching, shaping and bending the minds of the young people of America.

In *Watkins v. United States* (354 U. S. 178 (1957)) the witness admitted "I freely cooperated with the Communist Party" and then refused to name his associates—without invoking the fifth amendment. There the Court exhibited a fellow feeling akin to brotherliness and reversed all of the inferior Federal courts of the District of Columbia and left the Un-American Activities Committee of the House of Representatives powerless to pursue simple inquiries that have been found essential to the existence of every free government in the world. Six of the members of the Court confessed their inability to distinguish between that which is "American" and that which is "un-American," and ridiculed the idea that pro-Russian may be "un-American." The Court commented gratuitously, "we remain unenlightened as to the subject to which the questions asked petitioned were pertinent," and left the American people "unenlightened" as to how it was any of the Court's business, and why certain members of the Court make every Communist cause their own. Section 3 of the 14th amendment contains a perfect remedy for our present dilemma.

Nine men in black robes ride herd over the Congress and the people. Their horses are phantoms but that can make no difference to a defenseless people if their Representative in Congress are in headlong flight.

While the proposed Senate bill No. 2040 will not restore the Lawrence amendment to the fifth amendment it will serve to purchase a little time and will be an expedient to preserve republican government on a temporary basis until permanent relief may be had in accordance with the methods spelled out in the Constitution itself. The Constitution needs supporting—not amending. It is late when truth becomes so fantastic as to be incredible.

Senator WATKINS. Mr. McNamara, we are happy to have you with us. Proceed with your statement.

May I say to the witnesses this afternoon that if you have rather lengthy statements and you think you could summarize your statements orally, we can have the whole thing printed in the record the same as if you had read it. It will appear in the same size type and all. And since I am the only Senator here at the moment, the other Senators will have to read it in the record anyway. I will be one of those who will try to read it as well.

Mr. McNAMARA. That is fine with me, Senator.

TESTIMONY OF FRANCIS J. McNAMARA, ASSISTANT DIRECTOR, NATIONAL LEGISLATIVE SERVICE, VETERANS OF FOREIGN WARS OF THE UNITED STATES

Mr. McNAMARA. My statement is rather lengthy so I will summarize it and, as you say, I would very much appreciate the full text being printed in the record.

(The prepared statement of Mr. McNamara reads as follows:)

Mr. Chairman and members of the subcommittee, I would like first of all to express my appreciation for this opportunity to state the position of the Veterans of Foreign Wars on S. 2040, a bill introduced by Senator Jenner to limit the appellate jurisdiction of the Supreme Court.

The Veterans of Foreign Wars numbers approximately 1,300,000 American men who have served honorably, either as officers or enlisted men, in the Armed Forces of the United States in a foreign war, insurrection, or expedition recognized by the United States Government as campaign-medal service. Our organization represents a true cross-section, not only of this Nation's veterans, but of the American people. Its members come from all walks of life. They are doctors, lawyers, judges; Senators and representatives, both Federal and State; gasoline-station operators and attendants, teachers, carpenters, State governors and former governors, clergymen, plasterers, members of all the armed services, and representatives of numerous other trades and professions.

During the past 2 years or so there has been deep concern in our organization over certain decisions of the Supreme Court. As a result of this concern a number of resolutions pertaining to the Court were adopted at our last national convention, which was held in Miami Beach, Fla., in August 1957.

One resolution, No. 201, VFW position on communism and courts, in referring to the Supreme Court, states that "recent court decisions protect the conspiracy," that is, the Communist conspiracy, "to such an extent that additional publicity and legislation are obviously necessary." The resolve clause of this resolution urges "immediate congressional legislative action to: 'a. Protect the secrecy of FBI files,—that is, to overcome the effect of the Supreme Court's decision in the *Jencks* case; 'b. Permit the expulsion of subversive employees from non-sensitive agencies of the Federal Government'—that is, to override the decision of the Supreme Court in the case of *Cole v. Young*; 'c. empower the various States to legislate against subversive activities with their border'"—which is a demand for legislation to overcome the Court's decision in the *Nelson* case.

This same resolution states that the members of the VFW "recognize and appreciate the magnificent efforts" of the Senate Internal Security Subcommittee and the House Committee on Un-American Activities under their respective chairmen, "vigorously endorse the continued existence of these committees and, in view of recent court decisions curtailing their investigative powers, recommend such legislative action as is necessary to enable these committees to continue, unhampered, their legitimate functions."

This is an indirect but nevertheless a clear indication of support for legislation that would reverse the Supreme Court's decision in the *Watkins* case. It also goes much further than that. It gives our national legislative service broad power to support any legislative measures deemed essential to the effective operation of these congressional investigating committees.

Inasmuch as this same resolution gives the endorsement of our organization to the 1958 legislative recommendations of these two congressional committees, I think it is pertinent to mention here some of these committees' conclusions and recommendations which bear on S. 2040.

The 1958 report of the Senate Internal Security Subcommittee states that the Supreme Court decisions of April, May, and June, 1958 "seriously restrained the course and progress of America's struggle against its domestic Communist enemies. The respective roles and powers of the local, State, and Federal governments in this struggle; the constitutionality of various municipal ordinances, State statutes, and Federal Executive orders; the adequacy of evidence—all were subjected to searching scrutiny and significant new limitations" (p. 218).

The report then went on to mention specific Supreme Court decisions as cases in point: the *Nelson* decision, *Slochower* decision, *Communist Party v. Subversive Activities Control Board*, the minority view in the *Black v. Cutter* ruling, and the Court's ruling in the case of *Cole v. Young* (pp. 218-219).

Among the subcommittee's conclusions is this one:

"Antisubversive activity by State authorities has been hampered and deterred by the Supreme Court decision in *Pennsylvania v. Nelson*." (p. 220).

Pertinent here are the following recommendations of the subcommittee:

"The Congress should enact legislation to make clear its intent that individuals found to be security risks shall be ineligible to hold any employment in or under the Government of the United States, whether or not designated as 'sensitive' positions.

"The Committee on the Judiciary, or an appropriate subcommittee thereof, should undertake a study to determine the constitutionality of legislation to make it a condition of Government employment in any capacity that the employee shall give responsive answers to any questions put to him by any authorized tribunal of the United States respecting his loyalty to the United States * * *.

"The Congress should enact legislation similar to H. 3017 of the 84th Congress to permit State legislation for the purpose of combating subversive activity" (pp. 220-221).

The 1954 report of the House Committee on Un-American Activities also makes a legislative recommendation to which the VFW is committed and which is pertinent to the subject of this hearing.

It urges legislation to overcome the effect of the *Cole v. Young* decision of the Supreme Court (p. 59).

Another resolution adopted by the VFW at our last national convention, No. 106, makes the following statements in its whereas clauses:

"* * * on June 17, 1957, the Smith Act, because of a decision of the United States Supreme Court, was considerably damaged, if not completely nullified. The Supreme Court ruled that (1) since the Communist Party had been reorganized in 1945 and the statute of limitations had, therefore, expired, the Smith Act could not be used to prosecute Communist Party organizers; (2) that those who advocated the overthrow of our Government by force and violence could not be prosecuted under the Smith Act unless it could be proved that the advocacy incited to concrete action. * * *

"The security of the United States has become endangered because of the weakening of the Smith Act. The appalling resulting situation demands that Congress repair the breaches in the walls of our national security.

"The protection of American youth demands that Congress amend the Smith Act, making it a crime to teach and urge forcible overthrow of our Government, whether or not the advocacy points out the concrete manner in which the overthrow is to be effected."

This resolution indicates extreme displeasure with the Court's June 17, 1957, decision in the case of the California Smith Act Communists and urges the Congress "to amend the Smith Act to punish by a fine and imprisonment all persons:

"1. Who teach and advocate the violent overthrow of our Government whether or not such teaching and advocacy describes a specific or concrete action to accomplish such overthrow.

"2. Who organize any society or group committed to the forcible overthrow of our Government, or any branch or unit of such a society or group already organized.

"3. Who knowingly belong to or willfully participate in the activities of any society, group, or organization committed to the violent overthrow of our Government, whether or not such society, group, or organization outlines the concrete manner in which such overthrow is to be effected."

Another resolution, No. 183, "Urging Enforcement of the Smith Act," calls upon the States, as soon as Federal legislation permits them to do so after the Supreme Court's ruling in the Nelson case, "to legislate against subversive activities within their borders," and also calls upon the Department of Justice "to renew the vigorous prosecution of the Communists for violation of the Smith Act and other laws of the United States."

It is hardly necessary to point out that, at the present time, it is just about impossible for the Department of Justice to do this. Recent Supreme Court decisions pertaining to this act have almost completely destroyed its effectiveness. Until Congress acts to overcome these decisions, we can look forward only to fewer prosecutions, rather than more, under the Smith Act.

The report of the American Bar Association's committee on Communist tactics, strategy, and objectives was also endorsed by a resolution, No. 249, adopted at our last national convention. This resolution gave VFW support to legislative recommendations of the bar association committee that would overcome the effect of the Supreme Court's decisions in the cases of *Jencks*, *Watkins*, *Cole v. Young*, *Wilkovich*, the *California Communists*, the *Stocholmer case*, *Schwartz v. Board of Bar Examiners of New Mexico*, and *Konigsberg v. State Bar of California*.

The resolution resolved that our organization "strongly reemphasizes the concluding sentence of the bar association's report," to wit: "If the courts lean too far backward in the maintenance of theoretical individual rights, it may be

that we have tied the hands of our country and have rendered it incapable of carrying out the first law of mankind--the right of self-preservation."

The resolution concluded with a call for Congress, if it deemed it necessary, to pass without delay laws enabling the various States to investigate and prosecute acts of subversion against these sovereign States as well as the Federal Government.

As a final word on the position of our membership on this question one other resolution, No. 178, a general one concerning the fight against communism, will be mentioned. It pledges our organization to "oppose all local, State, and National policies or actions" which aid communism "in the attainment of any of its objectives."

In view of these resolutions our national legislative service has a clear and compelling mandate from our national convention to urge the Congress to enact legislation that will overcome practically every recent major decision of the Supreme Court dealing with the problem of communism. It could well be said that we have a mandate to achieve legislation that will defeat what might be termed "the policy of the Supreme Court on this subject."

These VFW resolutions do not spell out the exact form of the legislation desired. They do not state that it should be accomplished by denying the Supreme Court appellate power in certain areas. On the other hand, they do not bar this step as a means to their end--and there can be no doubt but that the adoption of S. 2040 would attain the objectives spelled out in these resolutions.

These resolutions also make it clear that it is the VFW position that certain functions and rights should be reserved to the States. S. 2040 would implement this position by removing the Court's appellate power in several fields of activity traditionally reserved to the States.

Therefore it seems that there are only two questions which must be resolved for this bill to receive our organization's endorsement. First, is it constitutional? Second, if it is constitution, is it a desirable measure, would it serve the common welfare?

As to the constitutionality of S. 2040: Article III of the Constitution is devoted to the judiciary and its role in our Government. Section 1 of this article begins:

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

Section 2, paragraph 2, of this article, which spells out the Supreme Court's jurisdiction, states:

"In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction both as to law and fact, *with such exceptions and under such regulations as the Congress shall make*" (emphasis added).

In other words, the appellate jurisdiction of the Supreme Court in all matters coming within the purview of the Federal judiciary is completely under the control of the Congress. The Congress can make exceptions to the Court's appellate power, deprive it of all such power in certain areas or cases, or it may lay down certain regulations which will govern the manner in which the Supreme Court may exercise its appellate power.

It therefore appears that there can be no question about the constitutionality of S. 2040 which would deprive the Supreme Court of appellate power in five specific areas. If Congress should pass this bill, it will simply be exercising a power which the Constitution very clearly gives it.

The next question is that of whether the bill is a desirable one, whether there is need for it, whether it would serve the common weal. A review and analysis of what the Court has been doing in recent years in cases affecting national security is a prerequisite to answering these questions. Only then can it be determined whether it has been properly performing its constitutional functions.

Inasmuch as our organization has endorsed the report of the American Bar Association's committee on Communist tactics, strategy, and objectives, I will first mention 15 decisions covered in that committee's report. It should be noted that before citing these cases, the committee said they "directly affect the right of the United States of America to protect itself from Communist subversion."

1. In the case of the *Communist Party v. the Subversive Activities Control Board*, the Court refused to uphold or pass on the constitutionality of the Subversive Activities Control Act of 1950. It thereby delayed the effectiveness of this act. Justices Clark, Reed, and Minton, in their dissenting opinion, said the-

majority had used a "pretext" to avoid its "responsibility and duty" to rule on the act's constitutionality.

2. *Pennsylvania v. Steve Nelson*. The Court declared that the Pennsylvania State Sedition Act was unenforceable on the ground that, when Congress passed the Smith Act, it intended to preempt prosecution in the field of seditious activity. This decision rendered ineffective the laws of 42 States and of the Territories of Alaska and Hawaii designed to punish sedition.

3. *Fourteen California Communists v. U. S.* The Supreme Court reversed two Federal courts and said that the teaching and the advocacy of violent overthrow of the United States Government, even "with evil intent" was not punishable under the Smith Act if it was "divorced from any effort to instigate action to that end."

4. *Cole v. Young*. The Supreme Court again reversed two Federal courts and ruled that security risks could not be dismissed unless they occupied a "sensitive position." In their dissenting opinion Justices Clark, Reed, and Minton said "the Court's order has stricken down the most effective weapon against subversive activity available to the Government. It is not realistic * * *. One never knows which job is sensitive."

5. *Service v. Dulles*. Once more the Supreme Court reversed two Federal courts and denied to the Secretary of State the "absolute discretion" given to him by law to fire any employee "in the interests of the United States."

6. *Stochmeier v. The Board of Education of New York*. Here the Court reversed three New York courts and said New York City could not fire an employee who invoked the fifth amendment when questioned about Communist activities. It declared unconstitutional a city-charter provision that any official who refused to answer questions about his official conduct asked by a recognized investigative agency would be automatically dismissed. The dissenting opinion of Justices Reed, Burton, Minton, and Harlan said that this ruling "strikes deep into the authority" of New York to protect itself from officials whose conduct does not meet declared State standards for employment.

7. *Sweezy v. New Hampshire*. The Supreme Court reversed the New Hampshire Supreme Court and ruled that the attorney general of the State had no right to ask Sweezy, who had lectured at the State university, if he believed in Marxism and if he had advocated it in his lectures. In their dissenting opinion Justices Clark and Burton said the decision "destroyed the fact-finding power of a State in this field."

8. *U. S. v. Witkovich*. The Supreme Court ruled that the Attorney General of the United States had no right to ask a person ordered deported from this country if he had attended Communist Party meetings since the order for his deportation was issued. It made this ruling in spite of the fact that the Immigration and Nationality Act of 1952 requires all such aliens to "give information under oath as to his * * * associations and activities and such other information * * * as the Attorney General may deem fit and proper." The dissenting opinion of Justices Clark and Burton said the ruling stripped the Attorney General of an "important power" necessary to protect the internal security of the United States.

9. *Schwartz v. The Board of Bar Examiners of New Mexico*. The Court reversed the board of bar examiners and the New Mexico Supreme Court and said that a person's membership in the Communist Party in the 1930's "cannot be said to raise substantial doubts about his present good moral character."

10. *Konigsberg v. State Bar of California*. The Court reversed the findings of the bar examiners and the California Supreme Court and said it was unconstitutional to deny a license to practice law to an applicant who refused to deny that he was a member of the Communist Party.

11. *Jencks v. U. S.* Again the Supreme Court reversed two Federal courts and said that Jencks must be given the contents of confidential reports made to the FBI by all Government witnesses used in this trial. Jencks, it should be noted, through his attorney had asked only that these reports be made available to the trial judge for his examination and determination as to whether or not they were material to the case and should be made available to the defendant. Justice Clark, in his dissenting opinion, said that all United States intelligence agencies, as a result of the majority decision, "may as well close up shop for the Court has opened its files to the criminal and thus afforded him a Roman holiday for rummaging through confidential information as well as vital national secrets."

12. *Watkins v. U. S.* The Supreme Court reversed the Federal district court and six justices of the District of Columbia Court of Appeals and held that a

congressional witness could not be required to name persons he had known as Communists.

13. *Raley, Stern and Brown v. Ohio*. The Court reversed the Ohio Supreme Court and lower courts and set aside contempt convictions of three men who had refused to answer questions about Communist activities asked them by the Ohio Un-American Activities Commission.

14. *Flazer v. the United States*. The Court reversed two Federal courts and set aside the contempt conviction of a man who had refused to produce records of Communist activities subpoenaed by the Senate Internal Security Subcommittee.

15. *Sacher v. the United States*. The Court reversed two Federal courts and reversed the contempt conviction of an attorney who had refused to tell the Senate Permanent Investigations Committee whether he was or had ever been a Communist.

Other significant decisions the Court has made recently:

Five Pennsylvania Communist Leaders v. the United States. The Court reversed the Smith act convictions of these men on the grounds that a Government witness "may have lied" in their first trial. The Court refused the plea of the Department of Justice that the case be sent back for determination of the credibility of the witness in question.

Mrs. Antonia Scutner v. the United States. The Court ruled that the Attorney General had no authority to require an alien awaiting deportation to quit the Communist Party. Justices Clark and Burton, in their dissenting opinion, said that the decision destroyed the effectiveness of Congress attempts, through the Immigration and Nationality Act of 1952, to control subversives whose deportation has been forestalled by technical difficulties.

In the case of three Communist leaders who had sheltered Robert Thompson, ball-jumping member of the Communist Politburo, the Court ordered a new trial on the ground that, after keeping the hideout cabin in the high Sierra Mountains under surveillance for 24 hours, FBI agents had seized contents of the cabin without a search warrant. The dissenting opinion pointed out that "only a fragmentary part" of the items seized were admitted into evidence, that there was "ample evidence of guilt otherwise" and that, because of this, the rule of harmless error should have governed and their convictions been upheld.

Ben Gold v. U. S. The Court reversed the conviction of this Communist for falsifying a Taft-Hartley oath on the ground that FBI interrogation of three members of the jury about an unrelated case was intrusion on the jury's privacy, even though unintentional. The Government was subsequently forced to drop prosecution of Gold because of the age of the case and the present non-availability of material evidence. Four Justices dissented from this opinion. Three stated that the FBI interviews had had "no effect upon the jurors adverse to the defendant."

Roschild v. U. S. The Court, by a 5-4 decision, reversed the appeals court and the Immigration Service by cancelling the deportation order of an alien who had come to this country in 1914 and had been a Communist Party member in the 1930's. Even though the alien admitted paying dues to the Communist Party and attending Communist Party meetings, the majority held that there was no proof of the kind of "meaningful association" with the party required by the Immigration Act.

These and other recent decisions of the Supreme Court make it clear that something must be done to curb it because the Court is usurping the power of the States, local communities and their agencies, and the executive and legislative branches of the Government.

The function of the Court is to interpret law as it has been written by authorized legislative bodies. The Court has no right to make law itself and, in interpreting law, it is not supposed to interpret it in any way it sees fit, but as the legislators who wrote it intended it to be interpreted.

It is up to Congress to determine if the States may prosecute subversives, but in the Nelson case the Supreme Court determined that they could not, and it did so by twisting the intent of Congress in writing the Smith Act.

The legislative and executive branches of the Government have the right to determine qualifications for Federal employment and the various States and municipalities have a similar right to set standards for their employees as long as, in doing so, they do not violate basic constitutional rights.

The Supreme Court intruded on this right in the Cole and Slochower cases. The dismissal of Slochower, for example, was not an invasion of his constitutional rights. He was not forced to incriminate himself; his right to invoke the fifth

amendment was unquestioned and respected. The Court, however, did not respect the right of the people of New York City, who pay the salaries of the city's employees, to determine the standards those employees must maintain if they want to continue in the city's service.

In the *Schwartz* and *Konigsberg* cases the Court introduced on the traditional right of State bar associations and bar examiners to determine the qualifications of lawyers who would practice before their courts.

The Court has also been making extralegal judgments. In the *Schwartz* case it made a determination that no substantial doubt about a man's good moral character was raised by the facts that he had been a Communist Party member in the thirties, that he had used aliases and had a criminal record. This was not an interpretation of law but rather a social judgment and beyond the function of the Court.

In the *Cole* case the Court made a decision as to what is a sensitive agency of the Government. This, too, was not an interpretation of law and it was, in effect, a reversal of a law passed by the Congress in 1950 which gave the President the power to designate sensitive agencies of the Government. The Court decision here intruded on the prerogatives of both the legislative and executive branches.

In the *Watkins* case the Court made unreasonable restrictions on the power of the Congress to investigate for the purposes of legislation.

The Court has also shown a lack of consistency. In the case of the five Pennsylvania Smith Act Communists, it reversed their convictions on the ground that a witness against them "may have lied." And in the case of the *Subversive Activities Control Board v. The Communist Party*, on the basis of what Justice Clark described as flimsy Communist claims of perjury, the Court decided that the evidence of three witnesses may have been tainted and sent the case back to the SACB. Yet, in the case of a Florida cattle thief who appealed on the ground that he had been convicted by perjured testimony, the majority refused to consider his case, even though, as the minority found, there was convincing evidence of perjury.

A second reason why there is need to curb the Court is because it has, in a number of recent decisions, shown what could well be termed carelessness and irresponsibility.

I believe no one will question the thesis that the Supreme Court, in ruling on matters affecting national security, has the most solemn obligation to carefully check its facts, to make sure it is on solid ground in every statement it makes. One misstatement of fact or falsehood in a Supreme Court decision might be excused, but a series of them in a series of decisions is inexcusable—a clear sign of dereliction of duty. Yet, that is what we are faced with today. Here are some examples:

THE NELSON CASE

In the *Nelson* case the Supreme Court ruled that the States could not prosecute seditious activity for three reasons: It was the intention of Congress to occupy the field when it passed the Smith Act, there was "serious danger of conflict with the Federal plan" and the Federal Government had "dominant interest" in the field.

As to the Court's claim that Congress intended to preempt the field of seditious activity in passing the Smith Act, it should be noted that Representative Howard Smith, author of that act, made the following statement in a letter to Hon. Frank Truscott, former Attorney General of the State of Pennsylvania:

"DEAR MR. ATTORNEY GENERAL: Justice Musmanno of your supreme court has been kind enough to furnish me with a copy of the opinion in the case of *Commonwealth v. Nelson*, in which the supreme court of your State holds that the enactment of the Smith Act, prescribing punishment for acts designed to overthrow the Government of the United States by force and violence, had the effect of nullifying State laws for a similar purpose.

"As I am the author of the Federal act in question, known as the Smith Act, I am deeply disturbed by the implications of this decision. May I say that when I read this opinion, it was the first intimation I ever had, either in the preparation of the act, in the hearings before the Judiciary Committee, in the debates in the House, or in any subsequent development, that Congress ever had the faintest notion of nullifying the concurrent jurisdiction of the respective sovereign States to pursue, also, their own prosecutions for subversive activities. It would be a severe handicap to the successful stamping out of subversive activities if no State authority were permitted to assist in the elimination of this evil, or to protect its own sovereignty. The whole tenor and purpose of the

Smith Act was to eliminate subversive activities, and not assist them, which latter might well be the effect of the decision in the *Commonwealth v. Nelson* case."

Representative Smith also made the following statement to a House Judiciary Subcommittee in reference to the Supreme Court's Nelson case decision:

"I was the author of the Smith Act and I never dreamed of anyone else dreaming that by reason of Congress stepping in and enacting a law to prevent treasonable activities that the States were precluded from enacting a law to protect themselves against the same evils; and it is just as true in respect to hundreds of other fields of Federal legislation as in subversive activities."

Senator Styles Bridges, in an appearance before this Judiciary Subcommittee made the following statement:

"Mr. Chairman, I was in Congress in 1910 when the Smith Act was passed. I know what the Congress was thinking about when they passed that act. And I say, Congress never intended that it should preempt the field regarding subversion."

"An examination of the legislative history of the act shows clearly that Congress did not intend to assert exclusive jurisdiction over this field. Surely, if Congress intended to supersede State sedition laws, they would have clearly stated so in the act."

"Congressman Smith of Virginia, author of the act, stated on the floor of the House that the Smith Act had nothing 'to do with State laws.' If the author had intended otherwise, he certainly would not have made this statement * * *."

"Now, as a Member of the Congress at that time, in 1910, I recall very clearly the discussions on this legislation, and I concur with what Congressman Smith said, that it was never the intention of the Congress or any of the bodies of the Congress that participated, that this be the intention of the act."

Senator Edward Martin of Pennsylvania has made the following statement, also in an appearance before this Judiciary Subcommittee:

"A study of the debate at the time the Smith Act was approved in 1910 makes it clear that Congress did not wish nor intend that it should nullify the State sedition laws then existing or to be passed."

Senator John Stennis, of Mississippi, declared as follows in a statement to this subcommittee on S. 3017:

"A casual reading of the section on which this case turned would convince anyone that the act has not met the historic test of Federal preemption laid down by John Marshall (6 Wheat. 204, 443) that the intent of Congress to preempt the field of legislation to the exclusion of the States must be 'clearly and unequivocally expressed.' The contrary is true. As pointed out by the dissenting Justices, this section is merely one of a number included in title 18 (crimes) of the United States Code. Section 3231 of this title, which codifies the Federal criminal laws, states:

"Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof."

"This section antedates the Smith Act—it was enacted in 1825 and has been included in our Federal Code continuously since that time. So, to reach its tortured conclusion and strike down these State laws, the Court had to ignore the clear mandate of a Federal statute on the books for over 140 years, and the quoted judicial criterion established even earlier by Chief Justice John Marshall. The reading of such an 'intent' by Congress was so palpably absurd that it brought forth an immediate protest from the distinguished sponsor of the act, Representative Howard Smith of Virginia."

It is clear from these statements that there was no validity in the statement in the Supreme Court's decision in the Nelson case that Congress, in passing the Smith Act, intended to deny to the States the power to prosecute sedition.

It is worth noting, too, that Justices Reed, Burton, and Minton, in their dissenting opinion in the Nelson case, stated flatly that there was nothing in the Smith Act itself or any subsequent act of Congress to support the majority decision.

Also open to serious question is the Court's statement that there would be "serious danger of conflict with the Federal plan" if the States were given the power to prosecute sedition.

The Honorable Louis C. Wyman, attorney general for the State of New Hampshire and vice president of the National Association of Attorneys General, made the following statement when he testified before this Judiciary Subcommittee in May 1950:

" * * * the Supreme Court was advised after it had requested the Solicitor General for the view of the Department of Justice—was advised by the Department of Justice that, in the record of 15 years since enactment of the Smith Act in 1910, there had not been conflict, there had been cooperation and there had been help."

An amicus curiae brief filed with the Supreme Court by the Department of Justice in the Nelson case stated:

"The administration of the various State laws has not, in the course of the 15 years that the Federal and State sedition laws have existed side by side, in fact interfered with, embarrassed, or impeded the enforcement of the Smith Act. The significance of this absence of conflict in administration or enforcement of the Federal and State sedition laws will be appreciated when it is realized that this period has included the stress of wartime security requirements and the Federal investigation and prosecution under the Smith Act of the principal national and regional Communist leaders."

This clear and unequivocal statement that there has been absolutely no conflict between the States and the Federal Government in the prosecution of sedition makes one wonder how the Court would have dared to make a claim to the contrary in its decision.

THE BLOCHOWER CASE

The Court stated in its decision on Blochower:

"It appears that neither the subcommittee nor Blochower was aware that his claim of privilege would ipso facto result in his discharge and would bar him permanently from holding any position either in the city colleges or in the city government."

The record of the Blochower's hearing shows that this statement is not true, that both the subcommittee and Blochower knew what the result would be if he invoked the fifth amendment. Because of this, New York City asked the Court to reconsider its decision on the ground that it was based on a demonstrable error of fact.

The Court calmly admitted its error on May 28, 1950, in refusing to reconsider its earlier decision.

THE WATKINS CASE

In this decision the following statement is made:

"In the decade following World War II, there appeared a new kind of congressional inquiry unknown in prior periods of American history. Principally this was the result of the various investigations into the threat of subversion of the United States Government. * * * This new phase of legislative inquiry involved a broad-scale intrusion into the lives and affairs of private citizens."

This statement, too, is not true. Similar congressional inquiries were made by the Special Committee on Un-American Activities prior to World War II—in 1938, 1939, 1940, 1941, 1942, 1943, and 1944. These investigations, too, concerned subversion and "intruded" into the lives and affairs of private citizens, not only Communists and fellow travelers, but also Nazis and pro-Nazis. Even prior to the formation of the Special Committee on Un-American Activities in 1938 there were similar investigations, such as the inquiry of the Select Committee To Investigate Charges Made by Dr. William A. Wirt and the Special Committee on Nazi Propaganda, both of which operated in 1931.

Again, in the Watkins decision, the Court majority makes a comparison—by implication, unfavorable to the Congress—between congressional committees and the royal commissions of the British Commonwealth in their manner of conducting investigations. It stated:

"Modern times have seen a remarkable restraint in the use by Parliament of its contempt power. Important investigations, like those conducted in America by congressional committees, are made by royal commissions of inquiry. * * * Seldom, if ever, have these commissions been given the authority to compel the testimony of witnesses or the production of documents. Their success in fulfilling their factfinding missions without resort to coercive tactics is a tribute to the fairness of the processes, to the witnesses and their close adherence to the subject matter committed to them."

The untruth in this statement and the unjust implied criticism of the Congress contained in it has been exposed by the American Bar Association's committee on Communist tactics, strategy, and objectives. I quote from that section of its report which deals with the Canadian Royal Commission on Espionage:

"CANADIAN LAW AND COMMUNISTS"

"The report of the Canadian Royal Commission on Espionage, which was created on February 5, 1946, to investigate the charges of Igor Gouzenko, and which is the royal commission most nearly comparable in purpose to the House Un-American Activities Committee, reveals the following differences between the methods used by a royal commission investigating subversion and the methods used by a congressional committee investigating subversion:

"1. A royal commission can arrest and jail witnesses. A congressional committee has no such power.

"2. A royal commission can hold witnesses without bail and incommunicado for many days and until after they are questioned. A congressional committee has no such power.

"3. A royal commission can compel witnesses to testify and impose sanctions for refusing to testify. It does not recognize a fifth amendment or privilege against self-incrimination, as do our congressional committees.

"4. A royal commission can have its police agents search witnesses' homes and seize their papers. A congressional committee has no such power.

"5. A royal commission may forbid a witness to have his lawyer present at the hearing. Congressional committees permit a witness to have his lawyer present and even to consult with him before answering each specific question.

"6. A royal commission can require all concerned in the inquiry, including witnesses, to take an oath of secrecy. The questioning by the commission can be secret and, since only selected excerpts from the testimony are then made public, it is impossible to know whether a fair selection was made. Most congressional committee hearings are public and open to the press.

"7. A royal commission is not subject to or under the control of the courts, Parliament or the Cabinet, and a commission 'is the sole judge of its own procedure.' Congressional committees are completely subject to Congress, and they need the assistance of the courts in dealing with contemptuous witnesses."

Just it may be charged that the American Bar Association has taken an exceptional commission as an example in an unobjective attempt to criticize the Supreme Court, I will mention certain facts about the royal commission on espionage established by the Commonwealth of Australia in 1954 to investigate the Petrov case. This, too, was a commission with a function very similar to that of the House Committee on Un-American Activities or this subcommittee.

On pages 447-453 of this commission's report there is reproduced the "Royal Commission on Espionage Act 1954" which delineates the powers of the commission.

This act reveals that the commission can subpoena witnesses and also fine and imprison them if they fail to appear or to produce any documents they are ordered to produce by the commission.

Witnesses subpoenaed to appear who do not report from day to day, unless excused by the chairman and released from further attendance, can be fined and imprisoned.

The chairman of the commission may issue a warrant for the arrest of a person who is subpoenaed and fails to appear. This warrant authorizes "the detention of the person in question" until he is released by order of the chairman of the commission.

A person who refuses or fails to answer a question put to him by a member of the commission can be imprisoned or fined.

Any person who contravenes or fails to comply with various sections of this act is, in addition to being guilty of an offense, also guilty of contempt "as if it were a contempt of the High Court."

Any person at all in the Commonwealth of Australia can be fined or imprisoned if, by writing or speech, he uses words calculated to bring the commission or any member of it into disrepute, or if he uses words which are false or defamatory of the commission or one of its members.

All members of the commission, in exercising their duties, have the same protection and immunity as a justice of the high court of Australia.

No witness summoned to appear before the commission has a right to the protection of the fifth amendment and can be fined or imprisoned if he refuses to answer any question or produce any document on the grounds that it may incriminate him or his spouse.

In the light of these facts I believe there can be no doubt that the Supreme Court's statement that royal commissions do not "resort to coercive tactics in

fulfilling their factfinding missions" is plainly untrue, just as is its statement that these commissions "seldom, if ever," have been given authority "to compel the testimony of witnesses or the production of documents."

THE COVERT CASE

The case of *Reed v. Covert* had nothing to do with communism but deserves mention here. This case concerned United States military criminal jurisdiction over civilians accompanying servicemen overseas. A woman who had been convicted by courts martial, under the Uniform Code of Military Justice, of murdering her husband appealed her conviction to the Supreme Court. Justice Black, in writing the majority decision which reversed her conviction, referred to a 1942 executive agreement between the United States and Great Britain and said that this agreement gave the United States exclusive jurisdiction over offenses committed in Great Britain by servicemen of this country and their dependents.

This statement, too, was not true. The agreement in question concerned only servicemen. It made no mention of dependents. It was a wartime agreement, covering a period when wives were not permitted to go overseas with their husbands. For this reason, the agreement in question had no relevance to the issue on which he was ruling.

I do not know and therefore will not attempt to explain why or how these untrue statements and implications have crept into recent Supreme Court decisions. The facts speak for themselves, however. The Court is not performing its duty in a manner the people and Congress expect—and have a right to demand—of it. Congress therefore has an obligation to do something to correct the situation in carrying out its responsibility to the people and the Nation's security.

Another reason why Congress must act is because the previously mentioned Court decisions make it clear that the Court is not responsive to the will of the people. It is not serving the people as it should.

Some people claim the Court should not be influenced in any way by popular desires or opinion, that it should be completely divorced from it in every way.

This is not a correct view. The judiciary is one of the three branches of the Federal Government. As such it is part of the Federal power. If we are to have real self-government, all of the Federal power, not just part of it, must be responsive to the people. Legislation represents the will of the people. The court's function, in other words, is that of interpreting the people's will. If the Court does not serve the people in this way, it becomes an agent of autocracy, not democracy.

This view has recently received public support from a member of the Supreme Court. In a speech at Georgetown University last November, Justice William J. Brennan made the following statements:

"Law is here to serve, insofar as law can do so * * * the realization of man's ends."

Law is "a service to attain the ends that society desires."

Under the present Supreme Court, however, United States law is not serving the end and desires of the American people.

The people of this country showed their desires, as far as communism is concerned, when, through their elected representatives, they supported the Smith Act, the Internal Security or Subversive Activities Control Act of 1950, the Communist Control Act of 1954, the Federal loyalty-security program; when 42 States and 2 Territories passed antiseditious laws and when, on the Federal, State, and municipal level, numerous other anti-Communist measures were adopted.

As an indication of how the American people feel about the Communist Party and individual Communists, and whether or not the Supreme Court is serving them by the decisions it is making, I quote from several public opinion polls on this subject:

A Gallup poll which appeared in various newspapers on May 17, 1950, stated that the Mundt-Nixon bill—which, with minor changes, is the Internal Security Act of today—"meets with the overwhelming approval of United States voters." This bill, by the way, had not then become law.

The poll revealed that when asked about its requirement that Communist Party members register with the Department of Justice, 63 percent of the persons polled in August 1948 favored registration; 77 percent did so in December 1949; and 67 percent in May 1950.

The Gallup report of that date also made the following statement: "The general public has consistently favored outlawing the party, and by a very

large vote." Surveys made by the American Institute of Public Opinion revealed that in 1947 the public favored such a step by a vote of 2 to 1 and in December 1949 by a vote of 4 to 1.

The result of a poll made by the Psychological Corporation of New York City and released on May 20, 1950, showed that of persons interviewed in 132 cities and towns from coast to coast, 70.2 percent said that they believed "a Communist is a traitor to the United States" and only 9 percent answered "No" when asked whether they so believed. When the same question was asked in January 1948, 65 percent had answered "Yes" to it and in April 1949, 70.6 percent.

This release also stated that when people were asked whether they thought the Communist Party was like other political parties in the United States or like a fifth column loyal to Russia first, 80 percent of the people questioned in April 1949 had said that communism was like a fifth column.

A Gallup poll published on August 20, 1950, made the following statements:

"The overwhelming majority of American voters, even before the Korean war, were in favor of requiring all members of the American Communist Party to file their names with the Federal Government. * * *

"* * * the public would like to see steps taken now to remove all members of the Communist Party from jobs in industries that would be important in wartime. * * *

"Sentiment for routing the 'bad security risks' out of private employment in war industries is overwhelming—15 to 1."

Ninety percent of those asked had said that all Communist Party members should be removed immediately from all positions in United States industries that would be important in wartime.

The same Gallup poll stated that when questioned about what should be done with Communist Party members in the event of war with Russia, only 1 percent of those polled had said, "Nothing, everyone is entitled to freedom of thought." The overwhelming majority expressed the belief that Communists should be placed in prison, in internment camps, exiled from the United States, sent to Russia, or shot or hanged.

Even allowing for a certain percentage of inaccuracy in opinion polls, these reports make it clear that the American people have intense distaste for Communists and that they believe in strong measures being taken against them, that they believe Communists are traitors. Treason has always been considered among the most heinous of crime.

In spite of this, the Supreme Court has struck down or crippled and emasculated one antisubversive law, order, and agency after another.

The outcry of the people against the Supreme Court in the past 2 years or so—and the lack of protest from the people over the last 10 years while these measures were being adopted and upheld in numerous lower courts—is a clear indication of how far removed from the will of the people the Supreme Court is.

I might add that the great number of lower-court decisions the Supreme Court has had to strike down in its recent rulings is additional evidence that a serious question exists as to the Supreme Court's competence. Its decisions can be termed right only if those of numerous other judges—of many years' experience and high repute—can be termed wrong.

Various proposals have been submitted to the Congress as means of meeting the security problem posed by the Supreme Court.

It has been suggested that the Court be impeached. Inasmuch as the Constitution states, however, that impeachment can be only for "treason, bribery, or other high crimes and misdemeanors" it would appear that grounds for impeachment do not exist.

Election of Justices has been proposed. There is a danger in this of embroiling the Court in politics and thus impairing its objectivity. Inasmuch as the Constitution gives the President the power to appoint Justices with the consent of the Senate, this would also involve amendment of the Constitution—a step which should, as a rule, be avoided unless it is absolutely necessary.

The proposal has been made that Congress be given the power to veto a Supreme Court decision. This, too, would involve a constitutional amendment which is unnecessary because a constitutional provision already existing gives the Congress the power to curb the Supreme Court.

It has been urged that reconfirmation of Justices be required after varying numbers of years. This, again, contains the danger of involving the Court in politics and impairing its objectivity. It is therefore of rather dubious value.

Previous judicial experience of varying types and years has also been proposed as a requirement for Supreme Court Justices. There is certainly value

in this. It will not, however, solve the major problem. Mere experience is no guaranty that a Justice will not act just as some of the current Justices have been acting.

It has been suggested that no one who has held political office within a certain number of years shall be eligible for the Supreme Court. This is of questionable value. It may bar an exceptionally well-qualified man who would undoubtedly be above politics on the Court and result in the appointment of a far less competent person who might be very political in outlook even though he had never held political office.

It has been urged that the Supreme Court be forced to hold a full oral hearing on any case it decides. The VFW has not had the chance to look thoroughly into facts relevant to this suggestion. It does not know if it would unduly delay Court proceedings and decisions. Therefore it does not condemn nor approve the proposal—but does point out that this procedure alone will not be a guaranteed cure for the problem. The fact that the Court listens to oral arguments is no assurance that it will rule wisely and well.

It seems therefore that the best solution to the problem is S. 2646. It requires no constitutional amendment. It would effectively deal with the problem at hand by simply denying the Supreme Court appellate power in those five areas in which it has done the greatest damage and demonstrated its strongest penchant for exceeding its powers. These areas are:

1. The functions, practice, or jurisdiction of a committee or subcommittee of the Congress, or their contempt actions and proceedings.
2. The activities, functions, practice, and jurisdiction of the executive branch in the field of personnel security.
3. State control of subversive activities.
4. Local school rules, bylaws, and regulations concerning subversive activities by teachers.

5. Any laws, rules, or regulations of the States and State bar examiners or similar bodies—and acts flowing from them—concerning the admission of persons to the practice of law.

Most of these areas are areas of States rights and community rights. They are areas where it is desirable to exclude Federal power. Permitting the Supreme Court, a part of the Federal power, complete freedom to operate in these areas (such as it now has) can endanger States rights just as giving the legislative or executive branch unlimited freedom in these areas would. The Federal judiciary can—and does—endanger State sovereignty just as the executive and legislative branches can.

For these reasons those who truly believe in the United States Constitution—in the States rights and in the limits of Federal power it provides—will have no difficulty in endorsing S. 2646. It will accomplish a number of desirable ends.

Of course, there is some opposition to this bill. In time misconceptions and myths always creep into the affairs of men and their societies. It is because of this that some very sound ideas, when they are proposed, jolt and shock people. When they are first brought forth, they appear to be revolutionary, extremely radical, or completely wrong and dangerous. They so appear only because of these myths which have grown up and which conceal the truth about their validity.

There is reason to believe this is the case with much of the opposition to S. 2646. The idea of depriving the Supreme Court of some of its appellate powers shocks some people. It appears to be dangerous. They usually—out of ignorance—say it would be unconstitutional.

This is so because of a myth now current in this country—the myth that the Supreme Court is without question the highest of all the branches of government, that it is not only the Supreme Court but the supreme power of these United States; that it has an unquestioned right to tell the other branches of Government and the States what they can and cannot do—almost without limitation.

A study of the Constitution makes it clear that our Founding Fathers never intended the Supreme Court to be supreme even in its appellate powers, which is the subject with which this hearing is largely concerned. They very specifically and unequivocally put the Supreme Court's appellate functions under the control of the Congress and gave Congress the unquestioned right to give and take away, or to restrict that power.

According to the Constitution, the Supreme Court is anything but the highest of the three branches of Government. It is a lesser one. The people, in creat-

ing the judicial, legislative, and executive branches of this Government as separate, distinct, and balancing powers, gave the legislative branch important powers over both the executive and judiciary. The reason for this is obvious. They wanted their Government to be responsive to their will. The legislative branch, because of its nature, its election system, etc., is closer to the people and can be more readily controlled by them. The Founding Fathers, therefore, gave most of the power of this Government to the Congress.

The idea that the Supreme Court is to be revered, held sacrosanct, never curbed, and its word always blindly obeyed has also gained wide acceptance. This myth serves the Supreme Court, but not the people of this Nation. The sooner such a myth is destroyed the better off the people will be.

Another misconception currently finding favor is the idea that the executive branch of the Government and the judiciary are much more reliable than the legislative; that they are sounder, more reasonable, more stable, and not so liable to be irresponsible, immoderate, or hysterical; that they have much more devotion to the Constitution than the Congress does.

Reason tells us, however, that the 531 men and women who make up the Congress are a stabler and safer group with which to trust the people's interests than a Supreme Court of only 9 men, or an executive branch made up of 1 man elected by the people who has surrounded himself with his own choice of administrators.

In spite of all the recent charges of hysteria and irresponsibility on the part of Congress—and in spite of the fact that the phenomenon of mass hysteria does exist—the fact is that 531 men and women, the great majority of whom are attorneys, former judges, doctors, engineers, and men of a generally high educational level, will, as a rule, be difficult to panic or push into irresponsible action. Their very numbers, the variety of ideas, beliefs, and thoughts among so large a group, argues its greater responsibility. Just as it does its being better informed on a variety of subjects than a small group of men, and its being closer to the people and their desires.

Our organization's resolutions make it clear that we are counting on the Congress to correct the evils wrought by the Supreme Court. I trust that the Congress itself and the people of this country will therefore adopt our faith in the Congress as the more trustworthy agency of the Government—and also our conviction about its constitutional superiority and its clear responsibility and right to take needed action now in regard to what the Supreme Court has done to our national welfare.

The Veterans of Foreign Wars therefore urges this subcommittee, the full Senate Judiciary Committee, and the Congress as a whole to act favorably on S. 2646, a measure which we deem beneficial to the interests of this Nation and its people.

In closing, I would like to express to the subcommittee the Veterans of Foreign Wars appreciation for allowing us the privilege of presenting our views on S. 2646.

Mr. McNAMARA. The first four pages of the statement of the Veterans of Foreign Wars on S. 2646 are concerned with resolutions passed by our organization which affected the Supreme Court. They cover every major decision made by the Supreme Court on the subject of Communism in the last 2 years, and they amount, in effect, to a mandate for our legislative service to overcome all the decisions and what might be termed the policy of the Supreme Court in dealing with Communist issues. And, inasmuch as we have this mandate, it appears that there are only two questions for us to decide when it comes to the matter of endorsing S. 2646.

The first, is the bill constitutional and is it desirable? Would it serve the common welfare?

As far as its constitutionality is concerned, section 2, paragraph 2, the third article of the Constitution states that—

In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

In other words, the Founding Fathers clearly intended that the appellate powers of the Supreme Court would always be subject to the will of Congress. The Congress could give and take it away as it saw fit; and, inasmuch as that is what this bill does, we see no constitutional bar.

As to the desirability of the bill, the answer to that depends to a great extent on what the Court has been doing in recent years on the Communist question. I review in my statement 20 recent Court decisions affecting the subject of communism, and 15 of these are taken from the report of the American Bar Association's committee on Communist tactics, strategy, and objectives. And this committee notes that each 1 of these 15 directly affects the right of the United States of America to protect itself from Communist subversion.

And I conclude that these and other recent Court decisions make it clear that the Court is usurping the power of the States, the local communities, and their agencies, and the executive and legislative branches of the Government. And it is, therefore, incumbent upon the Congress to do something to curb the Court, whose function is to interpret law as it is written by authorized legislative bodies and not write law itself.

The Congress, for instance, has the right to determine that the States may prosecute subversives, but, in the Nelson case, the Supreme Court determines that they could not, and it did so by twisting the intent of Congress in writing the Smith Act.

The legislative and executive branches of the Government have the right to determine qualifications for Federal employment, and the various States and municipalities have a similar right to set standards for their employees as long as, in doing so, they do not violate basic constitutional rights.

The Supreme Court intruded on this right in the Cole and Slochower cases. The dismissal of Slochower, for example, was not an invasion of his constitutional rights. He was not forced to incriminate himself; his right to invoke the fifth amendment was unquestioned and respected. The Court, however, did not respect the right of the people of New York City, who pay the salaries of the city employees, to determine the standards those employees must maintain if they want to continue in the city's service.

The Court has also been making extralegal judgments. In the Schwabe case, it made a determination that no substantial doubt about a man's good moral character was raised by the fact that he had been a Communist Party member, that he had used aliases, and that he had a criminal record, and this was not an interpretation of law but, rather, a social judgment, and beyond the function of the Court.

And the second reason why we feel there is need to curb the Court is because, in a number of recent cases, it has made statements which aren't true. Now, we believe that, on matters affecting national security, the Court has a solemn obligation to carefully check its facts and make sure that it is on solid ground in every statement it makes.

In the Nelson case, the Court ruled that the States could not prosecute seditious activity because, for one thing, the Congress had intended to occupy the field when it passed the Smith Act.

Now, Representative Howard Smith, the author of that act, has pointed out that this was not his intention at all. In a letter to the attorney general of the State of Pennsylvania, he said:

As I am the author of the Federal act in question, I am deeply disturbed by the implications of this decision. May I say that, when I read this opinion, it was the first intimation I ever had, either in the preparation of the act, in the hearings before the Judiciary Committee, in the debate in the House, or any subsequent development, that Congress ever had the faintest notion of nullifying the concurrent jurisdiction of the respective sovereign States to pursue, also, their own prosecutions for subversive activities.

Senator Styles Bridges has also made a similar statement. He said:

I was in Congress in 1940 when the Smith Act was passed. I know what the Congress was thinking about when they passed that act. And I say Congress never intended that it should preempt the field regarding subversion.

Senator Edward Martin has stated:

A study of the debate at the time the Smith Act was approved in 1940 makes it clear that Congress did not wish nor intend that it should nullify the State sedition laws then existing or to be passed.

Senator John Stennis has also taken strong exception to the Court's claim. And I think it is clear from these statements that there was no validity in the statement of the Supreme Court's decision in the Nelson case that Congress, in passing the Smith Act, intended to deny to the States the power to prosecute sedition. And it is worth noting that Justices Reed, Burton, and Minton, in their dissenting opinion in the Nelson case, stated flatly that there was nothing in the Smith Act, itself, or any subsequent act of Congress to support the majority decision.

The Court also claimed in the Nelson case that, if States were allowed to prosecute sedition, there was "serious danger of conflict with the Federal plan." This statement, too, doesn't hold up under investigation.

The Department of Justice has presented an amicus curiae brief with the Supreme Court in this case in which it says:

The administration of the various State laws has not, in the course of the 15 years that the Federal and State sedition laws have existed side by side, in fact, interfered with, embarrassed, or impeded the enforcement of the Smith Act. The significance of this absence of conflict in administration or enforcement of the Federal and State sedition laws will be appreciated when it is realized that this period has included the stress of wartime security requirements and the Federal investigation and prosecution under the Smith Act of the principal national and regional Communist leaders.

This clear and unequivocal statement that there has been absolutely no conflict between the States and the Federal Government in the prosecution of sedition makes one wonder how the Court would have dared to make a claim to the contrary in its decision. The Slochower case—

Senator WATKINS. I wonder at this time if you would permit an interruption to call attention to a view contrary to what you are stating now, at least with respect to whether or not this is constitutional.

Now, this letter is written to one of the members of this committee, and it says, in part:

Thank you for calling my attention to Senate bill 2846, which would have the effect of limiting the appellate jurisdiction of the Supreme Court.

In my opinion, this measure should be vigorously opposed. For one thing, it would undermine the authority of the Court as a guarantor of constitu-

tional government where it would deprive that body of jurisdiction in cases involving basic constitutional rights. This is particularly serious because the area of deprived jurisdiction is one in which constitutional prerogatives too frequently have been ignored. There is also a substantial possibility that this measure would be unconstitutional. It seems likely that it would violate the due-process clause of the fifth amendment, because witnesses before congressional committees, alleged subversives, and lawyers could not obtain a uniform adjudication of their political and civil rights before the highest Court of the land, while other persons could.

Thus is created a very arbitrary classification which would, I believe, do violence to the Constitution.

And this man happens to be the dean of a very important law school in the United States. And he says there:

This argument admittedly needs further research and elaboration. I raise the question because I think it needs consideration.

Sometime during your presentation I wish you would reply to that directly, if you desire.

Mr. McNAMARA. All right. Fine.

Just offhand, I would say, Senator, that I don't know who this man is and I know that various people have raised questions about the constitutionality of this bill. But I cannot see how any man, no matter what his standing is, can claim it is unconstitutional when the Constitution, itself, which I quoted a few minutes ago, states so explicitly and clearly that this is what Congress can do any time it wants to.

Senator WATKINS. He says it might have one interpretation for one set of citizens and another set who couldn't get into the Court would still have a different one. In other words, you might get—

Mr. McNAMARA. Well, in all Federal cases, under this bill, you would have the same court giving the final interpretation. It wouldn't go up as high as the Supreme Court, but you would have your court of appeals here in Washington give the final ruling. One court in all cases. So your principles underlying the interpretations or the decisions would be basically the same, unless this court started to vary as much as the Supreme Court has.

I believe I was speaking, Senator, last about some untrue statements that have cropped up in court decisions recently. One was in the Slochower case, in which the Court stated:

It appears that neither the subcommittee nor Slochower was aware that his claim of privilege would ipso facto result in his discharge and would bar him permanently from holding any position either in the city colleges or in the city government.

Now, the record of the Slochower hearing shows that this statement is not true, that both the subcommittee and Slochower knew what the result would be if he invoked the fifth amendment. Because of this, New York City asked the Court to reconsider its decision on the ground that it was based on a demonstrable error of fact. The Court calmly admitted its error on May 28, 1956, but refused to reconsider its decision.

Then in the Watkins case, the Court stated:

In the decade following World War II, there appeared a new kind of congressional inquiry unknown in prior periods of American history. Principally, this was the result of the various investigations into the threat of subversion of the United States Government * * *. This new phase of legislative inquiry involved a broad-scale intrusion into the lives and affairs of private citizens.

Now, that statement, too, is not true. Similar congressional inquiries were made by the Special Committee on Un-American Activities prior to World War II—in 1938, 1939, 1940, and during the war. These investigations, too, concerned subversion and intruded into the lives and affairs of private citizens, not only Communists and fellow travelers but also Nazis and pro-Nazis. Even prior to the formation of this committee in 1938, we had committees such as the Select Committee To Investigate Charges Made by Dr. William A. Wirt and the Special Committee on Nazi Propaganda, which made the same type of general investigations.

And then in the Watkins decision, too, the Court, by implication, makes an unfavorable comparison between the special commissions of inquiry of the British Commonwealth and the committees of this Congress. It says:

Modern times have seen a remarkable restraint in the use by parliament of its contempt power. Important investigations, like those conducted in America by congressional committees are made by royal commissions of inquiry Seldom, if ever, have these commissions been given the authority to compel the testimony of witnesses or the production of documents. Their success in fulfilling their fact-finding missions, without resort to coercive tactics, is a tribute to the fairness of the processes to the witnesses and their close adherence to the subject matter committed to them.

The American Bar Association's committee on Communist tactics, strategy, and objectives has pointed out the untruth in that statement. It went into the matter of the Canadian Royal Commission on Espionage that looked into the Gouzenko case and it makes this statement—it points out these differences between that commission and the United States congressional committee:

1. A royal commission can arrest and jail witnesses. A congressional committee has no such power.

2. A royal commission can hold witnesses without bail and incommunicado for many days and until after they are questioned. A congressional committee has no such power.

3. A royal commission can compel witnesses to testify and impose sanctions for refusing to testify. It does not recognize a "fifth amendment" or privilege against self-incrimination, as do our congressional committees.

4. A royal commission can have its police agents search witnesses' homes and seize their papers. A congressional committee has no such power.

And so on. It makes three more points which directly contradict the Court's implication.

Now, some people may claim or believe that the American Bar Association might have selected an unusual commission here in an effort to discredit the Supreme Court. Well, I have looked into the report of the Australian Royal Commission. It was set up in 1954 to investigate the Petrov case. And on pages 447 to 455 of this report there is produced the Royal Commission on Espionage Act of 1954 which outlines the powers of the commission. This act reveals that the commission can subpoena witnesses and also fine and imprison them if they fail to appear or to produce any documents they are ordered to produce by the commission.

Witnesses subpoenaed to appear who do not report from day to day, unless excused by the Chairman and released from further attendance can be fined and imprisoned.

The Chairman of the Commission may issue a warrant for the arrest of a person who is subpoenaed and fails to appear. This war-

rant authorizes "the detention of the person in question until he is released by order of the Chairman of the Commission."

A person who refuses or fails to answer a question put to him by a member of the Commission, can be imprisoned or fined.

Any person who contravenes or fails to comply with various sections of this act is, in addition to being guilty of an offense, also guilty of contempt "as if it were a contempt of the high courts."

Any person at all in the Commonwealth of Australia can be fined or imprisoned if, by writing or speech, he uses words calculated to bring the Commission or any member of it into disrepute or if he uses words which are false or defamatory of the Commission or one of its members.

All members of the Commission, in exercising their duties, have the same protection and immunity as a Justice of the High Court of Australia.

And, then, any witness summoned can be fined or imprisoned if he refuses to answer any question or produce any document on the grounds that it may incriminate him or his spouse.

In the light of these facts, I believe there can be no doubt that the Supreme Court's statement that Royal Commissions do not "resort to coercive tactics in fulfilling their factfinding missions" is plainly untrue, just as is its statement that these Commissions "seldom, if ever," have been given authority to "compel the testimony of witnesses or the production of documents."

Then, in the Covert case, this had nothing to do with communism but involved a right of the United States military to try the dependents of servicemen who accompanied them overseas. A woman who had been convicted by court-martial of murdering her husband appealed her conviction to the Supreme Court. Justice Black, in writing the majority decision which reversed her conviction, referred to a 1942 executive agreement between the United States and Great Britain and said that his agreement gave the United States exclusive jurisdiction over offenses committed in Great Britain by servicemen of this country and their dependents.

Actually, this statement, too, was not true. The agreement in question, which I have checked, makes no reference at all to the dependents of servicemen. It was a wartime agreement covering a period when servicemen were not permitted to have any dependents accompany them overseas.

Now, I make no attempt to explain how these untrue statements have crept into one Supreme Court decision after another, but I believe that it is indicative of the fact that the court is not performing its duty in the manner that the people and Congress expect and have a right to demand of it, and, therefore, Congress has the obligation to do something to correct the situation.

Another reason why we feel Congress should act, is because the Court is not responsive at the present time to the will of the people.

Senator WATKINS. Just what do you mean by that?

Mr. McNAMARA. Well, we are supposed to have—

Senator WATKINS. In other words, you think they ought to go out and count noses?

Mr. McNAMARA. No, sir, I don't, but we have self-government or we should have, and if you have self-government in every branch of

the Federal power, the judicial as well as the legislative and executive, it will be generally responsive to the will of the people. The Court's function is to interpret legislation. The legislation is the will of the people. In other words, the Court is supposed to interpret the will of the people, what the people want, inasmuch as legislation is an expression of their will, and if it does not do this, it becomes an act of autocracy rather than democracy and, Justice Brannan, I might point out, has just recently expressed this view in a talk at Georgetown University last fall when he said:

Law is here to serve insofar as law can do so the realization of man's ends
And—

Law is service to attain the ends that society desires.

Under the present Supreme Court, however, United States law is not serving the ends and desires of the American people. They have shown what their desires are, as far as communism is concerned, by the support they have given the Smith Act since it was passed 18 years ago. They have shown their desires by the support they have given the Communist Control Act, the Internal Security Act of 1950, by the support they have given 42 State sedition laws and numerous other measures adopted on all levels of government to curb communism.

I might mention a few public opinion polls which are pertinent here. The Gallup poll, May 1950, stated that the Mundt-Nixon bill which, with minor changes, is the Internal Security Act of today, "meets with the overwhelming approval of United States voters."

Another poll, the Psychological Corporation of New York City, released on May 26, 1950, showed that persons interviewed in 132 cities and towns, 79.2 percent said they believed "a Communist is a traitor to the United States" and only 9 percent answered "no" when asked whether they so believed, and the same question was asked in January 1948, when 65 percent had answered "yes" to it and in April 1949, 79.6 percent.

Another Gallup poll later in the year 1950, stated that when questioned about what should be done with Communist Party members in the event of war with Russia, only 1 percent of those polled had said, "Nothing. Everyone is entitled to freedom of thought." The overwhelming majority expressed the belief that Communists should be placed in prison, in internment camps, exiled from the United States, sent to Russia, or shot or hanged.

Now, in spite of this, the Supreme Court, in its recent decisions, has struck down, crippled, and emasculated one antisubversive law, order and agency after another. And, I think this demonstrates that it is not at all responsive to the will of the people, which it should be in a general way.

The outcry of people against the Court in the past 2 years and the lack of protest from the people over the last 10 years while the various antisubversive measures were being enacted, is an indication how far removed from the will of the people the Court is.

I might add that the great number of lower court decisions the Supreme Court has had to strike down to arrive at its recent decisions, is an indication that a serious question exists as to the Court's competence. We can say the Court has been correct in all of these cases only if we first admit that all the lower courts, made up of judges of

many years' experience and high repute, have been consistently wrong.

Now, various proposals have been made for handling this question. It has been suggested that the Court be impeached, that we elect Justices, that Congress be given the power to veto the Supreme Court's decisions, that Supreme Court Justices be subject to reconfirmation at every so many years, that previous judicial experience be required, and that no one who had held political office in the last 5 years or so be allowed to sit on the Court, or that the Court be required to grant a full oral hearing on every case before it decides.

Some of these have merits, others I think would not solve the problem at all. Some of them would involve an amendment to the Constitution which I think should be avoided unless it is absolutely necessary. And inasmuch as the Constitution has clearly given the Congress the power to curb the appellate functions of the Court, and we have something already existing that will provide the answer to this question, it is our feeling that S. 2646 is the answer.

Senator WATKINS. Let me ask you this question. Suppose this law became effective and the Supreme Court could be deprived of jurisdiction in the matters mentioned. And then your circuit courts of appeal should follow pretty much the pattern that the Supreme Court had followed prior to the enactment of this act. What would you do next?

Mr. McNAMARA. Well, I would say, Senator, if that happens—

Senator WATKINS. I am asking that for information because it could happen. It is possible that—

Mr. McNAMARA. Yes; I would say whenever the situation was bad enough that it is the duty of Congress to act in the interest of national security, and if it had to do that, it would again enact legislation that would take care of that problem. Now, what would be the best form, I don't know.

Senator WATKINS. Would you take jurisdiction away from the circuit courts of appeal, the intermediate courts?

Mr. McNAMARA. I would say—

Senator WATKINS. If you applied the same remedies, you might get to the point where you don't have anybody to consider these matters at all, wouldn't you?

Mr. McNAMARA. In theory, yes; but I don't think in practice we would ever come to that because, as I mentioned before, what the Supreme Court has been doing is reversing one Federal court after another. In the summary I made earlier in my statement of the 20 recent Supreme Court decisions, I point out that in case after case, the Supreme Court has reversed State courts and then 1 or 2 Federal courts. In other words, it seems that we have reached the point where our lower courts have a body of law and traditional law that they abide by, that they believe in. It gives them a sound basis from making decisions. But, in spite of all that, these cases come up to the Supreme Court. The Communists have lost every single appeal in all of the lower State courts, and then win when the case comes to the Supreme Court. So there has been a consistency in our lower courts, but it seems to be lacking in the Supreme Court. So, from a practical viewpoint, I don't think we would arrive—

Senator WATKINS. These questions just naturally present themselves. I haven't made up my mind on this question at all and I

am seeking all the light I can get. That question does arise. Judges change as time goes on.

Suppose we had the same situation in the intermediate appellate courts we now have in the Supreme Court. Now, as you say—well, of course, Congress could then act. What next can it do? Is there anything else we might do other than take away the Supreme Court's jurisdiction in these cases? Is there any other avenue?

Mr. McNAMARA. I have not explored other possible remedies. As to impeachment, in my statement I say it would appear that grounds for impeachment do not exist. The Constitution provides that impeachment can be only for "treason, bribery, or other high crimes, and misdemeanors." And I don't believe there are grounds for charging the High Court, the Supreme Court, with that. Therefore, I reject the idea of impeachment.

Senator WATKINS. Do you know of any other grounds that might possibly be used?

Mr. McNAMARA. One thought that occurs to me is the Constitution says that the Justices shall hold their position under conditions of good behavior. Now, Congress I believe has never defined just what good behavior is. I do not propose a definition for this good behavior but that might be one way of handling this situation, by drawing up a definition of good behavior that would cover this theoretical problem if it arose.

Senator WATKINS. I assume you recognize that this is—the remedy proposed here is a rather drastic one. Of course, I recognize the situation is also one that calls probably for some action. I personally do not agree with many of those decisions the Supreme Court has rendered in those cases, but as a lawyer and a former judge, I recognize the fact that many times people become disturbed at what courts do, and then later on the same courts are received with considerable respect after that, the decisions are, with great respect thereafter.

Mr. McNAMARA. I know, Senator, the reaction of many people is that this is a rather drastic measure but I think it is due, in part—I mentioned here that certain myths creep into society over a period of years and I believe one of the current myths is that the Supreme Court is not only the supreme court of the land but is the supreme power that is somehow above all the other branches of government, that it should be up there on a pedestal at all times. It cannot be contradicted, but when you read the Constitution, it clearly provides that Congress has power over the courts, that if anything, Congress is the more important branch of the government.

Senator WATKINS. At least we like to think so over here.

Mr. McNAMARA. Well, I think it is constitutionally sound. The Founding Fathers very clearly gave the Congress a very strong power over the Court which I don't think they would have done if they had thought that the Court should be above or beyond curbing or criticism. Obviously, if we are going to maintain our balance of powers, the Congress must have some means of disciplining the Court or the executive branch of the Government when they overstep their bounds, and that, I think, is where the Constitution—where the Founding Fathers were so explicit in saying the appellate courts and the Supreme Court are always and completely subject to the will of Congress.

So, even though that sounds drastic, it is just because many of us don't read the Constitution frequently. We are not familiar with all of its provisions and we have developed this idea that the Supreme Court is supreme in every way when actually it isn't.

Senator WATKINS. Do you have any questions?

Senator JENNER. I have no questions.

Senator WATKINS. You haven't finished your statement yet, have you? I interrupted you.

Mr. McNAMARA. Not quite. I would just like to make one more point and that will wind it up.

Senator WATKINS. All right, sir, go right ahead.

Mr. McNAMARA. I say that another misconception currently finding favor is the idea that the executive branch of the Government and the judiciary are much more reliable than the legislative; that they are sounder, more reasonable, more stable, and not so liable to be irresponsible, immoderate, or hysterical; that they have much more devotion to the Constitution than the Congress does.

Reason tells us, however, that the 531 men and women who make up the Congress are a stabler and safer group with which to trust the people's interests than a Supreme Court of only 9 men or an executive branch made up of 1 man elected by the people who has surrounded himself with his own choice of administrators.

Despite all of the recent charges of hysteria and irresponsibility on the part of Congress, and despite the fact that the phenomenon of mass hysteria does exist, the fact is that 531 men and women, the great majority of whom are attorneys, former judges, doctors, engineers, and men of a generally high educational level, will, as a rule, be difficult to panic or push into irresponsible action. Their very numbers, the variety of ideas, beliefs, and thoughts, among so large a group, argues its greater responsibility, just as it does its being better informed on a variety of subjects than a small group of men, and its being closer to the people and their desires.

Our organization's resolutions make it clear that we are counting on the Congress to correct the evils wrought by the Supreme Court. I trust that the Congress itself and the people of this country will therefore adopt our faith in the Congress as the more trustworthy agency of the Government, and also our conviction about its constitutional superiority and its clear responsibility and right to take needed action now in regard to what the Supreme Court has done to our national welfare.

The Veterans of Foreign Wars, therefore, urges this subcommittee, the full Senate Judiciary Committee, and the Congress as a whole, to act favorably on S. 2646, a measure which we deem beneficial to the interests of this Nation and its people.

In closing, I would like to express to the subcommittee our appreciation for being given the opportunity to express our views.

Senator WATKINS. Senator Jenner, do you have any questions?

Senator JENNER. I have no questions. I am sorry I didn't get in to hear the whole presentation of the witness, but I certainly want to thank you and your organization for the interest you have taken in coming before this committee and presenting your views on this bill.

Senator WATKINS. I join with Senator Jenner in expressing that appreciation. It is a very interesting question and I am sure you will agree with me that it is one that should be given very careful consideration.

Mr. McNAMARA. I surely do, Senator.

Senator WATKINS. And I think that is just what this committee will do. You may be excused now.

Mr. McNAMARA. Thank you, sir.

(Witness excused.)

Senator WATKINS. We will call Mr. Irving McCann of Washington, D. C.

TESTIMONY OF IRVING G. McCANN, WASHINGTON, D. C.

Senator WATKINS. Did you hear the statement I made to Mr. McNamara about summarizing your paper?

Mr. McCANN. Yes, sir. Mine is brief. I can give it in 10 or 15 minutes.

Senator WATKINS. Whatever way you would like.

Mr. McCANN. I would like to do it that way and then answer questions. I may make 3 or 4 interpolations because of the inquiries you have made, but I think my document won't take but 10 or 15 minutes to read.

Mr. Chairman and members of the committee, for the purpose of identification my name is Irving G. McCann of 1700 K Street NW., Washington, D. C. As to my qualifications as a witness, I received academic degrees from four colleges and universities and am a member bar of the United States District Court and the Court of Appeals for the District of Columbia, the United States Supreme Court, and several other Federal and State courts. I have practiced law for 40 years and at this time am an associate of and trial lawyer for the firm of Brookhart, Becker & Dorsey of this city. This is a personal statement based solely on my judgment and 70 years of experience, and my associates are not responsible for the views which I express. I have served as special assistant to the Attorney General of the United States, as counsel for three select committees of the House of Representatives, and as general counsel of the Standing Committee on Education and Labor of the House of Representatives in the 80th Congress which enacted the Taft-Hartley law. I am the author of *Why the Taft-Hartley Law?* My experience has given me a very strong faith in the integrity of the Congress as the guardian of the rights of the States and citizens of the United States. It is my favorite branch of the Government. That is an interpolation.

Senator WATKINS. We might agree with you on that. However, sometimes I think Senator Jenner and I would also agree that the Congress does some things that we don't like and we might want to limit its jurisdiction.

Mr. McCANN. That is right; yes, sir. That is all right, too. I think that people ought to object—

Senator JENNER. The people can handle our jurisdiction.

Mr. McCANN. They take care of that every 6 years, Senator.

While I have the greatest respect for our Federal judiciary, I do not know a single one of them who is infallible. They are human

beings, and putting black robes on them does not endow them with wisdom. It may make some of them conceited, captious, and unreasonable, but it does not make any of them supermen. The Congress of the United States has a constitutional duty to police the judiciary. And I think they have a constitutional duty to restrict the judiciary and that they should do so when they get beyond their field, their proper field of activities.

I have not studied and am not qualified to discuss the specific provisions of S. 2646 to strip the Supreme Court of its authority to review cases in the different areas of the security field. But I do have a very strong conviction that the Supreme Court of the United States has exceeded its constitutional authority in assuming jurisdiction with respect to matters which the Founding Fathers specifically reserved to the Congress, the executive branch, the States, and the people.

I appear before your committee to urge that legislation be enacted not only to limit the authority of the United States Supreme Court to prevent it from encroaching upon the constitutional rights granted to the Congress and the executive branch, but also to stop the Supreme Court from meddling with the rights reserved in the Constitution to the States and to the people. I also respectfully urge your committee to amend S. 2646 to require the Supreme Court to perform one of the primary duties for which it was created, namely, to review and adjudicate those cases in which any circuit court of appeals sitting en banc has decided a question of law by a mere majority.

And I think, Mr. Chairman, that one of the most important studies which this committee could make would be a statistical study of the Supreme Court's activities with respect to various subject matters. How many cases of review have been requested on communism? How many writs of certiorari have been granted in the last 10 years? How many petitions for writs of certiorari have been requested by minority groups? How many were granted? How many denied? How many requests for certiorari have been made by practicing attorneys such as myself after decisions such as I am going to discuss here where a court of appeals clearly decides an issue one way or the other? How many writs of certiorari were granted by the court?

I think it is time in this country that the rights of all the people should have a hearing before the Supreme Court as well as Communists and minority groups. Now, that is an interpolation. [Applause.]

The Congress, as the elected representatives of the people, has not only the right but also the duty to stop the Supreme Court from interfering in affairs which do not concern it. It also has the right and the duty to require the Supreme Court to review and decide all cases where a circuit court of appeals sitting en banc clearly demonstrates by a bare majority decision the need for a clarification and determination of the law.

It is my opinion that if the Supreme Court is stripped of its jurisdiction to intrude in the affairs of Congress, the executive branch, and the States, it will have ample time to perform at least some of the duties for which it was created. When I suggest that it should be mandatory upon the Supreme Court to pass on questions which a full court of appeals decides by a mere majority, it seems to me that this is a very modest and reasonable requirement for the Congress to

make of the Supreme Court. When a circuit court of appeals decides any case by a vote of 5 to 4, there must of necessity be considerable doubt as to the wisdom and justice of such a decision.

As you well know, most Federal judges are appointed to office as a reward for political services to the party in power. Some of them rise above their former estate as politicians and become great judges, but others follow the same formula on the bench which made it possible for them to secure their appointments to the judiciary; namely, you scratch my back and I'll scratch yours. That is why so many Supreme Court Justices and circuit-court judges pair off the way they do on important cases. That is another very cogent reason why it should be mandatory for the Supreme Court to grant certiorari in any case where a circuit court of appeals is divided 5 to 4.

With your permission I should like to illustrate the need for such legislation from a recent case of mine in which the Supreme Court denied a petition for writ of certiorari. On May 23, 1955, I filed suit for damages in the United States District Court for the District of Columbia on behalf of *Marguerite Jamieson and Cecil B. Jamieson, v. Woodward & Lothrop and Helena Rubinstein, Inc.*, and demanded a jury trial. The suit was based upon the manufacture and sale by Helena Rubinstein, Inc., of a rubber rope called a Lithe-Line which was advertised and sold to women as an exercising and reducing device which anyone could use, and which, if used according to instructions, would restore the figure of the user to her wedding-ring size. The Lithe-Line was sold by Woodward & Lothrop to plaintiff Marguerite Jamieson and delivered to her home in Virginia. This is the little miracle worker which would restore any woman's figure to its wedding-ring size. You will note that it is a rubber rope about 40 inches long with handgrips at each end.

On receiving the Lithe-Line Mrs. Jamieson read the instructions, sat down on the floor, gripped the hand holds and put the middle of the rope upon the soles of her feet; then she lay flat on her back and started to lift her feet over her head as directed and illustrated in the instructions which accompanied the Lithe-Line. The rope slipped off her feet and struck her across the eyes with such force that she suffered a detached retina of her left eye.

It was alleged in her complaint that the "device when used according to instructions" was

"inherently dangerous to the user and failure of defendants to warn or otherwise protect plaintiff Marguerite Jamieson against such danger constituted negligence and breach of warranty of fitness."

It was further stated by plaintiffs in answer to an interrogatory by defendants that—

No safety or protective device of any nature to prevent the Lithe-Line from striking the user doing the Tummy Flattener exercise—now, that was the exercise to flatten the tummy when they put it over the feet and push up with the rope—is provided by the defendants nor is any warning of danger given.

The deposition of Marguerite Jamieson was taken by defendants and she testified to reading about the Lithe-Line in an advertisement by Rubinstein in a ladies' magazine and to purchasing a Lithe-Line from Woodward & Lothrop and that said Lithe-Line was delivered to her home in Virginia. She further testified that she read the instructions before using it and that she was following the instructions

when the injury to her eye occurred. Defendants thereafter filed a motion for summary judgment and the motions court asked to see the Little-Line—I don't think he picked it up, so much as picked it up, but he asked to see it—which he looked at and compared with an old-fashioned skip rope, jumping rope that little girls used to use. Later, the court showed his complete ignorance of the pleadings in the case when he asked, "Is this an elastic rope?" When my associate, Mr. Dorsey, said, "Your Honor, this elastic, rubber rope has quite a bit of tensile strength" the court interrupted him with the profound statement, "Mr. Dorsey, you can take an ordinary rubber band and stretch it, and if you are careless with it, it might snap; and ordinarily it would not hurt anybody, but it might hurt somebody * * * it might hit you. I would not suppose you would have a cause of action against the manufacturer of the rubber band or the person who sold it to you." To which Mr. Dorsey replied, "No, I would not suppose so either. But the manufacturer didn't advertise and sell that for a particular purpose, or provide particular instructions for its use, which if you follow and then are injured does give rise to a cause of action. What the defendants in this case are attempting to do is to prevent any of the questions of adequacy of warning, particularly in view of the strength developed in this article when you use it in accordance with the instructions, from ever being presented."

Without prolonging this narrative, the court cut Mr. Dorsey's argument off short and arrogated the functions of a jury—now, may it please the Senate, the Constitution gives people the right to a jury trial, and right here is where the district courts very frequently forget the Constitution. He assumed the powers of a jury. I don't want any judge who has a limited experience to pass on a technical question such as this. I will take the four or five hundred years of experience of ordinary men who know something about it. That judge knew more about rubber bands than he did about athletic equipment, and his last exercise was probably with a skip rope.

Now, your ordinary jury will have broad personal experience that they can bring to bear on the thing.

Now, getting back to my problem.

Without prolonging this narrative, the court cut Mr. Dorsey's argument off short and arrogated the functions of a jury by finding:

It is clear from the record of this motion that there is no basis for any contention that either of the defendants was negligent in any way or did anything or failed to do anything that was the proximate cause of the accident.

So the court granted summary judgment to defendants and denied plaintiffs their constitutional right to a trial by jury and the determination by a jury after hearing all of the evidence as to whether or not defendants were negligent.

We thereupon filed an appeal in the United States Court of Appeals for the District of Columbia. Following the submission of briefs, the United States Court of Appeals for the District of Columbia Circuit, sitting as the usual three-judge panel, heard oral argument from counsel for petitioners and respondents on May 3, 1956. On January 18, 1957, or 7 months later, the court of appeals ordered, *sua sponte*, that the case be set for rehearing before the court en banc. On January 31, 1957, the court, sitting en banc, heard oral argument from counsel for petitioners and respondents. On April 16, 1957,

the court of appeals affirmed the judgment of the district court in granting a motion for summary judgment both as to Woodward & Lothrop and Helena Rubinstein, Inc. The court of appeals was in unanimous agreement in affirming the district court in respect to Woodward & Lothrop, but was divided as to respondent Helena Rubinstein, Inc. A majority of 5 judges of the court of appeals decided to affirm the district court as to Helena Rubinstein, Inc., but the remaining 4 judges—and, of that 4, 2 of them sat on the first argument that we had before the court of appeals; in other words, 2 of 3 in the first argument agreed that we had a case against Helena Rubinstein, but the remaining 4 judges would have reversed the district court as to Respondent Rubinstein. We then petitioned the United States Supreme Court for a writ of certiorari for a review of the decision by the United States Court of Appeals for the District of Columbia Circuit as to respondent Helena Rubinstein, Inc. The petition was denied.

The majority and minority opinions of the United States Court of Appeals for the District of Columbia Circuit in *Marguerite Jamieson et al. v. Woodward & Lothrop et al.* (247 F. 2d 23-42) was a case of national interest, involving, as it did, the question of the responsibility of manufacturers who advertise their products as safe and furnish instructions to the ultimate consumer on how they shall be used. With respect to the instructions given by Helena Rubinstein, Inc., for the use of the Lithe-Line in the exercise known as the tummy flattener, it is interesting to note that, between the time that this case was filed in the United States district court and the time of the argument before the United States court of appeals en banc, the instructions for the use of the Lithe-Line were changed and the purchasers of the Lithe-Line were instructed that, in the exercise known as the tummy flattener, they should put their feet in the handholds and pull on the center of the Lithe-Line. The court of appeals would not consider this at the time of argument because it was not before the trial judge when he granted the motion for summary judgment. Nevertheless, the fact that Helena Rubinstein, Inc., changed their instructions to provide for a safe use of the Lithe-Line was an admission against interest.

This case was of further national interest because it involved the interpretation of the law of a sovereign State (Virginia) with respect to negligence and breach of warranty of fitness.

The truth of the above statements is established by the fact that on December 15, 1957, George D. Newton, Jr., student director of Yale University Law School, wrote to me requesting copies of the pleadings and record on appeal in *Jamieson v. Woodward & Lothrop* (supra) and said:

We think the above case, in which you were counsel, is one of legal significance, and have thus selected it for argument in the Yale moot court of appeals during the 1958 spring term.

Finally, without burdening your record with numerous quotations from the minority opinion in *Jamieson v. Woodward & Lothrop* (247 F. 2d 34 through 42), it is my considered judgment that it would be difficult to find a dissenting opinion by any four circuit judges which specifically points out as many errors in fact, in logic, and in law in a majority opinion as does the minority opinion in this case. It is

difficult to understand how the Supreme Court could have denied certiorari in this case if they read the minority opinion.

The Supreme Court has been so preoccupied with doing things which it ought not to have done that it has been negligent in failing to do the things which it ought to have done. So, I respectfully request that your subcommittee amend S. 2646 so that the Congress shall put an end to the sins of omission, as well as those of commission, by the Supreme Court.

Now, may it please the court, that completes my statement, and I would like to request that the opinion in the case of *Marguerite Jamieson et al., Appellant v. Woodward & Lothrop* be included as an exhibit in connection with my case, so that the criticisms which I say were made by the minority of the majority opinion may be available to anyone who was interested in this statement.

Senator WATKINS. The request will be granted, and it may be marked as an exhibit. That means it won't be copied.

Mr. McCANN. I want it copied.

Senator WATKINS. When we take it as an exhibit, before the committee—if we were to copy all these Supreme Court decisions in full in the record—

Mr. McCANN. I know that, Senator, but the point is this. The criticisms I have made of the Supreme Court here are pinpointed in the minority opinion there, and I would like to have the minority opinion at least follow my statement so as to show that I am not exaggerating, but stating factually, what was in that minority opinion. Now, it starts with page 34 and goes to, I think, something like 42; I am not sure.

Senator WATKINS. Well, would you be content if we just made the minority opinion reproduced and have the whole thing as an exhibit?

Mr. McCANN. Yes, but have the minority opinion follow my statement, and then anyone can see just what—

Senator WATKINS. That will be ordered.

(The minority opinion referred to will be found in the Federal Reporter, second series, and is as follows:)

[From 247 Federal Reporter, 2d series]

JAMIESON v. WOODWARD & LOTHROP

(Cite as 247 F. 2d 23)

WASHINGTON, Circuit Judge (dissenting), with whom EDGERTON, Chief Judge, and BAZELON and FAHY, Circuit Judges, join.

I would reverse as to defendant Rubinstein.

Mrs. Jamieson bought the Lithe-Line, manufactured and marketed by the defendant, for the purpose of reducing her abdomen. Instructions for its use were packed in the container with the Lithe-line. On the afternoon of the day the device was delivered to her home in nearby Virginia, plaintiff said, she read the instructions through, did two of the exercises there described and recommended "to get the feel of the rubber hose," and then proceeded to the "Tummy Flattener" exercise, the particular exercise "that was supposed to reduce" the abdomen. She followed the recommended procedure contained in the instruction booklet and, while so doing, the Lithe-Line slipped off her feet and struck her across the eyes, knocking her unconscious and causing a detached retina and permanent partial loss of vision in the left eye. The injury occurred while she was performing the exercise exactly as the manufacturer had directed and recommended, without any deviation from the instructions and without fault on her part, so far as the record before us shows. Her suit is based, not on the theory that the manufacturer put on the market an exerciser in itself inherently dangerous, as

the majority appears to believe, but on the premise that the exerciser *when used as directed* by the manufacturer became dangerous and that the manufacturer owed a duty to warn or otherwise protect her against such danger. In other words, her theory is that the use of the Lithe-Line in the Tummy Flattener exercise as directed by the manufacturer created an unreasonable risk of injury which gave rise to a duty toward users of the device. That theory of liability finds abundant support not only in the decisions of the Virginia courts, which govern here, but also in the general law of negligence.

1. Let us look first at general principles. The majority does not appear to dispute the fact that the Lithe-Line may slip off the feet when stretched in the Tummy Flattener exercise as directed, and that, if it does so, a force is released which can inflict injury on the user. It apparently bases its holding that the manufacturer had no duty to warn or protect the user as a matter of law on two grounds: (a) that the manufacturer could not have foreseen the risk of serious injury, and (b) that the danger was so obvious that the manufacturer was justified in believing that users would realize the danger.¹ But the record now before us does not provide a sufficient factual basis to award summary judgment to the manufacturer as a matter of law on either ground.

The majority states that "Any article may slip in use." If that premise is accepted, it must follow that the manufacturer could and should have foreseen that the Line might slip while being used in the Tummy Flattener exercise. From the directions for the exercise in question—and the accompanying drawing—it would appear that if the Line slips, the user's face will usually be in the path of the recoil. While injury of the type here involved and other serious injuries, as for example a broken nose or broken teeth, are perhaps less likely than a facial bruise, a black eye, a bloody nose, or a cut lip, all were within the range of possibility and all can reasonably be regarded as sufficiently serious to impose a duty on the manufacturer to take reasonable steps to reduce the danger.² It would be a rare woman indeed who would willingly use an exercise which, without fault on her part, could give her a black eye or a cut lip or any facial injury. As was said in *Poplar v. Bourjois*, 1048, 208 N. Y. 62, 80 N. E. 2d 334, where the plaintiff pricked her finger on an insecurely fastened metal star on a perfume box, infection developed, and the finger was amputated:

"* * * Liability for negligence [on the part of the manufacturer] turns upon the foreseeability of any harm resulting from the careless conduct, not upon the foreseeability of the exact nature and extent of the injury which does in fact ensue. * * * It would be legally inconsequential that the amputation was less clearly to be foreseen than a simple scratch or pin prick." *Id.*, 208 N. Y. at pages 67, 68, 80 N. E. 2d at pages 336, 337. And as the Supreme Court has recently said:

"It was not necessary that [defendant] be in a position to foresee the exact chain of circumstances which actually led to the accident." *Ferguson v. Moore-McCormack Lines, Inc.*, 1957, 352 U. S. 521, 77 S. Ct. 457, 458, 1 L. Ed. 2d 511.

Certainly I cannot say here that all foreseeable injury was so trivial that the manufacturer is, as a matter of law, relieved of all duty to protect the user from injury. Death from a shoe so constructed that a wrinkle would and did develop in its lining is surely unlikely, but the fact that such a shoe caused a blister has been held sufficient to let a jury decide the question of liability for negligence in a case in which the blister became infected and death resulted. *Pearlman v. Garrod Shoe Co.*, 1937, 276 N. Y. 172, 11 N. E. 2d 718.

¹ *Campo v. Scofield*, 1950, 301 N. Y. 468, 95 N. E. 2d 802, a case principally relied on, involved the question whether the complaint, which alleged negligence only in the design of an onion topping machine, stated a cause of action. It was held that the complaint was defective in failing to allege that the defect (in design) was latent or that the danger presented by the functioning of the machine was not known to the plaintiff or other users. In our case, the plaintiff does not rely on negligence in design as such, but on negligence in failing to warn or otherwise protect her. As will appear *infra*, there is no showing in the present record that the plaintiff actually appreciated the danger involved in using the exerciser according to directions or that she should be charged with knowledge of it. In this connection, cf. *James, Products Liability*, 34 Texas L. Rev. 44, 61-62 (1955).

² It is not required, of course, that a product be accident-proof, only that reasonable steps be taken to prevent injury. Poisons kill and knife blades cut. With poison, reasonable care normally requires the use of an adequate warning. See *West Disinfecting Co. v. Plummer*, 1916, 44 App. D. C. 345. But with ordinary knives, though danger surely exists, a warning would add little to the ordinary user's knowledge and is not generally thought to be required. However, when the knife blade is a rotary wheel used with a power attachment, then there may be an unreasonable risk of injury unless a shield or similar protective device is used. The precaution need not (and often could not eliminate the danger, but it at least should reduce an unreasonable risk to a reasonable one).

The Lithe-Line was marketed for a particular class of persons—overweight women who desired to reduce or "streamline" parts of their body. It was not marketed for individuals who could be expected to have any special training or experience. See Restatement of Torts § 388, Comment I, p. 1048 (1934). The tendency of expanded rubber to contract to its original length, when released, is undoubtedly commonly known and was known by Mrs. Jamleson, according to her deposition (see footnote 4, *infra*). But the fact that she understood this hardly justifies the legal conclusion that she or any other user of the Lithe-Line would understand, without some tests, training or experience, that rubber of the type and consistency used in the Lithe-Line, when stretched in the Tummy Flattener exercise as directed, would or could recoil and strike the face of the user, with the impact alleged to have occurred here. In other words, the resiliency of rubber generally may be assumed to be a fact known to all, but reasonable minds can differ as to whether the danger that lurks in this condition in performing the particular exercise recommended by the manufacturer here—a striking force which can hit the eye and detach a retina—was readily apparent to all users of the device. See James, *supra* at 54, pointing out that liability is not defeated even under the narrowest rule unless the danger that lurks in a particular condition is both obvious and is fully appreciated by the victim.³ And while the physical laws of action equaling reaction may be understood by some, it does not follow that Mrs. Jamleson or any other housewife, when using the Lithe-Line as directed, will inevitably realize that she is stretching the line to a point or a position where, on rebound, it can and will strike her face with the force here alleged.⁴ Similarly, although the smoothness of the rubber rope was apparent, a jury could reasonably find that users would be justified in assuming that the rope would not slip. The manufacturer originated and recommended the particular exercise and invited women to perform it, and the user might assume with ample reason that the manufacturer had used reasonable care to determine that the depression in the bottom of the foot formed by the instep would hold the rope in place while the exercise was being performed. Cf. *E. I. DuPont de Nemours & Co. v. Baridon*, 8 Cir., 1934, 73 F. 2d 26, 29;⁵ *c.f.* also *Barrett v. Building Patent Scaffolding Co.*, 1942, 311 Mass. 41, 45-46, 40 N. E. 2d 3, 9.⁶

The situation in this case bears some analogy to that in *Hopkins v. E. I. Du Pont de Nemours Co.*, 3 Cir., 1952, 199 F. 2d 930, 933, where the dangerous character of dynamite generally was concededly obvious to all, but the court pointed out that the issue was whether the danger involved in the particular

³ James cites in support: *J. C. Lewis Motor Co. v. Williams*, 1952, 85 Ga. App. 538, 69 S. E. 2d 816; *Crist v. Art Metal Works*, 1930, 230 App. Div. 114, 243 N. Y. S. 496, affirmed per curiam 1931, 255 N. Y. 624, 175 N. E. 341; *Henry v. Crook*, 1922, 202 App. Div. 19, 195 N. Y. S. 642; *Karstead v. Philip Gross Hardware & Supply Co.*, 1922, 179 Wis. 110, 100 N. W. 844.

⁴ Mrs. Jamleson's testimony on deposition concerning this point was:

"Q. [By defendant Woodward & Lothrop's counsel] You knew that [the Lithe-Line] was an elastic band, didn't you? You could stretch it and after you stretched it it would contract and resume its ordinary position like a rubber band does? A. That's right.

"Q. And you knew if you stretched it above your head and if it was released—well, just as if I were stretching it between the thumb and the fourth finger of each hand, and if you raised one hand above the other hand and let it go it would snap down on the bottom hand, would it not? A. That's right.

"Q. You knew that? A. Yes."

No further questions on this point were asked. Giving the plaintiff the benefit of all possible inferences in her favor, this testimony fails to indicate that she understood as an actual fact that her use of the line as directed could result in the line striking her face on rebound. At most, it indicates that she realized that it might strike her hands if released. Even the experience of a small boy with a sling shot—cited by the majority, although he of course does not fall in the general class of persons for whom this device was marketed—probably would not make him fully aware of all the factors involved in the potential danger here.

⁵ The court there said:

"Through its advertising and literature the defendant had expressly invited the plaintiff and other growers to use its product for the purpose of disinfecting bulbs and bulbets, and, since it had undertaken to direct the manner in which it should be used, the users had a right to assume that the company had exercised such care as an ordinarily prudent manufacturing chemist would usually have used in giving the directions for the use of such a product, and had not knowingly prescribed a use which would destroy their plants."

⁶ Barrett involved the question whether a painter had assumed the risk of working on defective scaffolding furnished by the defendant to his employer, or contributed negligently to his injury. The court, in deciding that these were jury questions, applied the familiar rule that a risk is obvious for this purpose only if the employee can be found to have appreciated the risk, taking his age, intelligence, and experience into account, and held that it could not decide that matter as a question of law. *Inter alia* it said, 40 N. E. 2d at page 9: "The experience of the plaintiff is to be taken into account, but he had a right to rely to a reasonable extent upon the assumption that reasonably safe scaffolding had been provided. . . . But we are of opinion that it was a question for the jury to determine whether the dangerous condition . . . was obvious."

way it was there used was known to construction workers, and declined to take the case from the jury at the conclusion of the plaintiff's case.' Here also the issue is whether the danger involved in using the exerciser in the particular way it was used was, or should have been, fully apparent to plaintiff and other users, with the additional important factor here that the manufacturer specifically recommended and directed that it be used in that way. Much less than in *Hopkins* should such an issue be decided against the plaintiff as a matter of law on the incomplete and meager evidence here, where there is nothing tending to show that all elements of the danger involved in using the device as directed were in fact known to, or appreciated by, Mrs. Jamieson, and where there is no basis for a legal conclusion that she must be charged conclusively with knowledge of the danger, on the theory that all elements of it must have been apparent to all persons invited by the manufacturer to use the device. In these circumstances, I cannot hold that the manufacturer as a matter of law could reasonably assume that no protective measures were needed. The manufacturer of course could not expect that all the users should be experienced persons who are able to recognize the danger. This question, like foreseeability, should be left to the jury.

In any event, reasonable minds could differ as to whether the manufacturer could justifiably expect that prospective user would remain fully aware of the danger after reading his advertising claims, even assuming for purposes of argument that they might otherwise be reasonably expected to recognize and appreciate it. The leaflet of instructions furnished with the Lithe-Line stated *inter alia*:

"Lithe-Line—easily the best turn done to the body beautiful since the curve was invented. For, given enough of this ingenious little elastic rope it is possible for *any* body to prune the hips, sleek the legs, carve the waistline * * *. And do it pleasantly. As a cat does it—with the same grace-giving movements. * * * You'll have great fun, besides, pulling and stretching, bending and twisting * * *. A real workout is yours, too, against the tenacity of the Lithe-Line. You'll marvel at the supple way your body responds with new lines of rhythm and beauty as you stretch yourself into shape and gain the grace and poise that you've coveted at your life."

The atmosphere created by such statements, especially the representation that it is possible for "any body" to reduce it, directed at weight-conscious women such as the plaintiff, can reasonably be expected to dispel any suspicion of danger and to "lull the user * * * into a false sense of security," and this "might also reasonably have been foreseen by the defendant." See *Malze v. Atlantic Refining Co.*, 1045, 352 Pa. 51, 55, 41 A. 2d 850, 852, 160 A. L. R. 449, where the court used this language in holding that it was for the jury to say whether the warning, printed in small type on a label, against inhaling the fumes of a cleaning fluid, was sufficient where the label contained in larger type on four sides of the can the word "Safety-Kleen." One supplying a chattel is subject to liability "if by word or deed he leads those who are to use the chattel to believe it to be of a character or in a condition safer for use than he knows it to be or to be likely to be." Restatement, Torts § 388, Comment b (1034). Cf. *Crist v. Art Metal Works*, 1030, 230 App. Div. 114, 243 N. Y. S. 496, affirmed per curiam 1931, 235 N. Y. 624, 175 N. E. 341, where it was said, in holding that a complaint, based on injuries received by a child from a toy revolver represented by the manufacturer to be "absolutely harmless," should not be dismissed without trial, *id.*, 230 App. Div. at page 117, 243 N. Y. S. at page 496: "The advertising matter accompanying it [the article] may induce the use in such manner as to make an otherwise harmless article a source of danger." Compare also, as to the assumptions of safety which may reasonably be made by users on the basis of the manufacturer's printed statements: *McCormick v. Lowe & Campbell Athletic Goods Co.*, 1940, 235 Mo. App. 612, 624-625, 144 S. W. 2d 866, 871; *Wolcho v. Arthur J. Rosenbluth & Co.*, 1908, 81 Conn. 358,

¹ *Heggbloom v. John Wanamaker* New York, 1942, 178 Misc. 792, 36 N. Y. S. 2d 777, cited by the majority, is not analogous. It involved an exerciser called "Stretch-a-way," not described in the opinion. A rubber strap of the exerciser broke after 3½ years of safe use. The retailer, not the manufacturer, was sued for breach of warranty and for negligence in failing to test the device and discover that it was defective. In the course of holding that no liability existed on the part of the retailer to the plaintiff, who was not the purchaser of the exerciser from the retailer, the court stated that the exerciser was not an inherently dangerous instrument as a matter of law, nor inherently dangerous, even if defective, since it had been used for 3½ years without breaking. As stated, the opinion does not describe the article or how it was used, so that no basis is afforded to compare it with the Lithe-Line. In any event the question there was not, as here, whether the use of the exerciser as directed created a peril as to which there was a duty to warn or otherwise protect users.

303-304, 71 A. 560, 568, 21 L. R. A., N. S., 571; *Henry v. Crook*, 1922, 202 App. Div. 10, 105 N. Y. S. 642.

But apart from whether or not the record at this stage shows that the hazard was obvious to, or should have been appreciated by, Mrs. Jamieson, there is a further question: Can a manufacturer, after it has recommended that the exerciser be used in a way fraught with peril, and after injury results from that use, obtain judgment as a matter of law by asserting that the danger should have been fully apparent to anyone who so used it. In both *De Eugenio v. Allis-Chalmers Mfg. Co.*, 3 Cir., 1954, 210 F. 2d 409, 413, and *Allis-Chalmers Mfg. Co. v. Wichman*, 8 Cir., 1955, 220 F. 2d 426, 427-428, the courts declined to upset jury verdicts and to hold that there was no negligence as a matter of law, where the injury occurred in using a machine precisely as directed by the manufacturer, notwithstanding that the danger from such use may have been obvious. Although the negligence alleged here is not negligence in the instructions given as in the cases just mentioned, but negligence in failing to warn, or otherwise protect (comparable to the alternative allegation of negligence in *Allis-Chalmers Mfg. Co. v. Wichman*, supra), the reasoning underlying those cases is persuasive.¹ So here, I would hold that it is for the jury to say, after hearing evidence, whether there was a duty to warn or otherwise protect plaintiff from the danger. And although the jury may consider whether the hazard was or should have been apparent to the plaintiff, this would seem to be pertinent in this type of case on the question of whether the plaintiff assumed the risk,² cf., e. g., *Barrett v. Building Patent Scaffolding Co.*, supra, rather than on the question of the manufacturer's negligence. At the present stage, a jury could reasonably find that women purchasing the Lith-Line for purposes of reducing would be warranted in assuming that an exercise, prescribed without any qualification by a well-known and reputable manufacturer such as the defendant, could be performed with the device issued by that manufacturer without injury, and that a duty to warn or otherwise protect existed.

Thus, I must disagree strongly with the majority view. I think that the evidence adduced thus far—the device itself plus the directions and the plaintiff's testimony on deposition that she was injured as she used the device precisely as directed—indicate at the very least that there may be liability and that the plaintiff is entitled to an opportunity to present her evidence. This is not say, of course, that if evidence were received the plaintiff would necessarily prevail. It would be a question for the trier of fact on all the evidence to resolve the factual issues bearing on the manufacturer's alleged negligence and the affirmative defenses, if any, which might be pleaded.

2. We all agree that Virginia law should guide us, since the injury occurred in that state. *Boland v. Love*, 1955, 95 U. S. App. D. C. 337, 222 F. 2d 27. While no Virginia case has involved injury from a product under quite the circumstances here, in *McClanahan v. California Spray-Chemical Corp.*, 1953, 194 Va. 842, 75 S. E. 2d 712,³ the court had this to say about a manufacturer's duty toward users at common law:

"The liability of a manufacturer for injury to a third person, which injury results from the use, in a manner within the reasonable contemplation of the parties, of a manufactured product that is potentially dangerous, is based upon the principle of law that where one person is placed in such a position with regard to another that anyone of ordinary sense would know that his failure to use ordinary care and skill might cause injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger. * * *

¹ Although in *De Eugenio*, 210 F. 2d at page 413, it was stated that "It is probably true, as defendant insists, that there is no duty to warn against the obvious," the duty to warn was not there involved and the statement cannot in any event be treated as a considered and definite holding. In any case, as already appears, here all elements entering into the danger cannot be regarded as fully apparent to the expected users, so that a jury could reasonably find a duty to warn or otherwise protect.

² Defendant Rubinstein did not plead this or contributory negligence as defenses, although defendant Woodward & Lothrop did. Cf. *Dougherty v. Chas. H. Tompkins Co.*, 1957, 99 U. S. App. D. C. 348, 240 F. 2d 34, 35-36.

³ In *McClanahan*, the plaintiff used an orchard spray at a time which was not the time specified for its use in the manufacturer's instruction, with the result that his trees were damaged and produced no fruit for two years. Although the manufacturer's directions stated that the spray was not to be used on bearing trees after a certain time, no separate warning was given that use after such time might harm the trees. Notwithstanding that the directions as to time for use were not followed, the court declined to set aside a jury verdict for the plaintiff, holding that the jury could reasonably find that the manufacturer had failed to give the necessary and adequate warning to prevent injury, as required by the Federal and Virginia Insecticide, Fungicide, & Rodenticide Laws, 7 U. S. C. A. § 135 et seq., Code 1950, § 3-198 et seq.

"The fact that directions are overlooked or are not meticulously followed does not relieve the manufacturer of the duty to warn of latent dangers common to a class of articles." 104 Va. at page 852, 75 S. E. 2d at page 718. I understand this to adopt the same criteria for liability as have been heretofore considered: a manufacturer must use reasonable care to guard users against dangers resulting from the contemplated use of its product, even though there is no privity of contract, "when the risk of injury is foreseeable in the sense that it is reasonably possible and users cannot justifiably be expected to recognize the danger. If a manufacturer may be held liable for injury that results when directions were overlooked, surely there may be liability for injury that results when directions are precisely followed. More recently in *Olds v. Wood*, 1955, 104 Va. 960, 80 S. E. 2d 32, 33, the court reiterated this principle, recognizing as correct the statement that a manufacturer of an article, which becomes dangerous when applied to its intended use in the usual and customary manner, is liable to any person who, without fault on his part, is injured as a result of the manufacturer's negligence in its manufacture or sale." As already demonstrated, at this stage of our case it appears that the jury could find that the essential elements for liability under these decisions—that is, use as directed and intended, without fault on the user's part, injury from such use, and foreseeability of the injury in every sense—all exist. And if, after a manufacturer's directions have told the time at which a tree spray is to be used, it is for the jury to find whether a separate warning that it should not be used at other times is necessary, as *McClannahan* holds, surely the Virginia court would leave it to the jury to say whether a manufacturer, who tells a user to perform a dangerous exercise with his product and injury results from so doing, should have warned or otherwise protected the user in the circumstances here. Under Virginia law then, the majority seems quite wrong in finding no liability as a matter of law.

Most of the decisions from other jurisdictions cited by the majority hold that questions of the sort presently raised must be determined by a jury. Those holding that the manufacturer was not liable as a matter of law did not involve an injury received while a product was being used exactly as directed by the manufacturer without mistake or fault on the user's part; on the contrary, the injury occurred when the product was not being used according to directions or not in the usual, customary or correct way,¹ or the injury resulted from a mishap brought about by the apparent carelessness of the user,² or the holding is not persuasive for other reasons.³ Thus, neither reason nor authority gives support to the majority's position.

¹ The Virginia court had arrived at the position that privity is not required even before the New York court's decision in *MacPherson v. Buick Motor Co.*, 1910, 217 N. Y. 382, 111 N. E. 1050. See *Standard Oil Co. v. Wakefield's Administrator*, 1904, 102 Va. 824, 831, 47 S. E. 830, 832, 66 L. R. A. 792. See also our decision in *Hanna v. Fletcher*, 97 U. S. App. D. C. 810, 231 F. 2d 469, certiorari denied sub nom *Gleicher Iron Works, Inc. v. Hanna*, 1953, 351 U. S. 989, 78 S. Ct. 1951, 100 L. Ed. 1501.

² In the *Olds* case it was held that there was a failure of the plaintiff to prove the acts of negligence alleged and to bring the case within the principle of law set out in the text above. There the directions on a bottle of shampoo instructed the user to heat the liquid until warm, to pour through the hair, to massage, and to dry well with a towel. Plaintiff followed directions and after completing the drying, lit a match "at arm's length." Upon lighting the match there was a "flash of flame" which engulfed plaintiff's hair and clothing. Plaintiff's evidence established that the liquid was lukewarm when applied to her hair and that its flash point was 171 degrees. Thus, the plaintiff's own evidence showed that the flash could not have been caused by the liquid heated only to the lukewarm stage (below its flash point) and compelled the conclusion that the liquid was not dangerous when used in the usual and customary manner, i. e., warm, according to directions. Her allegations that the manufacturer was negligent "in the manufacture and sale" of the shampoo and in failing to "give proper and complete instructions as to its use" were thus not proved.

³ See *Sawyer v. Pine Oil Sales Co.*, 5 Cir., 1946, 155 F. 2d 855; *Youn v. Alb-Chalmers Mfg. Co.*, 1948, 253 Wis. 558, 34 N. W. 2d 853; *Crandall v. Stop & Shop*, 1937, 288 Ill. App. 543, 6 N. E. 2d 853.

⁴ See *Blissenbach v. Yanko*, 1951, 90 Ohio App. 557, 107 N. E. 2d 409, 412, where in concluding that the steam vaporizer was not negligently constructed as alleged, the court stated: " . . . the negligence of the mother . . . was the sole proximate cause" of the injury, on the evidence; *Sawyer v. Pine Oil Sales Co.*, supra. Even in *Campo v. Scofield*, supra [301 N. Y. 468, 93 N. E. 2d 806], discussed in footnote 1 above, the court concluded by saying that the complaint was properly dismissed, in part because the duty owed to remote users does not require a manufacturer "to protect against injuries resulting from the user's own patently careless and improvident conduct." See also *Sauler v. Lynch*, 1951, 192 Va. 341, 64 S. E. 2d 644.

⁵ *Poplar v. Bourjois*, supra, applied Maryland law, which the court indicated did not coincide with its views. *Timpson v. Marshall, Meadows & Stewart*, 1950, 198 Misc. 1034, 101 N. Y. S. 2d 583, is a decision by a trial justice which seems out of harmony with *Poplar* and other decisions of the highest New York court.

3. A further point remains. The majority says that no issue of fact was raised as to the negligence of the defendant in not providing safeguards. The complaint alleged that the failure to "warn or otherwise protect" the plaintiff against the danger constituted negligence; this was denied by defendant Rubinstein. Furthermore, the plaintiff in her answer to defendant's interrogatory, as to the manner in which the device is inherently dangerous, replied in part:

"No safety or protective device of any nature to prevent the 'Atthe-Line' from striking the user doing the 'Tummy Flattener' exercise is provided by the defendants nor is any warning of danger given."

Even though the complaint and the plaintiff's answer do not use the word "safeguards" explicitly, that is the clear sense of the terms used. The issue as to whether the defendant was negligent in not providing safeguards was thus adequately raised and remained an issue so long as the limited evidence before the trial court did not resolve or eliminate it. Cf. *Roumel v. Bernstein*, 100 U. S. App. D. C. —, 213 F. 2d 617. No evidence was produced to make it "quite clear what the truth is" on this issue. *Sartor v. Arkansas Natural Gas Corp.*, 1914, 321 U. S. 620, 627, 61 S. Ct. 724, 728, 88 L. Ed. 967. The plaintiff "is entitled to [her] day in court" on this "vital issue of fact" since "[t]he material facts as to such issue are entirely absent from" the record, the issue is not proper for disposition on summary judgment. *Vale v. Bonnett*, 1951, 89 U. S. App. D. C. 116, 119, 191 F. 2d 331, 337; see also *Pierce v. Ford Motor Co.*, 4 Cir., 1951, 190 F. 2d 910, 915, certiorari denied 1951, 342 U. S. 887, 72 S. Ct. 178, 96 L. Ed. 690; *Kaufman v. Western Union Telegraph Co.*, 5 Cir., 1955, 224 F. 2d 723, 727, certiorari denied 1956, 350 U. S. 917, 76 S. Ct. 821, 100 L. Ed. 825.

As the majority states, "It was not necessary that her [the plaintiff's] evidence be proffered," on a motion for summary judgment. Nor was it necessary in my view that the plaintiff "suggest" as a fact "the desirability or feasibility of additional accessories to the rope," such as "flapping stirrups or mid-way loops," or "a different type of rope" (the terminology of the majority opinion), or that she particularize "a safeguard" of any other nature. The general issue as to negligence in not protecting her by safety devices or otherwise had already been raised. Only evidence (which the court concedes was not required) could show the desirability and feasibility of any particular device or method,—unless it were of course some device, the desirability and feasibility of which was a matter of common human understanding, requiring no evidence to demonstrate, and in that event the issue as to it would be apparent and plaintiff should have the benefit of arguing it to a jury without evidence. Cf. *Dougherty v. Chas. H. Tompkins Co.*, 1957, 99 U. S. App. D. C. 318, 240 F. 2d 34, 36-37. Further, had plaintiff suggested a particular safeguard, the suggestion might well have been construed as limiting the broad issue as to protective measures theretofore raised to the one safeguard suggested. Finally, the majority's view results in resolving against the plaintiff all doubts on the existence of an issue as to safeguards, contrary to the rule heretofore stated by us. *Dewey v. Clark*, 1950, 80 U. S. App. D. C. 137, 143, 180 F. 2d 766, 772. That view seems to me quite untenable.

* * * * *

¹⁴ The majority cites *Radio City Music Hall Corp. v. United States*, 2 Cir., 1943, 135 F. 2d 715, as support for saying that the plaintiff "had to raise an issue of fact." This may be granted, but the cited case does not warrant a holding that the issue was not raised here. There a witness for the plaintiff gave evidence on deposition sufficient to entitle it to a verdict if believed. The Government on plaintiff's motion for summary judgment did not suggest that the witness fabricated, only that given more time it might find evidentiary support for its contention that some of the persons shown by the witness' testimony to be independent contractors were in fact employees. This, a mere hypothesis, was held not to make a genuine issue of fact. No such situation is involved here.

¹⁵ If permitted to do so, perhaps the plaintiff could offer evidence that the use of corrugated rubber or footstraps would have reduced the chance of slipping, or that other manufacturers have taken such precautions, or that other manufacturers use a less resilient material than rubber (or at least less resilient rubber than the type used here). Perhaps she could show that other manufacturers of similar products have provided directions for a safer way to do the exercise—as, for example, by wearing shoes or thick socks to provide a secure grip on the line, or by changing the position of the hands so that the path of recoil would be shifted—or that this defendant should have done so in any event. Perhaps she could even supply evidence that the instructions should not have prescribed the exercise at all in order to provide reasonable protection for her. On the other side, perhaps the defendant could show that countless women have done this exercise with this product without injury, and could provide other relevant evidence bearing on the desirability and feasibility of particular types of safeguards, and its duties in the matter. However, further evidence from the plaintiff of an appropriate standard of reasonable care, though relevant, is normally not a prerequisite to the establishment of a jury question. See *James and Sigeron*, *Particularizing Standards of Conduct in Negligence Trials*, 5 Vand. L. Rev. 697 (1952).

Surely, under the law of Virginia there is no broad franchise to manufacturers to put on the market, without liability, products accompanied by directions that they be used in ways which are dangerous to the person, and which may cause physical injury without fault on the part of the user. I cannot think that the courts of that state would willingly countenance such a result, or that they would allow considerations of protecting or fostering the business of this manufacturer or of others to be extended that far. Certainly when this court declares the law of the District of Columbia I hope it will take a more enlightened view.

Mr. McCANN. May it please the committee, there is only one suggestion I have in answer to something you asked someone else and that is this. I don't see why the Congress should bother about the courts at all on contempt proceedings. Since the days, the earliest days in our history, the Congress did exercise the right of trying contempt cases itself. You will recall that that famous man from Texas who won Texas for John Hancock, Sam Houston, was tried for contempt before the House of Representatives about 80 or 100 years ago, and for many years Congress cut and dried its own fish. It didn't depend upon the courts to decide the question of contempt. And I think a procedure could very readily be set up by the judiciary of the Senate and the House where the rights of the people would be protected, where, if it was necessary, counsel could be provided for these people and you would save all of those long delays of district court trials, Court of Appeals and Supreme Court reviews and you could dispose of that yourself, and you have the right and the power to do that.

Now, that is my answer in case you run into the problem you indicated a while ago, that while the Supreme Court is prevented from doing, the court of appeals might do the same thing. Well, you can stop that.

Senator WATKINS. I think there is more to your suggestion. One of the big difficulties here is to find the time and the personnel to do it.

Mr. McCANN. Well, I think it could be done and I think machinery could be set up on the thing. I think there are plenty of competent people who could be secured to do a job of that kind, and I have seen so many of these things. I investigated communism in the Teachers' Union in New York. I investigated the Communists in Allis-Chalmers plants. I went through some very hectic days when I was with the Committee on Education and Labor.

Now, Communists are dirty rats and there is no use in being so damned considerate of them, if you will excuse me, as some agencies of the Government have been.

Senator WATKINS. Thank you very much, Mr. McCann.

(Senator Jenner assumes the Chair.)

Senator JENNER. The next witness is Dr. Clarence E. Fronk, of Honolulu, Hawaii.

Senator WATKINS. Mr. Chairman, may the record show that I have to leave for other duties, and this illustrates one of the difficulties we have around here in getting people to do jobs such as were suggested by the last witness. We are having difficulty even getting chairmen to preside over this hearing.

Senator JENNER. Thank you, Senator.

Dr. Fronk, do you swear that the testimony given in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Dr. FRONK. I do.

TESTIMONY OF DR. CLARENCE E. FRONK, HONOLULU, HAWAII

Senator JENNER. Will you state your full name for the committee?

Dr. FRONK. Clarence E. Fronk.

Senator JENNER. Where do you reside?

Dr. FRONK. Honolulu, Hawaii.

Senator JENNER. What is your business or profession?

Dr. FRONK. I have been a practitioner of medicine, largely general service, for the past 38 years in Honolulu.

Senator JENNER. Are you here individually or do you represent an organization?

Dr. FRONK. I am here individually.

Senator JENNER. You don't represent any organization of any kind?

Dr. FRONK. No. I belong to an organization, which is what brought me into this picture here, although I did not come from Hawaii to represent that organization.

Senator JENNER. You are appearing here as an individual?

Dr. FRONK. Yes, sir.

Senator JENNER. Proceed, Mr. Sourwine.

Mr. SOURWINE. Do you have a prepared statement?

Dr. FRONK. I have no prepared statement. I was just asked to appear before the committee.

Senator JENNER. Do you have any questions?

Mr. SOURWINE. I understood that you had testimony that you wanted to give, Dr. Fronk.

Dr. FRONK. Well, I would be glad to answer any questions that might be asked of me.

Mr. SOURWINE. Do you have an interest in this bill?

Dr. FRONK. Very much.

Mr. SOURWINE. Do you have an opinion as to the action which should be taken by this committee with respect to the bill?

Dr. FRONK. I do.

Mr. SOURWINE. Would you explain your interest and give your recommendations and tell why?

Dr. FRONK. Yes. I listened very carefully to the representative of Veterans of Foreign Wars. We had discussed it—I am a member of the Veterans of Foreign Wars. We have discussed it many times at home. I am also a member of the Hawaii Residents' Association, and we are, I think, the only organization in the United States that are devoted full time to the fighting of communism and other subversive activity in terms of the American way of life and the living together in racial harmony.

I am a member of a panel that appears before public schools or any organization who requests us to talk about communism and other allied subversive activities, and I would like to see some rules or regulations or laws passed whereby it would make it much more easy to fight communism than what it is now since the ruling of the Supreme Court. And I believe this bill would largely help that.

Mr. SOURWINE. Have the decisions of the Supreme Court to which you refer, and I take it you mean the decisions that have been mentioned here by other witnesses, dealing with Communists and Communist activity within the past 2 years, have those decisions had an impact in Hawaii, Doctor?

Dr. FRONK. Tremendous.

Mr. SOURWINE. What has been that impact?

Dr. FRONK. Since the Supreme Court freed the seven members who were convicted in our local court of teaching the advocacy of overthrow of the Government by force and violence, since this decision has come out and that decision has been reversed, it is the belief of many of our people, and it is what those that were freed are now trying to advocate, that they were not Communists. But that is not the case. The Supreme Court only ruled that the acts that they committed were no offense against the country. And they are now trying to gain respectability through that.

Mr. SOURWINE. Who do you mean by "they"? You mean the Communists?

Dr. FRONK. Yes.

Mr. SOURWINE. In Hawaii?

Dr. FRONK. Yes, sir. The so-called identified Communists.

Mr. SOURWINE. Are they succeeding?

Dr. FRONK. I would say "Yes."

Mr. SOURWINE. Explain that answer.

Dr. FRONK. Only recently one of the United States district judges sanctioned the appointment of an identified Communist to the Red Cross governing body, and when the United States district attorney, Louis Brasard, resigned because of that, he was raked over the coals publicly, in print, and verbally by the judge for his action. He called him a superman—not a superman, but a super patriot for refusing to sit on a board with an identified Communist.

Mr. SOURWINE. Is it your opinion, Dr. Fronk—are you trying to tell the committee that as a result of these Supreme Court decisions, Communists are gaining in prestige and position in Hawaii?

Dr. FRONK. There is no question about it.

Mr. SOURWINE. Are there other instances than the one you have just mentioned?

Dr. FRONK. Yes, I would think so. When the Governor himself, I think it was only 3 days before I left home, offered an appointment to Jack Hall, one of the convicted seven, as a member of the public safety commission, which he refused, saying he did not have the competency to sit on such a board because he didn't even know how to drive an automobile himself, but the appointment was offered to him.

Mr. SOURWINE. How do you feel the enactment of this bill will help to rectify that situation?

Dr. FRONK. I would think that this bill would correct it to the extent that you could make it easier to identify what a Communist is. So that when I would appear before a high school or any organization talking about communism, they ask you a question, what does a Communist have to do to become a traitor to his country, and we can't answer it now because—

Mr. SOURWINE. Because why, Doctor? You say you can't answer it now because.

Dr. FRONK. Because the Supreme Court says that he must commit an overt act to be a traitor to his country, not from what he says or does, but there must be some overt act committed.

Mr. SOURWINE. I have no more questions, Mr. Chairman.

Senator JENNER. I have no further questions. We certainly appreciate your interest, doctor, in coming this long distance and appearing before this committee, and we appreciate —

Dr. FRONK. Might I just add to that, I did not come here to appear here before this committee. I came here as a member of the Committee on Rehabilitation of the Veterans Association, and I got into this —

Mr. SOURWINE. Your testimony is just why you are here.

Senator JENNER. In other words, you learned of the hearing and you just came in and volunteered your testimony.

Dr. FRONK. Yes.

Senator JENNER. We appreciate it. Thank you, sir.

Mrs. Madalen Leech, come forward, please.

STATEMENT OF MRS. MADALEN D. LEECH, SECRETARY, AMERICAN COALITION OF PATRIOTIC SOCIETIES, WASHINGTON, D. C.

Senator JENNER. Please give the committee your full name.

Mrs. LEECH. Mrs. Madalen Dingley Leech, a resident of the District of Columbia.

Senator JENNER. Where do you reside?

Mrs. LEECH. 1697 31st Street NW., Washington, D. C.

Senator JENNER. Do you have a prepared statement?

Mrs. LEECH. I do.

Senator JENNER. You may proceed.

Mrs. LEECH. In response to demands by the membership, some 3 million members in a hundred civil, fraternal, and patriotic societies, in the American Coalition of Patriotic Societies, that organization adopted a resolution in annual convention on the subject.

Resolved, That the American Coalition of Patriotic Societies deplors the tendency of the Supreme Court to go beyond judicial functions and respectfully suggests that Congress clarify, under the permissive provisions of the Constitution, the limitations of the Court.

My remarks, then, are my own.

The jurisdiction of the Supreme Court is spelled out in the Constitution of the United States (art. III, sec. 2) :

• • • with such Exceptions, and under such Regulations as the Congress shall make.

Obviously, the Congress must now exercise its duty to circumscribe the appellate jurisdiction of the Supreme Court because of the Court's unwarranted and unconstitutional invasion of the rights of the sovereign people.

It is within the power and duty of the Congress to prevent the Court from nullifying the rights of the States and from thwarting the will of the people. This may be, incidentally, the last chance the people have to do something about this. We are grateful to you for trying to do something about it.

The establishment of the three separate branches of Government was intended to maintain a separation of powers against dictatorship. Citizens know our form of government is being changed by the subterfuge of "humanitarianism" or the "general welfare", with the result of hastening socialism at home and orienting the United States toward the final triumph of a Socialist-Communist controlled one-world gov-

ernment, with extinction of the Constitution and the rights of free-men.

Recent Supreme Court decisions have the effect of building up bigger Federal Government at the expense of the legislative branch and the rights of the sovereign States and the sovereign people, guaranteed by the Constitution.

The Supreme Court overrode the expressed wishes of the sovereign people in the States, by making null and void their laws against subversion (Nelson case). The Supreme Court has denied the sovereign people the right to bar fifth amendment teachers from public payrolls (Slochower case). It has opened FBI files to defendants and their lawyers in cases of doubtful loyalty (Jencks case), and has set a dangerous criminal free on a technicality that he was questioned and confessed before arraignment (Mallory case).

The Court has also made it easy for fifth amendment Americans to stymie congressional investigating committees, in the Watkins case.

In short, these decision—and others—are the subject of much displeasure and discomfort to all patriotic Americans who are shocked that the Court has seen fit to so apparently serve the Communist conspiracy and criminal element in this country at the expense of loyal citizens. In effect loyal citizens have been deprived of their sovereign right to protect themselves, and are being deprived of their basic constitutional liberties.

In addition, the basic principle of private property rights has been challenged in the Girard case. This decision strikes at the very heart of the difference between our system of government and that of communism which does not recognize private property rights and which right the Communists would most like to wipe out.

The Court has told the sovereign States how they must run their schools and transportation. It is the historic right of the citizens of the States to run their own affairs.

It is necessary to the survival of our constitutional system of government, that the Congress of the United States clarify the limitations of the Supreme Court.

The American coalition would like to associate itself with any legal arguments made before this committee by Mr. Robert B. Dresser, attorney, of Providence, R. I., and Mr. R. Carter Pittman, attorney, of Dalton, Ga.

Thank you. I want to assure you that the concern of people all over this country is perhaps the greatest in this issue than on any other single issue in my time, since I have been secretary for this big group, and since mail has been coming across my desk. Our people are aware and deeply concerned, and also grateful to you, sir.

Senator JENNER. You say there are about a hundred organizations in the coalition?

Mrs. LEECH. I think there are about a little over a hundred now. Thank you very much for your courtesy.

Senator JENNER. Mrs. Edith Stafford.

STATEMENT OF MRS. EDITH K. STAFFORD, NORTH HOLLYWOOD, CALIF.

Senator JENNER. Will you give your full name to the reporter?
Mrs. STAFFORD. Mrs. Edith K. Stafford.

Senator JENNER. Where do you reside, Mrs. Stafford?

Mrs. STAFFORD. In Los Angeles.

Senator JENNER. What is your address there?

Mrs. STAFFORD. 5039 Radford Avenue, North Hollywood.

Senator JENNER. Do you have a prepared statement?

Mrs. STAFFORD. I do, Mr. Chairman.

Senator JENNER. Are you here as an individual or do you represent some organization?

Mrs. STAFFORD. I am here as an individual.

Senator JENNER. All right. You may proceed.

Mrs. STAFFORD. Mr. Chairman and members of the committee, I am Edith K. Stafford from Los Angeles, Calif. I wish to thank you for the opportunity to appear before this committee. I do not represent any organization or any agency. However, I am speaking not only for myself but for those who, on learning of the committee's hearings, within 24 hours voluntarily gathered enough money for my trip to Washington and asked me to present the following viewpoint to you. My remarks are directed only to the section 4 of the Senate and House bills which limit the appellate jurisdiction over rule, bylaw, or regulation adopted by a school board, board of education, board of trustees, or similar body concerning subversive activities in its teaching body.

At this point let it be noted that boards of education hire many persons not engaged in actual teaching who come into direct contact with the children. They, too, should be included in this section. I speak from a background of service as a member of the Los Angeles Board of Education, the governing body of the second largest school system in the United States—

Senator JENNER. Are you a member now?

Mrs. STAFFORD. I am not at the present, no.

Senator JENNER. How long had you been a member?

Mrs. STAFFORD. I was there 6 years. The governing body of the second largest school system in the United States with a staff of approximately 20,000 teachers and 10,000 noncertified employees.

When indications of possible Communist conspiracy and infiltrations were reported to the Los Angeles Board of Education by the superintendent, the board directed that a procedure be drawn by the county council to protect the children in the classroom and the loyal employees of the school. This was carefully and painstakingly done. The board requires its employees to assure the public that they are free of a criminal record or a communicable disease. The board therefore thought it reasonable to require the employees to assure the public under oath that they were free of communism.

The sound procedure instituted by our board was introduced by Senator Dilworth and enacted into California State law. Under the board's rule and the Dilworth bill, approximately 16 employees were discharged from our schools. Many others resigned rather than be questioned under oath before the board of education. Other boards of education in California have discharged teachers and other personnel under this same Dilworth law.

When the Supreme Court reversed the decision of the New York courts in the Slochower case, two boards of education in California each considered a dismissal case, and in the light of that reversed deci-

sion, reinstated the teacher involved. What school board would have hope of success in the future of discharging a teacher when the constant threat of a Supreme Court reversal is ever present?

This situation is so serious that Senator Dilworth, whose record has won for him the esteem and admiration of not only California but the entire Nation, gave me this statement to deliver to this committee and I quote:

The effort to control the activity of teachers who are engaged in indoctrination of students in Communist ideology has been brought to a halt in California. We are engaged in a study to see what means, if any, is left to the people to control the indoctrination of their own children.

Gentlemen of this committee, this halt is exactly what the Communists want to accomplish in this country. Teachers and other school employees work in a sensitive area where the minds and characters and futures of our children can be guided and molded. One teacher over the years influences hundreds and often thousands of children. The Communists have declared the field of education to be one of their primary targets of activity and they are known to be dedicated to propagandizing wherever they may be.

Let it be made clear that we believe that all but a few of our teachers are loyal to our country and our form of government. The problem is how shall we get rid of the small number who are not, and what are we going to do when the highest Court in our land threatens our ability to do so? The Supreme Court chooses for themselves the cases over which they shall take jurisdiction. Some wonder, then, on what philosophical or legalistic meat these members of the highest Court of the land feed that they can decide what cases they will accept or reject and the Congress should not do likewise. Every loyal American wishes to keep secure the rights safeguarded by our constitutional form of government. But a right of local and State government has been taken from us, that of determining the qualifications of employment of a school employee.

The question should be asked, Is the Supreme Court a subdivision of the Government, master of all other branches of Government and of the sovereign States? On page 276 of his book entitled, "The Sovereign State," Mr. James J. Kilpatrick poses the question in the following words, and I quote:

How is the judiciary to be checked and brought to an accounting, or is the higher Court alone of all agencies of government to go unchecked, never challenged effectively, never subjected to the direct approval of the people? If it be conceded that the Court has the power to take one reserved right from the States or the people, then what restrains it from seizing all rights? Can it be true, as Stone remarked in the Butler case, that the only check upon our own exercise of power is our own sense of self-restraint? If this be true, then a judicial oligarchy has been substituted for a republican government, and a divine right of judges has replaced a divine right of kings. Five men, a majority of 1 on a court of 9, may effectively allocate unto themselves the sovereign powers of not less than three-fourths of the States.

I quote again from Senator Dilworth from his speech entitled, "Responsibility for Selection of School Boards."

Certainly a teacher is a citizen and entitled to all the freedoms as a citizen, but when a teacher seeks and accepts employment and salary from the public, he assumes an obligation to please and to render satisfactory service to the public of whom the parents are the most interested members. In accepting employment the teacher does so voluntarily and of necessity becomes an employee

of the Government as far as his public service is concerned. To set the teacher up as the sole authority over what is taught would be to deny freedom of choice to the citizens of that district, to deny them the freedom to direct their own Government of which the schools are an important part. Our tenure laws give ample and deserved protection to teachers from discharge for trivial or petty reasons. There is an academic freedom that we can all believe in and that is the academic freedom of the students and parents from having foreign ideology rammed down the throats of the students against their will. Government in America is by the people and for the people. Our people must always have the power and the opportunity to correct unsatisfactory performance by Government agencies and employees, including teachers.

It is indeed a privilege for a teacher to teach, not a right. Parents are required by State law to send their children to school. If boards of education cannot protect the school from insidious and corrupting ideology, then here is the blueprint for our own destruction.

Mr. Chairman and members of the committee, we earnestly urge that you, our representatives, find and use the constitutional means to safeguard our country and our children.

Senator JENNER. Thank you, Mrs. Stafford. We appreciate your appearing here.

Mrs. STAFFORD. Thank you.

Senator JENNER. Mr. T. David Horton, chairman of the executive council of the Defenders of the American Constitution, Inc.

STATEMENT OF T. DAVID HORTON, CHAIRMAN OF THE EXECUTIVE COUNCIL OF THE DEFENDERS OF THE AMERICAN CONSTITUTION, INC.

Senator JENNER. You will give the committee your full name.

Mr. HORTON. My name is T. David Horton.

Senator JENNER. Where do you reside, Mr. Horton?

Mr. HORTON. I live at 1230 North Quinn Street, Arlington.

Senator JENNER. What is your business or profession?

Mr. HORTON. I am a publisher.

Senator JENNER. Are you here individually or do you represent an organization?

Mr. HORTON. I am asked to appear on behalf of the Defenders of the American Constitution, Inc., and on behalf of the Arlington Federation of Home Owners.

Senator JENNER. I see. Do you have any idea of what the membership of that organization is numerically, the organizations?

Mr. HORTON. No, I don't.

Senator JENNER. You appear under the authority of both of those organizations? They have asked you to appear and authorized you to appear?

Mr. HORTON. That is true.

Senator JENNER. Have you in the past taken any special interest in any legal matters pertaining to subversive activities?

Mr. HORTON. Yes.

Senator JENNER. You have. All right, you may proceed, then.

Mr. HORTON. Mr. Chairman, before going into my prepared statement, I would like to make a couple of observations on a point that was brought up by, I believe, Senator Watkins on the disparity of treatment that would be afforded those persons that would be denied final appeal to the Supreme Court if the bill under consideration were

passed. And I would like to say in answer to the suggestion that a comparison of the manner in which the contempt powers of courts and the contempt powers of Congress are handled offers some interesting information.

They both arise from the same source, courts, even for indirect contempts, however, try and decide their own charges of contempt. There is no right of challenging prejudice on the part of the Judge, no right to a jury trial, no right to be judged by an impartial fact finder or before an impartial tribunal.

If this is compared with the Supreme Court solicitude for subversives and rapists, I think that the disparities that were expressed in the letter that was read fall quite to the other side from what would initially appear. The Congress, which is accountable to the electorate, turns even the most flagrant examples of direct contempt over to an impartial tribunal where a jury trial is available. There has also been a suggestion that possibly in the controversial decisions of the court, that there have not been grounds for impeachment.

Another view on this subject is expressed in an insertion in the Congressional Record Appendix of August 30, 1957, by the Honorable Wint Smith, Kansas.

* * * The Supreme Court in its *Girard* decision has committed an impeachable offense under the Constitution of the United States, which provides that all officers of the United States shall be removed by impeachment for "high crimes and misdemeanors." The following quotation from Blackstone's commentaries on the common law clearly defines the offense which the Supreme Court has committed in the *Girard* case:

"And by the Habeas Corpus Act, it is enacted that no subject of this realm who is an inhabitant of England, Wales, or Berwick shall be sent prisoner into Scotland, Ireland, Jersey, Guernsey, or places beyond the seas (where they cannot have the full benefit and protection of the common law), but that all such imprisonments shall be illegal; that the person who shall dare to commit another contrary to this law shall be disabled from bearing any office, shall incur the penalty of a praemunire, and be incapable of receiving the King's pardon; and the party suffering shall also have his private action against the person committing, and all his aiders, advisers, and abettors, and shall recover treble costs, besides his damages, which no jury shall assess at less than 500 pounds."

This common law was enforced at the time of the adoption of the Constitution; and in the *Girard* case the Supreme Court has committed at least a "misdemeanor" which should subject the Court to wholesale removal from office.

The form of a commonwealth is soon altered by negligence, when those men are taken into power who do not love the present establishment (from p. 205, the *Life and Works of John Adams*, edited by Charles Francis Adams, Boston, 1851, vol. 6).

The decisions reprinted as appendix to the hearing of August 7, 1957, on S. 2646 demonstrate that the present members of the Supreme Bench certainly do not love the present establishment. Indeed, the present court subscribes to and perpetrates what Van Buren called—the dangerous heresy that the Constitution is to be interpreted, not by the well-understood intentions of those who framed and those who adopted it but by what can be made out of its language by ingenious interpretation (Autobiography of Martin Van Buren, p. 551, published as vol. II of the Annual Report of the American Historical Association, 1918).

In his *Defense of the American Constitution* (Life and Works, vols. 4, 5, and 6), John Adams, who has been described as the "clearest head" in the Continental Congress, outlined the basic philosophy and history of efforts to arrive at tripartite government. He shows by exhaustive

research that drew forth the highest praises of his contemporaries that tripartite balance (as opposed to separation) of power is the constitutional cornerstone upon which all responsible republics have been and must be based. (I might explain parenthetically the difference between the balance of power as conceived by our Nation's founders, and the perversion of that concept is the so-called separation of power doctrine that has infected the decisions of our heretical courts. Balance of power conceives 3 branches of government, each of which has the ability and duty to hold in check the other 2 branches. The result of this balance as implemented in the Founding Fathers' concept of what our Constitution should be, is that if responsibility can be had in any 1 of the 3 branches, the other 2 may be thereby held in check, and our liberties protected. "Separation of power," on the one hand, is the terminological distortion introduced to destroy the foundation of limited government. Separation of powers, as used by the court, means three branches of government, each separate from the others and without responsibility to hold any other branch in check. Each department is thereby given full rein to trample with impunity over the liberties of the people and the prerogatives of the States.)

S. 2646 splits off final determination in five areas and decentralizes this final power to the State courts. This is a wise move, consonant with the congressional duty to balance irresponsible judicial power through the limitation of appellate jurisdiction—a move that at its worst will remove tyranny from its inaccessible and centralized seat in Washington. In other words, even if one accepts the dour prediction of the centralists that 48 sets of State courts will be as unfaithful to American law and principles as the Federal Supreme Court has been—even if one accepts this facile assumption, the fact remains that when one is dealing with arbitrary and irresponsible power, the wise procedure is to at least decentralize that power. Such a move would put the solution of our problems in these five fields into the hands of each State. As things stand now, no State can remove a single United States Supreme Court Justice. If the depredations sought to be arrested by S. 2646 were to continue after its passage, in State courts, any State could protect itself in the five important areas enumerated in the bill.

To work for the integrity of the constitutional structure is the highest function to which the Congress can be called. The Defenders of the American Constitution hope that the Senate will show the same high purpose and dedication that characterized Missouri's stalwart Senator, Thomas Hart Benton, who, after 30 years' labor in the Senate, thus expressed himself of the Founding Fathers:

• • • gratitude and veneration is the debt of my birth and inheritance, and of the benefits which I have enjoyed from their labors; and I have proposed to acknowledge this debt—to discharge it is impossible—in laboring to preserve their work during my day, and in now commending it, by the fruits it has borne, to the love and care of posterity. • • • (Thirty Years' View, by Thomas Hart Benton, p. vi, 1854.)

Senator JENNER. Thank you, Mr. Horton.

Any questions?

Mr. SOURWINE. No questions.

Senator JENNER. Thank you very much. •

Mr. HORTON. Thank you for the opportunity of appearing.

Senator JENNER. Thank you very much. We appreciate your appearing.

The next witness will be Mr. Paul O. Peters.

STATEMENT OF PAUL O. PETERS, ARLINGTON COUNTY, VA.

Senator JENNER. You may be seated. Will you state your name to the committee?

Mr. PETERS. My name is Paul O. Peters. I am a research consultant. I live at 5825 North Four Mile Run Drive in Arlington County, Va.

Senator JENNER. Are you appearing here as an individual or do you represent some organization?

Mr. PETERS. I am appearing here as an individual and a man who gets a great many letters from people all over the United States, complaining about the predicament in which they presently find themselves in their communities with respect to the enforcement of laws needed to preserve the sovereign rights of the United States and of the respective States.

Senator JENNER. Do you have a prepared statement, sir?

Mr. PETERS. Well, I have some notes.

Senator JENNER. You may proceed.

Mr. PETERS. Thank you, Senator Jenner.

Article 3 of the Constitution provided for the establishment of a judiciary system in the United States as the department of the Government independent in its own sphere and having no authority to encroach on the powers granted to the legislative and the executive departments. And, at the time when the Constitutional Convention was meeting in Philadelphia in 1787, the powers and functions of this judiciary department were given considerable discussion, and it was, as a result of these discussions, that on July 17, 1787, it was agreed that in the new draft of the proposed Constitution that:

The legislative acts of the United States made by virtue of, and in pursuance of the articles of Union, and all treaties made and ratified under the authority of the United States shall be the supreme law of the respective States, as far as these acts or treaties shall relate to the said States, or their citizens and inhabitants and that the judiciaries of these several States shall be bound thereby in their decisions, anything in the respective laws of the several States to the contrary notwithstanding.

Now, Mr. Chairman, with certain refinements this declaration that was found in the proceedings of the Constitutional Convention became the keystone of article VI of our present Constitution.

In research into this subject matter of your bill, sir, I was amazed to find in *U. S. v. Dunnigton* (146 U. S. 351), it was held:

The Federal courts are in no sense agencies of the Federal Government and the Federal Government cannot be held liable for their errors.

I was amazed, Mr. Chairman, when I found this in my annotated copy of the Constitution.

Many people now believe that the Federal courts have recently erred in decisions which have affected the rights reserved to the legislative and executive branches, particularly the right of Congress to enact legislation designed to protect the security of the sovereign powers granted by the Constitution.

Many people believe that the Federal courts have cut across the Constitution and the Bill of Rights by decrees, orders and injunctions derogatory to freedom of speech, of the press or the right of the people peaceably to assemble and to petition the Government for a redress of grievances (real or imaginary) as provided for in the first amendment.

In *Marbury v. Madison*, one of the early decisions of our court, the court held that in political questions, the courts are bound to follow the political departments of Government meaning, of course, the legislative and executive branches.

At no time has there been so much dissatisfaction with decrees of the Supreme Court. The proposed legislation is the outgrowth of that widespread dissatisfaction.

During the past year and one-half there have been no fewer than 10 decisions which have disturbed the people, and most of them have been discussed here, so I will omit that part of my statement.

But I do want to point out that, in the famous case of John Stewart Service, who was a confidential employee of our State Department who was fired for having taken confidential documents down to a meeting in a downtown hotel and revealing the contents of those documents to agents for the magazine known as *Amerasia*, who was fired out of the State Department by a court order, recently was ordered to be reinstated and paid his full back salary for several years.

There also arises the case in which Pennsylvania, under its own antisedition laws, sought to prosecute one Steve Nelson, who had many aliases and was well identified as a full-fledged member of the Communist Party. In the Steve Nelson case, the courts held that the laws of Pennsylvania were null and void because this field had been occupied by the Federal Government. In other words, the court held that the sovereign states—none of the sovereign states had the right to protect their own sovereignty by local state anti-sedition laws.

I think it would be interesting to supplement your record, sir, with some of the statistics arrived at by Marian Stephenson who, writing in the February 16th issue of the *National Review*, has published a roll call on how the justices have voted in the matter of internal security measures in the last ten instances when they were before the courts. And with your permission, sir, I want to read into the record at this point the roll call prepared by Marian Stephenson. Here is the record:

Chief Justice Earl Warren, against the internal security measures, 10 times; for internal security matters, none.

Associate Justice Hugo L. Black, against internal security measures, 10 times; for them, none.

Associate Justice William O. Douglas, against, 10; for, none.

Associate Justice Felix Frankfurter, against these measures, 9 times, and for them, once.

Associate Justice John M. Harlan, eight times against and twice for.

Associate Justice William J. Brennan, Jr., five times against, none for.

Associate Justice Harold H. Burton, 6 times against, 3 times for.

Associate Justice Mr. Tom Clark, 2 times against these measures and 7 times for the protection afforded by the Constitution.

And a latercomer, Associate Justice Charles Evans Whittaker, is only recorded as having one vote, sir, against the internal-security measures.

Now, while I believe that the bill presently under consideration, S. 2646, is a very fair and strong measure and would stand up under the searchlight of constitutionality, I am of the opinion, sir, that the bill introduced in the House of Representatives by Representative William Colmer, of Mississippi, is an even stronger measure, and, with the permission of the chairman, I ask that section 1 of the Colmer bill be introduced in the record as supplementary to S. 2646.

Senator JENNER. It may go into the record and become a part of the record.

(H. R. 10775, sec. 1, is as follows:)

RULES OF INTERPRETATION

SECTION 1. No Act of Congress shall be construed as indicating an intent on the part of Congress to occupy the field in which such Act operates, to the exclusion of all State laws on the same subject matter, unless such Act contains an express provision to that effect. No Act of Congress shall be construed as invalidating a provision of State law which would be valid in the absence of such Act unless there is a direct and positive conflict between an express provision of such Act and such provision of the State law so that the two cannot be reconciled or consistently stand together.

Mr. PETERS. I think, also, that there is ample precedent for a full and complete congressional investigation of the Federal judiciary system. A few weeks ago I happened to pick up a three-volume set of writings of Junius in the period between 1767 and 1775, in the days when the English judiciary had fallen into such a low state of disrepute that the Lord Chief Justice refused to appear before the English Parliament and explain some of the unusual decisions of the court at that time.

And so, on December 6, 1770, on a motion by Mr. Sargent Glinn in the Lower House of the British Parliament, he moved that a committee should be appointed to inquire into the administration of criminal justice and the procedures of the judges in Westminster Hall, particularly in cases relating to liberty of the press and the constitutional powers and duties of juries, and I recommend, sir, that this subcommittee give some consideration to investigating the judicial powers which has been exercised during the past 25 years which have impinged upon the rights guaranteed in the Constitution through the legislative and executive branches of our Government.

Senator JENNER. Thank you.

Mrs. Margaret Morell?

(No response.)

Senator JENNER. Is there nothing further to come before this committee?

We will stand, then, in recess until 10 o'clock in the morning.

(Whereupon, at 3:05 p. m., the hearing recessed, to reconvene on Wednesday, February 26, 1958, at 10 a. m.)

LIMITATION OF APPELLATE JURISDICTION OF THE SUPREME COURT

WEDNESDAY, FEBRUARY 28, 1958

**UNITED STATES SENATE,
SUBCOMMITTEE TO INVESTIGATE THE ADMINISTRATION
OF THE INTERNAL SECURITY ACT AND OTHER INTERNAL
SECURITY LAWS OF THE COMMITTEE ON THE JUDICIARY,
Washington, D. C.**

The subcommittee met, pursuant to recess, at 10 a. m., in room 424, Senate Office Building, Senator William E. Jenner presiding.

Also present: J. Sourwine, chief counsel; Benjamin Mandel, research director, and F. W. Schroeder, chief investigator.

Senator JENNER. The committee will come to order.

Mr. SOURWINE. Mr. Chairman, before the first witness is called, there are several submissions of statements for the record.

Senator JENNER. Proceed.

Mr. SOURWINE. I have a letter from Miles D. Kennedy, the director of the American Legion, Washington headquarters, legislative commission, canceling the appearance of their representative. That probably should go in the record.

Senator JENNER. It may go into the record and become a part of the record.

(The letter referred to follows:)

**THE AMERICAN LEGION,
LEGISLATIVE COMMISSION,
Washington, D. C., February 25, 1958.**

Hon. JAMES O. EASTLAND,
*Chairman, Senate Internal Security Subcommittee of the Senate Judiciary
Committee, Senate Office Building, Washington, D. C.*

DEAR SENATOR EASTLAND: I wrote you under date of February 10 requesting that you grant an opportunity to a representative of the American Legion to appear before the Senate Internal Security Subcommittee in connection with hearings on S. 2040.

Mr. J. G. Sourwine, chief counsel, was good enough to reply under date of February 21 scheduling our representative for 10:30 a. m. on March 4, 1958.

Our people have been studying resolutions adopted at the 1957 national convention and have now advised me we do not have resolutions authorizing us to support S. 2040.

In view of the foregoing will you be good enough to cancel our appearance before the subcommittee.

Trusting this causes you no inconvenience, I am,

Sincerely,

MILES D. KENNEDY, Director.

Mr. SOURWINE. At the time that the resolution of the Judiciary Committee calling for these further hearings was passed, the full committee instructed that the subcommittee hear any witness who asked

to be heard within a reasonable time and hear also any witness invited at the request of a Senator.

Each Senator was asked to list any witnesses whom he desired to have invited. The statistics on that, for the record, are:

Senators' requests totaled 34. All of those 34 witnesses were invited. Of those, four have accepted the invitation to testify. Seven have made or indicated they will make submissions for the record. The remainder have declined the opportunity to testify.

There is a telegram here, Mr. Chairman, signed by Mrs. Robert Fitch, president of the Public Affairs Luncheon Club of Dallas. The telegram reads:

The 500 members of the Public Affairs Luncheon Club of Dallas, a nonpartisan group of women dedicated to the preservation of the Constitution, are unanimous in their support of the passage of Senate bill 2040 as proposed by Senator Jenner.
(Signed) Mrs. ROBERT FITCH, *President*.

As the chairman knows, communications with regard to this bill have been ordered into the record but the staff was instructed to filter out those which appeared to be inspired or which were merely a kind of a straw vote and to place in the record any which appeared to express an individual view or to be a spontaneous communication.

As of this date, the count on the communications ordered into the record in that way include 2 from Michigan, 7 from New York, 24 from California, 3 from Ohio, 2 from Massachusetts, 1 from Iowa, 6 from Florida, 3 from Indiana, 3 from Colorado, 3 from Pennsylvania, 5 from Illinois, 1 from Alabama, 2 from Wisconsin, 3 from Virginia, 8 from Texas, 5 from New Jersey, 2 from Oklahoma, 2 from the District of Columbia, 2 from Alaska, 2 from Montana, 2 from Connecticut, 7 from Maryland, 3 from Kentucky, 1 from Kansas, and 4 from Louisiana.

All of these communications, with the exception of one, were favorable to the bill. The one is the only written communication against the bill which has been received to date.

Senator JENNER. The only?

Mr. SOURWINE. The only one, Mr. Chairman; yes, sir.

Two written statements are here that are submitted for the record. This one, Mr. Chairman, is from Senator George Malone from Nevada.

Senator JENNER. It may go into the record and become part of the official record of this committee.

(The statement referred to follows:)

FEBRUARY 20, 1938.

HON. JAMES O. EASTLAND,
*Chairman, Senate Judiciary Committee,
United States Senate, Washington, D. C.*

DEAR JIM: As much as I would like, other committee meetings prevent a personal appearance before your Internal Security Subcommittee to testify on S. 2040 which would limit the appellate jurisdiction of the Supreme Court in certain cases.

I am, however, submitting the enclosed statement for the record.

If I can be of further help, let me know.

Sincerely,

GEORGE.
George W. Malone.

STATEMENT OF SENATOR GEORGE W. MALONE OF NEVADA ON S. 2646

THE JUDICIAL AND LEGISLATIVE BRANCHES OF GOVERNMENT

Pursuant to the authority of article 3, section 2, of the United States Constitution, original jurisdiction is set down in two specifically enumerated types of cases; in all other cases where a Federal matter is seasonably and properly brought into issue the United States Supreme Court shall have appellate jurisdiction, "with such exceptions, and under such regulations as the Congress shall make."

Thus it will be seen that the writers of the Constitution contemplated that it might become necessary for the Congress to exercise some restraint on the power of judicial review exercised by the Supreme Court of the United States.

In addition it is obvious that this is one more example of the check and balance system which was so successfully incorporated into the Constitution.

The Supreme Court, in such cases as *Marbury v. Madison* (1 Cranch 137) and *Kendall v. United States* (12 Peters 524) has itself declared that it is not the function of the courts of the United States to interfere in the exercise of political powers of the executive branch of the Government.

The court's authority is restricted to the review of ministerial activities, however, the Constitution has equally imposed political obligations upon the Congress, and it seems self-evident that political functions of Congress should, likewise, not be subjected to judicial review.

Despite this, in the past the Supreme Court has taken upon itself the power to review various matters that seem to be more appropriately within the scope of congressional activity.

In the course of such reviews they have so confused their function with that of the Congress that I now deem it necessary for the Congress to clarify this fundamental issue and specifically exercise the constitutional prerogative quoted above and so restrict the appellate jurisdiction of the Supreme Court that they will have no alternative but to rechannel their activities into their proper sphere.

It would be a waste of time and space to recite again the numerous cases in the past several years in which the Supreme Court has disregarded that ancient safeguard of the individual, that fundamental basis of our common law, the principle of stare decisis.

It seems to me that the essence of this principle is that the individual can live from day to day with the assurance that the laws today are the same as they were yesterday, and he can govern himself accordingly. But with the continual upheaval of past decisions and the disregard of precedent which is so manifest today no man can know from day to day what significant change will be made in the law without the due consideration of the merits that the Constitution so carefully imposed on the legislative body.

Therefore, I conclude that the time has already passed when the Supreme Court should have been returned to its proper perspective in the scheme of government provided for in our Constitution. I therefore favor the passage of S. 2646 as a needed and constructive step in the right direction.

Mr. SOURWINE. This is the statement of Edward S. Corwin, who was the compiler and annotator of the Constitution Annotated. He was one of those who was requested to appear at the suggestion of a Senator and said that because of a speech disability he could not appear and testify but called attention to certain of his recent writings bearing on the subject.

Senator JENNER. It may go into the record and become a part of the official record of this committee.

(The statement referred to follows:)

FEBRUARY 8, 1958.

EDWARD S. CORWIN,
Old Stone House, Stockton Road,
Princeton, N. J.

DEAR MR. SOURWINE: I am at present unable to testify before the Judiciary Committee on S. 2010, for the reason that my voice is out of commission and I am under firm orders by my doctor not to speak above a whisper, and my disability is likely to continue for some time. I am, however, sympathetic with the general purpose of S. 2010, although I suspect that it is too sweeping.

The enclosures are extracted from the 12th edition of my *The Constitution and What It Means Today*, now in press. They may be of some interest to Senators Hennings and Eastland, who also sent me copies of S. 2010. Will you please draw their attention to the material I am forwarding herewith?

Sincerely yours,

EDWARD S. CORWIN.

P. S.—I wish also to direct attention to pages 208-210 and 221 of my *The President, Office and Powers, 1787-1957; History and Analysis of Practice and Opinion* (edition IV, 1957).

[Source: *The Constitution and What It Means Today* (12th edition)]

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Indeed, in the last case just cited, the Court goes so far as to suggest that it is entitled to rule whether a question put to a person under investigation by a congressional committee was "relevant." It can be rather confidently predicted that Congress will not indefinitely permit its primitive power of inquiry to remain in judicial leading strings.

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Recently the security of the Dennis case, indeed of the Smith Act itself, was gravely impaired by the holding in *Yates v. U. S.*, which was decided on June 17, 1957. Here petitioners, who were codefendants in the Dennis case, were arraigned under the General Conspiracy Statute (18 U. S. C. 371). The Court held that inasmuch as the petitioners had not followed up their preachments asserting the right to overthrow government by force and violence with an effort to organize a putsch, they must be deemed to have been propounding an "abstract" doctrine. Indeed, the Court invites a reconsideration of the Dennis holding. Meantime, however, the Smith Act will have served to repeal all State anti-sedition acts. In short, today the right to preach the right to overthrow government by force and violence has become a preferred right as against both national and State Governments, provided only that those who do the preaching do so in abstracto.

Preface to 12th edition

The present edition brings the story in the main down to 1958. Its point of departure is furnished by the Court's holdings last June 17, when, in the words of a disrespectful critic, "The Court went on a binge." Of these holdings, especially notable are those in *Watkins v. U. S.* and *Yates v. U. S.* which, although they appear to have had the support of all the Justices except Justice Clark, have aroused a storm of adverse criticism on the part of the American Bar and in other informed quarters as well. (See especially Prof. Bernard Schwartz, *The Supreme Court—October 1958 Term*, *New York Law Review*, November 1957.) That these holdings are in for considerable trimming first and last can scarcely be doubted. (See, e. g., in the present edition pp. 19 and 202.)

[Source: *The President: Office and Powers, 1787-1957*, by Edward S. Corwin]

Pages 208-210

Jay mentions but one exception to the rule. Occasions may arise, he explains, when the initiation of a negotiation may require great secrecy and dispatch, and at such times the President must undoubtedly start the ball rolling; but otherwise all negotiations of treaties will be the joint concern of President and Senate. "Thus we see," he concludes, "that the Constitution provides that our negotiations for treaties shall have every advantage which can be derived from talents,

information, integrity, and deliberate investigation on the one hand, and from secrecy and dispatch on the other."

Some 30 years later, Rufus King, who had been a member of the Philadelphia Convention, advanced in the Senate itself closely similar views concerning the relations of that body and the President so far as treaty-making was concerned:

"In these concerns the Senate are the constitutional and the only responsible counselors of the President. And in this capacity the Senate may, and ought to, look into and watch over every branch of the foreign affairs of the Nation; they may, therefore, at any time call for full and exact information respecting the foreign affairs, and express their opinion and advice to the President respecting the same, when, and under whatever other circumstances, they may think such advice expedient. * * *

"To make a treaty includes all the proceedings by which it is made; and the advice and consent of the Senate being necessary in the making of treaties, must necessarily be so touching the measures employed in making the same. The Constitution does not say that treaties shall be concluded, but that they shall be made, by and with the advice and consent of the Senate; none, therefore, can be made without such advice and consent; and the objections against the agency of the Senate in making treaties, or in advising the President to make the same, cannot be sustained, but by giving to the Constitution an interpretation different from its obvious and most salutary meaning."

Indeed, even as late as 1908, Woodrow Wilson, having noted in his Constitutional Government that there could be little doubt that the Convention of 1787 intended that the Senate should advise the President as to appointments and treaties "in the spirit of an executive council associated with him upon terms of confidential cooperation," declared that on this premise it was still not only the President's privilege, but his best policy and plain duty, to deal with the upper chamber on that footing. He thereupon added: "If he have character, modesty, devotion, and insight as well as force, he can bring the contending elements of the system together into a great and efficient body of common counsel." How far Mr. Wilson came himself from realizing this ideal 11 years later is a matter of recorded history.

The somber truth is that the conception of the Senate as a Presidential council in the diplomatic field broke down the first time it was put to the test. The episode, the importance of which for American institutions and for the development of American foreign policy has rarely been appreciated, is narrated from the point of view of the Senate by Senator William Maclay, of Pennsylvania, in his celebrated Journal:

"August 22, Saturday (1789).—Senate met, and went on the Coasting bill. The Doorkeeper soon told us of the arrival of the President. The President was introduced, and took our Vice President's chair. He rose and told us bluntly that he had called on us for our advice and consent to some propositions respecting the treaty to be held with the Southern Indians * * * Seven heads * * * were stated at the end of the paper which the Senate were to give their advice and consent to. They were so framed that this could be done by aye or no."

It speedily transpired, however, that the Senate was not inclined to stand and deliver forthwith, and presently Robert Morris, also of Pennsylvania, rose and moved that the papers communicated by the President be referred to a committee of five, a motion promptly seconded by another Member. To continue Maclay's narrative:

"Several Members grumbled some objections. Mr. Butler rose; made a lengthy speech against commitment; said we were acting as a council. No council ever committed anything. Committees were an improper mode of doing business; it threw business out of the hands of the many into the hands of the few, etc."

Maclay, himself, now spoke at length in favor of commitment "in a low tone of voice." "Peevishness itself," he asserts, "could not have taken offense at anything I said." Nevertheless, he continues:

"* * * the President of the United States started up in a violent fret. "This defeats every purpose of my coming here," were the first words that he said. He then went on that he had brought his Secretary of War with him to give every necessary information; that the Secretary knew all about the business, and yet he was delayed and could not go on with the matter. He cooled, however, by degrees * * * He rose a second time, and said he had no objection to postponement until Monday at 10 o'clock. By the looks of the Senate, this seemed agreed to. A pause for some time ensued. We waited for him to withdraw. He did so with a discontented air. Had it been any other man than the man whom I wish

to regard as the first character in the world, I would have said, with sullen dignity."

McClay then adds his own interpretation of the event in these words:

"I cannot now be mistaken. The President wishes to tread on the necks of the Senate. Commitment will bring the matter to discussion, at least in the committee, where he is not present. He wishes us to see with the eyes and hear with the ears of his Secretary only. The Secretary to advance the premises, the President to draw the conclusions, and to bear down our deliberations with his personal authority and presence. Form only will be left to us. This will not do with Americans. But let the matter work; it will soon cure itself."

This prophecy has been amply verified by history. Washington went back to the Senate the following Monday for its answers to his questions, and while the ensuing colloquy seems to have moved along without any of the earlier jars, no President of the United States has since that day ever darkened the doors of the Senate for the purpose of personal consultation with it concerning the advisability of a desired negotiation.

From that time forth, in fact, the relations of President and Senate in the realm of diplomacy came rapidly to assume a close approach to their present form. The history of the famous Jay Treaty 5 years later is a primo illustration. The treaty was negotiated in London under instructions in the framing of which the Senate had no hand, and when it was laid before that body, the latter, instead of rejecting or accepting it outright, as it would have done in dealing with a nomination to office, proceeded in effect to amend it as if it had been a legislative project; nor did the administration challenge the Senate's right to pursue this course, although the British Government was at first disposed to do so. In a word, the Senate's function as an executive council was from the very beginning put, and largely by its own election, on the way to absorption into its more usual function as a legislative chamber, and subsequent developments soon placed its decision in this respect beyond all possibility of recall.

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The most recent phase of Presidential foreign policy demanding attention here is that which finds expression in the so-called Status of Armed Forces Agreements. The United States is at present party to 13 such agreements, 12 of them being with members of NATO and 1 with Japan. Under these, the other party is entitled to request the assistance of American forces stationed within their boundaries, while at the same time retaining jurisdiction over members of such forces in the case of unauthorized and harmful acts by members thereof. Thus, in the case of Italy, our agreement with which became effective January 21, 1958, the Italian courts had, prior to April 9, 1957, tried 64 such cases, of which 20 resulted in acquittals, 25 in suspended sentences, 10 in fines, and 9 in suspended sentences to confinement. The most notorious case, however, is one that arose in Japan early in 1957. In this instance, an American serviceman named Girard, in performing an apparently unauthorized act, killed a Japanese woman and was handed over by the President to the Japanese courts. The Supreme Court of the District of Columbia, from which a writ of habeas corpus was asked by Girard's friends, while discreetly refusing the writ, which it was in no position to back up, rendered "a declaratory judgment," pronouncing the President's order to be "unconstitutional." The ruling was appealed by the Government to the Supreme Court of the United States, which, on the authority of Chief Justice Marshall's holding in 1812, in the case of *The Exchange v. McFadden*, overruled the District of Columbia court. Inasmuch as the issue involved concerned the President's powers as Commander in Chief over a serviceman on duty in a foreign country, it is possible that the administration would have done better simply to ignore the district court's intervention. As to Girard, I am inclined to believe that he is in luck in not having to account to an American court-martial for his behavior.

MR. SOURWINE. Mr. Chairman, that is all of the submissions for the record that I have at this time.

Senator JENNER. Call the first witness.

Representative Watkins M. Abbitt.

**STATEMENT OF HON. WATKINS M. ABBITT, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF VIRGINIA**

Mr. ABBITT. Mr. Chairman, I appreciate very much the opportunity of being here this morning.

Senator JENNER. Thank you. You may be seated, Congressman.

Mr. ABBITT. My purpose is to introduce the distinguished gentleman from Virginia who desires to testify. I want to take one moment.

Senator JENNER. All right, sir.

Mr. ABBITT. Before introducing him, I would like to just say, briefly, that we in Virginia are vitally interested in preserving the constitutional government in America. We think that your bill is a long step in the right direction.

Senator JENNER. Thank you.

Mr. ABBITT. We think it will help us. And when I say "we," I think I speak for the overwhelming majority of Virginians who love and cherish this great country of ours and our way of life.

I count it a high honor in introducing to this committee the Honorable William Old, of Chesterfield.

Mr. Old was born and raised in Virginia, and his ancestors have been Virginians for generations. He was raised in Powhatan County, educated at Custer Springs Academy, where he was a student with the Honorable Martin Dies, Congressman from Texas. He graduated from Washington and Lee University, where he was a student with the Honorable W. M. Tuck, former Governor of Virginia and now Congressman from the Fifth District.

Judge Old has been an eminent lawyer and attorney. He is a constitutional student. He is one of the beloved circuit judges of Virginia.

In Virginia, our judges are not elected, as they are in some places—and I have no reflection on any other place—but they are appointed because of their integrity and their judicial ability, and they are held in high regard. I know of no person in the judiciary who is held in higher regard, loved more by Virginians, than is my friend, William Old.

He was the father of the so-called interposition doctrine that recently came up in Virginia and other States. I am proud and highly honored to introduce to you the circuit judge of Chesterfield County, Judge William Old.

Senator JENNER. Thank you, Congressman.

Mr. Old, we are glad to have you. You may proceed, if you have a statement.

**STATEMENT OF HON. WILLIAM OLD, CIRCUIT JUDGE,
CHESTERFIELD COUNTY, MO.**

Judge OLD. It is a great pleasure for me to be here, and I think the earnestness and the desperate necessity of this situation should impel everybody to give the most serious thought.

Senate bill 2646, introduced by Senator Jenner, would withdraw from the Supreme Court of the United States appellate jurisdiction

in certain specified fields, namely, first, with respect to the investigative functions of Congress; second, with respect to the security program of the executive branch of the Federal Government; third, with respect to State antisubversive legislation; fourth, with respect to home rule over local schools; and, fifth, with respect to the admission of persons to the practice of law within individual States.

This bill is predicated upon the provisions of article III, section 2, paragraph 2, of the Constitution, which reads as follows:

In all Cases affecting Ambassadors, other public ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Thus, the Congress is clothed with full power to make exceptions to the appellate jurisdiction of the Supreme Court and to regulate the exercise of such jurisdiction. It is indeed regrettable that it has become necessary for the Congress to consider the expedient of withdrawing from the Supreme Court appellate jurisdiction in the fields specified in the bill under consideration. However, it is now clearly apparent, from a long list of revolutionary decisions by the Supreme Court, headed by Chief Justice Warren, that the Court is determined to destroy our dual system of government under the Constitution, and create, by usurpation and encroachment, a judicial oligarchy of unparalleled proportions.

Washington in his Farewell Address pointed out the dangers which now beset us when he said:

The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a despotism. A just estimate of that love of power and proneness to abuse it which predominates in the human heart is sufficient to satisfy us of the truth of this position. The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories, and constituting each the guardian of the public weal against invasions by the others, has been evinced by experiments ancient and modern, some of them in our country and under our own eyes. To preserve them must be as necessary as to institute them.

It seems to me that the decision in the case of *Steve Nelson* against Pennsylvania is fraught with great and mortal danger to the institutions of our country. For in that case the Supreme Court invented and laid down the doctrine of preemption. Under the leadership of Howard W. Smith, the distinguished dean of the Virginia delegation in the House of Representatives, the Congress enacted the Smith Act to curb the subversive and seditious efforts of the Communist conspiracy in this country. It is incredible that anyone could conceive that an act proposed by Judge Smith would intend to impair State laws in the field of sedition or any other field. Moreover, the Smith Act itself specifically negated any such intent. Yet the Supreme Court, without any semblance of constitutional authority, held that Congress, by merely entering the field of sedition, regardless of its expressed intention, preempted the whole field and struck down all State laws involving sedition. Although the State government might be in mortal danger of being overthrown by the Communist conspiracy, they could do no act to defend themselves.

Just what was the purpose of the Supreme Court in inventing that doctrine of preemption? Was the Court so anxious to free *Steve*

Nelson, so that he might continue his subversive career, that it would destroy laws vital to the sovereign States under such a flimsy pretext? We don't know, but it seems incredible that concern for Steve Nelson could have been the motivating reason. If this doctrine of preemption were a sound constitutional principle could or should it be confined to the field of sedition? Is, or can it be, the purpose of the Court to destroy the sovereign States? To ascribe to the Court such a purpose is a horrible thought. But if that doctrine of preemption should, at a propitious moment, be extended to the field of taxation, the governments in the 48 States would be laid in ruins by one fell act, unless the States respectively should interpose their sovereignty against such a dire result.

In the *Slochower* case the Supreme Court held that New York City could not fire a teacher who refused to state whether he was a Communist or not, although State and municipal law required him to be fired under such circumstances. Just what is the purpose and underlying motive of that decision? And what is the constitutional principle under which it was enunciated? We don't know, but it seems incredible that the Court should have wished to reward Professor *Slochower* for defying the law under which he was employed. Can that decision, at a propitious moment, be extended to embrace hiring as well as firing, and force the States and municipalities to take their onomies into their employ as well as to keep them there? If not, why not?

The great and sovereign State of California has been ordered to admit to the practice of law a person whom its board of law examiners did not consider to be morally fit for such admission. The great and sovereign State of Illinois was deprived of its sovereign power in the matter of appellate procedure in its own State courts. The great and sovereign State of Oregon was deprived of its jurisdiction over non-navigable streams. In the *Girard College* case an extremely well-reasoned opinion by the Supreme Court of the great and sovereign State of Pennsylvania was nullified by a 5½ line per curiam memorandum opinion, which could hardly be considered otherwise than as a studied insult to that great court of Pennsylvania. All of these encroachments, and many more, have been inflicted upon the sovereign States by the Supreme Court of the United States during the few years of the Warren Court.

But the Supreme Court has not confined its usurpations and encroachments to the sovereign and reserved powers of the sovereign States. It has thrust its tentacles into the constitutional powers of the Congress and of the Executive, which, with the courts, constitute the three great coordinate branches of the Federal Government. The *Jencks* case encroached upon the constitutional powers of the executive branch of the Federal Government and struck a mortal blow at the ability of the FBI to deal with the subversive and criminal elements of this country. So destructive was this blow that Attorney General Brownell came before Congress beseeching relief against the Supreme Court's decision. Another lethal blow was struck at the police system of the Nation's Capital further curtailing their efforts to deal with a seething and spiraling criminal condition there. Mallory, a brutal Negro rapist, was freed by the Supreme Court upon the flimsy tech-

nical ground that Mallory was questioned by the police before arraignment. There was no question of Mallory's guilt. He admitted it. So the Washington Police Department and presumably every police department in the Nation is, by this infamous decision, precluded from holding a person to whom suspicion points without arraignment for a few hours, for questioning and for investigating the available evidence. No police department can function under any such restrictions.

These decisions probably are predicated on the nebulous provisions of section 1 of the 14th amendment. In its opinions in the cases referred to above, the Supreme Court has been particularly remiss in setting forth the constitutional basis for the inordinate power which it seeks to exercise. However, the court simply ignores specific provisions of the Constitution which in the clearest language would seem to preclude the exercise of any such power. We Virginians and the citizens of the other Southern States, since the deplorable decision of May 17, 1954, have been bombarded with statements asserting that decisions of the Supreme Court constitute the law of the land. These assertions are made as though handed down by some Olympian oracle, without citing a single provision of the Constitution which could confer upon the Supreme Court power to make law, or power for carrying into execution any power vested by the Constitution in the Government of the United States, without a law enacted by Congress to carry such power into execution. Suppose we should concede that the Supreme Court does have the prerogative to define the extent and limits of the power vested in the Government of the United States by section 1 of the 14th amendment and conceding further that the 14th amendment, although adopted under tainted circumstances, is a valid part of the Constitution, what then? Who is to make law for carrying such powers into execution? Section 8, article 1 of the Constitution is explicit on that point. The first 17 paragraphs of section 8 itemize specific powers delegated exclusively to Congress, which cannot be exercised by the Supreme Court or by the Executive or by the Supreme Court and the Executive, without law enacted by Congress. Paragraph 18, section 8, article 1, of the Constitution reads:

Congress shall have power: To make all laws which shall be necessary and proper for carrying into execution the foregoing powers—

that is, the 17 powers in section 8—

and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

Can the plain and explicit language of that provision be interpreted, construed, or twisted, by the process of any mental gymnastics, to mean otherwise than that the Congress is the sole and exclusive law-making agency of the Federal Government?

If Congress is endowed with exclusive power to make all laws which may be necessary and proper for carrying into execution all powers vested by the Constitution in the Government of the United States, how can the Supreme Court validly make any enunciation or decree having the force of law, regarding any power vested in the Federal Government, unless and until Congress shall have carried into execution such dormant power by necessary and proper law?

It seems certain that it was never intended that the provisions of section 1 of the 14th amendment, which is the source of all our troubles, should be self-executing or be enforced by any agency, judicial or

executive, except pursuant to legislation enacted by Congress. Section 5 of the 14th amendment reads:

Congress shall have power by appropriate legislation to enforce the provisions of this article.

We take the position that any enunciation or decree of the Supreme Court which undertakes to carry into execution any power vested by the Constitution in the Government of the United States except pursuant to valid act of Congress is not the law of the land, but is an illegal encroachment upon the constitutional powers of Congress and the sovereign and reserved powers of the sovereign States. The Supreme Court by making the above-mentioned decisions, without legislative authority from Congress, has abused its appellate jurisdiction, and Congress is in duty bound to withdraw appellate jurisdiction in the respects enumerated in S. 2646.

The Virginia Convention of 1788, which ratified the Constitution, set forth the following principle which I do not believe should ever be forgotten:

That Government ought to be instituted for the common benefit, protection, and security of the people; and that the doctrine of nonresistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind.

I hope this bill will unquestionably be passed.

Senator JENNER. Thank you, Judge. We appreciate your coming before us.

Mr. SOURWINE. May I inquire, Mr. Chairman?

Senator JENNER. Yes. Proceed.

Mr. SOURWINE. If I may, I should like to get for the record your opinion on several points that have been raised in the hearings so far.

Judge OLD. Yes, sir.

Mr. SOURWINE. One point which has been made is that, if this bill should pass, then uniformity of decision in certain areas—that is, those specified in the bill—would be lost. Would you comment on that, sir?

Judge OLD. I think probably they would be to some extent lost. But I believe that probably there should not be uniformity throughout the United States in many respects of a local nature.

Mr. SOURWINE. Judge, you are saying that with respect to such matters as control of entry into the bar and home rule of local schools uniformity should be uniformity at the State level?

Judge OLD. State Level.

Mr. SOURWINE. That it is local option matter, to be governed by the States?

Judge OLD. I firmly believe that to be true.

Mr. SOURWINE. Do you feel federally imposed uniformity from the top down in such matters is desirable?

Judge OLD. I think it could only create complete chaos, and in the school system I think it would completely destroy the school system.

Mr. SOURWINE. Judge, with regard to the administration of congressional investigations, do you believe that a judicially imposed uniformity is desirable?

Judge OLD. I do not think so. I think that that is a matter that is purely within the discretion of the respective Houses of Congress in their own determination without any control by the court.

Mr. SOURWINE. Judge, with regard to the conduct and administration of the Federal employees' security program, does that involve possible actions in a number of courts or possible actions in a single court? Do you know?

Judge OLD. I think it could possibly involve possible actions in a number of courts.

Mr. SOURWINE. So that to the extent that there were actions outside the District of Columbia, there would be in that field a possibility of some loss of uniformity in appellate decisions if the Supreme Court were taken out of the picture?

Judge OLD. Probably so, but unless you concede that the inferior courts in the Federal system are not going to carry out the law—I think we can concede that most of the judges in the Federal system are going to carry out the law as it is set forth by Congress.

Mr. SOURWINE. Well, is there any question there of what kind of uniform law you are getting or are going to get? For instance, the Supreme Court decision in *Cole v. Young* says that, in the administration of the Federal employees' security program, an employee cannot be fired under the discretionary authority granted by statute unless the position he occupies has previously been declared to be sensitive. That is the uniform rule if we are to assume that the Supreme Court's holding is the uniform rule. Is there any question in your mind as to the desirability of such a rule, and if so, will you tell us what you think the circuit courts will do with that rule if this bill is passed?

Judge OLD. I do not think uniformity imposed by some power considered to be absolutely supreme is desirable at all. It seems to me that the various agencies of the Federal Government should have considerable latitude in the question of employment for reasons that they consider to be to the benefit of the public business.

I do not think that a court of justice—that that is a judicial problem at all. I think the Court is usurping power when it undertakes to make it a judicial problem, and I do not think judicial uniformity is a correct thing.

Mr. SOURWINE. Now, I would like to ask you this, Judge. We have two questions involved here; have we not? One, the constitutional power, the constitutionality of the claimed power of the Congress to regulate the jurisdiction of the Supreme Court and make exceptions to it. On the other hand, we have the claimed power of the Court to declare acts of Congress unconstitutional.

Now, can you tell us where those two asserted powers stem from?

Judge OLD. In my opinion, the power of the Supreme Court to declare acts of Congress unconstitutional is related entirely to its power to decide issues between litigants which come before it.

Mr. SOURWINE. Is that power anywhere set forth in the Constitution? That is, the power of the Supreme Court to declare an act of Congress unconstitutional?

Judge OLD. No; no.

Mr. SOURWINE. Is the power of the Congress to regulate and make exceptions to the appellate jurisdiction of the Court set forth in the Constitution?

Judge OLD. It is set forth explicitly in the Constitution.

Mr. SOURWINE. In article III, section 2, clause 2?

Judge OLD. That is right; yes, sir.

Mr. SOURWINE. I would like to ask you about the construction of that language in article III, section 2, clause 2. It has been said before this committee that that section, that clause, does not mean what it appears to mean, that it is in fact to be construed as a conveyance of appellate power to the Supreme Court, that the apparent exception thereafter must be construed in connection with the previous grant of power and therefore cannot be construed to give the Congress authority to take the appellate power away from the Court.

What is your view?

Judge OLD. In other words, your suggestion is that having granted appellate power to the Supreme Court it cannot be limited by some provision that comes after that?

Mr. SOURWINE. Well, that suggestion has been made here.

Judge OLD. Yes.

Mr. SOURWINE. Even though the authority for the limitation appears to be in the same text and in the same paragraph and the same sentence as the grant of the power.

Judge OLD. I would say that any person who sought to make such an argument as that would be distorting the Constitution. I do not think he would be interpreting the Constitution at all. I think he would be by some specious reasoning trying to destroy the Constitution, in my opinion.

Mr. SOURWINE. I have no other questions, Mr. Chairman.

Senator JENNER. No further questions. Thank you very much, Judge, for appearing and giving us the benefit of your knowledge.

The next witness will be Mr. Edgar C. Bundy.

Mr. Bundy, will you state your name for the committee?

STATEMENT OF EDGAR C. BUNDY, PRESIDENT, ABRAHAM LINCOLN NATIONAL REPUBLICAN CLUB

Mr. BUNDY. Mr. Chairman and members of the subcommittee, my name is Edgar C. Bundy.

Senator JENNER. Where do you reside, Mr. Bundy?

Mr. BUNDY. I reside at 1407 Hill Avenue, Wheaton, Ill.

Senator JENNER. Are you representing yourself here as an individual, or are you representing some organization?

Mr. BUNDY. I am the president of the Abraham Lincoln National Republican Club, for whose nationwide membership I am authorized to speak concerning Senate bill 2646.

Senator JENNER. What is the membership of the Abraham Lincoln National Republican Club?

Mr. BUNDY. The membership of the Abraham Lincoln Republican Club is in 46 States and Alaska, and our board of directors have asked that the figures of membership remain a part of the private files of the organization because of the fact that there are so many leftwing, pseudoliberal groups that would like to find out just how strong we are.

Senator JENNER. All right.

Mr. BUNDY. And we keep that as an organizational secret.

Senator JENNER. You may proceed. You have a statement.

Mr. BUNDY. Mr. Chairman and members of the subcommittee, I and countless numbers of my fellow Americans continue to view with great alarm the recent series of decisions of the United States Supreme

Court which have dealt with cases involving subversives and subversive activities within the borders of the United States.

We believe that the decisions of the Supreme Court in regard to these matters have weakened the internal security of the United States immeasurably and have given aid and comfort to the enemies of the American Republic; namely, the agents of the Kremlin apparatus who are working in our midst.

Many of us never believed that we would see the day when 1 of the 3 major branches of the United States Government would give aid and comfort and protection to individuals who seek to destroy one of the grandest and noblest forms of human government ever devised in the history of this world.

Since none of us mortals has been given the omnipotent power to read the minds of others, we cannot say just why members of the Supreme Court of the United States have ruled in this manner. We do not know the motives behind such decisions. But, as free American citizens and supporters of the American form of government, we have an inherent right to protest such decisions which we believe to be against the best interests of the United States of America.

That is why we are grateful for this opportunity which has been afforded to us by the committee to present our views today. Since you who constitute the membership of this committee, and all other Members of the Congress of the United States, are the duly-elected representatives of the people, and not appointees in Government, you represent the last hope of the people of this country in the battle to preserve the Republic and to protect it from its enemies from within and from without.

Members of the Supreme Court of the United States are appointed. You are elected by the people. Every 6 years you must go back to the people in the grassroots and receive their approval in order to continue in public office. Your actions while serving as Members of the Congress of the United States are closely scrutinized by those who send you here to represent them. You are closely checked and held accountable by the electorate.

Not so with the members of the Supreme Court of the United States. The masses of citizens of this country have no direct contact with the members of the Supreme Court. The members are not subjected to the approval or disapproval of the people every few years. Theirs is a life tenure unless removed from office by impeachment proceedings or by physical or mental incapacity.

Often times we have witnessed the unexplainable action by Chief Executives of appointing men to this august body, the Supreme Court, who have never served as judges in the lower courts of our land, and who thereby lack the judicial experience which should be required of all who would serve in the highest tribunal of the United States. This is the least which should be required of those nine men who hold in their hands the power of life or death over individuals, groups, legislation, and, as has so recently been demonstrated, even the Constitution of the United States itself. It is also a sad spectacle to witness the appointment of men to this high body not on the grounds of distinguished legal ability but rather as a reward for service in the field of political action.

Many of us have wondered in recent days if it would not be a more fitting and proper procedure to nominate to this high tribunal, when

vacancies occur, only those men who have served with distinction in the supreme courts of the sovereign States or in Federal district courts for a reasonable period of time, and especially only those individuals who are thoroughly familiar with American constitutional law and whose judicial record shows, beyond a shadow of a doubt, that their interpretation of the Constitution of the United States is in the traditional American manner, as demonstrated by those who have hitherto occupied positions in this high body.

We can only wonder in the light of the decisions by the Supreme Court within the last several years, involving cases which have to do with the security of the United States, whether or not the Constitution and the powers therein granted to the Supreme Court can be so interpreted as to nullify decisions and interpretations set forth by those who constituted membership of the Supreme Court in former years.

We believe that the Constitution of the United States is a stable document, one that can be relied upon even in the so-called modern changing world. We do not believe that the Founding Fathers intended that the Constitution should be so flexible that even the American form of government could be changed by the particular whims and fancies of men who are engaged in interpreting it.

If we read the Constitution correctly, we see that the Constitution itself can only be changed by the people acting through their duly elected representatives. The members of the Supreme Court are not elected by the people.

We further believe that the Founding Fathers were wise for putting into the Constitution certain restrictions on the Supreme Court, which restrictive power is given expressly to you, the Members of the Congress of the United States.

We believe that it is time for the Congress of the United States to exercise those restrictive powers as guaranteed to it in article III, section 2, which states:

In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

It is a good thing that the wise Founding Fathers foresaw the fact that Congress might, at some time or another, have to make exceptions to and regulate appellate jurisdiction of the Supreme Court.

We believe that now is the time for Congress to assert its authority and exercise such authority as given to it in article III, section 2, of the Constitution by enacting Senate bill 2646, which would withdraw from the Supreme Court of the United States appellate jurisdiction with respect to the investigative functions of the Congress, with respect to the security program of the executive branch of the Federal Government, with respect to State antiradical legislation, with respect to home rule over local schools, and with respect to the admission of persons to the practice of law within the individual sovereign States.

Allow me to point out one other thing in regard to authority of the Congress of the United States to act in such a manner as described herein. Article I, section 1, of the Constitution of the United States states:

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Many of us feel quite strongly about the fact that the Supreme Court of the United States, instead of remaining in its respective field, has overstepped its constitutional bounds and has ventured into the field of legislation. When the Supreme Court of the United States begins to tell the legislative branch of the Government what it can and cannot do during a legislative hearing, such as was demonstrated in the Supreme Court decision involving *John P. Watkins v. United States of America* (June 17, 1957), the effect of such a decision renders congressional investigating committees, which have to investigate before they can legislate, practically helpless.

When the Supreme Court declared in this decision, "We have no doubt that there is no congressional power to expose for the sake of exposure," that body attacks the very heart of the legislative process. Congress must have full power to hold this very type of hearing in order to determine whether or not legislation is needed to cover the particular problem which arises in the field which Congress is investigating.

It seems to many of us that the Supreme Court has completely gone out of bounds in trying to determine what the legislative process should be. This is definitely forbidden in the Constitution of the United States in the particular language of article I, section 1.

President James Monroe, in speaking of the powers given by the Constitution to the Congress, said:

The whole system of the National Government may be said to rest essentially upon the powers granted to this branch. They mark the limit within which, with few exceptions, all the branches must move in the discharge of their respective functions.

We never thought that we would live to see the day when individuals who have aided and abetted the Communist conspiracy in this country would come before an investigative committee of the Congress and would blatantly defy the authority of the committee by invoking, not the fifth amendment to the Constitution of the United States, but, rather, the decision of the United States Supreme Court in *John P. Watkins v. United States of America*.

We do not believe that the Founding Fathers of this country, the framers of the Constitution, or anyone in his right mind, believed or would believe that the Supreme Court of the United States should be empowered by the Constitution to create an unwritten amendment behind which our enemies could hide to destroy us.

This is government of the people, by the people, for the people. If the people are not satisfied with the procedures adopted by congressional committees, while investigating the need for specific legislation, the people have the power within their own hands to change this situation. They can refuse to send certain elected representatives back to the Congress, or they can petition their own legislators to institute corrective action in either the House or the Senate. This prerogative was not given to nine men sitting on the Supreme Court of the United States.

Likewise, we do not believe that the Constitution of the United States empowers the Supreme Court to dictate to officers or agencies of the executive branch of the Federal Government in regard to the administration of programs established under authority of the Congress of the United States for the elimination from Government service employees in the executive branch whose retention may impair

the security of the United States Government. Nowhere in the Constitution of the United States does this authority, appropriated by the present Supreme Court, appear.

It is conceivable that, if the type of decision made by the Supreme Court in the *Communist Party, U. S. A. v. Subversive Activities Control Board* (April 30, 1956) is allowed to stand, then the administration of the entire internal security program could fall to pieces and the termites could continue their penetration and destruction of the very foundations of our American Government without restriction.

We cannot help but agree with Justice Tom Clark, who could not concur with the majority of the Court, when he said:

I have not found any case in the history of the Court where important constitutional issues have been avoided on such a pretext. * * * In this case the motion itself was wholly inadequate and even if the testimony of all three challenged witnesses were omitted from the record, the result could not have been different. There is no reasonable basis on which we could say that the court of appeals has abused its discretion. I abhor the use of perjured testimony as much as anyone, but we must recognize that never before have mere allegations of perjury, so flimsily supported, been considered grounds for reopening proceedings or granting a new trial. The Communist Party makes no claim that the Government knowingly used false testimony, and it is far too realistic to contend that the Board's action will be any different on remand.

Justice Clark then went on to say that the only purpose for the procedural maneuver of the Communist Party was to gain additional time before the order to make it register as a "Communist-action" organization could become effective.

To quote Justice Clark further:

This proceeding has dragged out for many years now, and the function of the Board remains suspended and the congressional purpose frustrated at a most critical time in world history. Ironically enough, we are returning the case to a Board whose very existence is challenged on constitutional grounds. We are asking the Board to pass on the credibility of witnesses after we have refused to say whether it has the power to do so. The constitutional questions are fairly presented here for our decision. If all or any part of the act is unconstitutional, it should be declared so on the record before us. If not, the Nation is entitled to effective operation of the statute deemed to be of vital importance to its well-being at the time it was passed by the Congress.

When the Communist Party of the United States of America, which is not a political party at all but an arm of the worldwide Kremlin conspiracy to destroy the last vestige of free nations, can cite the Supreme Court of the United States against the executive and congressional branches of the Government, then it is time for the Congress of the United States to rise up and assert the power given to it in the Constitution of the United States to restrict the Supreme Court in this particular appellate field.

We have had some outstanding examples in our generation of what can happen to a once-free government when power is taken away from the people and placed in the hands of a cabal, from which sooner or later arises a dictator. There is an ominous trend within this country to take more and more power away from the sovereign States and give it into the hands of an all-powerful Federal Government without constitutional authority providing for such.

The Supreme Court's decision in *Commonwealth of Pennsylvania v. Steve Nelson* (April 2, 1956) said in effect that the sovereign States have no right to protect themselves against sedition or attempts to overthrow those governments by violence or force. The Supreme

Court further took upon itself to state just what the intentions of Congress were in--

enacting the Smith Act of 1940, the Internal Security Act of 1950, and the Communist Control Act of 1954.

Here again, instead of ruling on the merits of the case itself, the Supreme Court attempted to tell what was in the mind of Congress and what was not. Congress immediately reacted to this decision by saying that no such intentions as the Supreme Court set forth were in the mind of Congress at the time the law was passed.

Not only does this affect the ability of the State of Pennsylvania to control subversives within its borders, but also the ability of 44 other States of the Union to do likewise under existing State statutes.

Again, we cannot help but agree with three of the Supreme Court Justices who filed dissenting opinions in the case. They declared:

The State and National legislative bodies have legislated within constitutional limits so as to allow the widest participation by the law enforcement officers of the respective governments. The individual States were not told that they are powerless to punish local acts of sedition, nominally directed against the United States. Courts should not interfere. We would reverse the judgment of the Supreme Court of Pennsylvania.

It is time for us to reread article X of the United States Constitution which uncompromisingly declares:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Supreme Court in rendering this decision against the Commonwealth of Pennsylvania has ruled in direct contradiction to the Constitution of the United States.

The Supreme Court of the United States is becoming a contradictory body. In its decision in the case of *Harry Slochower v. The Board of Higher Education of the City of New York* (April 9, 1956) it held unconstitutional section 903 of the New York City Charter, which provided for the discharge of any city employee who pleaded the privilege against self-incrimination to avoid answering a question relating to official matters.

In rendering this decision, the Supreme Court denied the right of the city of New York, and all other lower echelons of government throughout the United States, to protect itself from employees being paid by public tax money who refuse to answer questions relating to subversive activities.

To show that the present United States Supreme Court is not consistent with the previous United States Supreme Court's decisions, we would like at this point to refer to the decision of a previous United States Supreme Court in upholding the constitutionality of the New York Feinberg law, and also in passing upon the constitutionality of that part of the Taft-Hartley law which requires a non-Communist oath. The Court said:

One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty.

From time immemorial, one's reputation has been determined in part by the company he keeps.

We know of no rule, constitutional or otherwise, that prevents the State, when determining fitness and loyalty of persons, from considering the organizations and persons with whom they associate.

Guilt by association is an epithet frequently used and little explained, except when it is generally accompanied by another slogan, "Guilt is personal." Of course it is; but personal guilt may be incurred by joining a conspiracy. That act of association makes one responsible for acts of others committed in pursuance of the association.

In other words, what the United States Supreme Court said at that time was that the State, including New York and its lower echelons of government, has a right and a duty to investigate associations, past and present, and the conduct of one who is being employed by government. Employment by the State is not a right of any individual, but rather a privilege. Therefore, when one attempts to hide behind the fifth amendment of the Constitution and refuses to answer whether or not he or she has been a member, or is now a member, of the Communist conspiracy, he forfeits all rights to be employed by government, whether on the local, State or National level.

Nowhere in any of the historical documents of the United States has it ever been stated that the purpose of the Founding Fathers in including the fifth amendment in the Constitution of the United States was to provide a convenient vehicle behind which an enemy of the United States could hide while working for the destruction of that free government and the Constitution, which includes the fifth amendment.

Mr. SOURWINE. May I interrupt you, Mr. Bundy?

Mr. BUNDY. Yes.

Mr. SOURWINE. You said in the paragraph above that employment by the State is not a right of any individual but, rather, a privilege.

Mr. BUNDY. Yes, sir.

Mr. SOURWINE. In the next sentence you say:

Therefore, when one attempts to hide behind the fifth amendment of the Constitution and refuses to answer whether or not he or she has been a member, or is now a member, of the Communist conspiracy, he forfeits all right.

You mean he forfeits the privilege?

Mr. BUNDY. That is right.

Mr. SOURWINE. You said it was not a right.

Mr. BUNDY. That is right. Yes, he forfeits all privilege.

Mr. SOURWINE. All right.

Mr. BUNDY. Paragraph (4) of Senate bill 2646 must be passed by the Congress in order to remedy this situation and eliminate these contradictions of the Supreme Court.

When the Supreme Court of the United States ruled on May 6, 1957 in the case of *Rudolph Schware v. Board of Bar Examiners of the State of New Mexico*, and in the case of *Raphael Konigsberg v. The State Bar of California and the Committee of Bar Examiners of the State Bar of California*, it, in effect, again entered into a field prohibited by article X of the Constitution, and opened the door for Communist lawyers, and lawyers with criminal records, to come into our judicial system and take over.

The action of the Supreme Court in these two cases is inexcusable and intolerable. When a sovereign State cannot set up rules of good conduct governing the admission of those who wish to practice law within the borders of that sovereign State, then the complete breakdown of law and order in the American Republic is only a matter of time.

The Senate of the United States can correct this situation by enacting paragraph (5) of Senate bill 2040.

A most important reason for the extreme urgency for passing Senate bill 2040 is the jubilation which has resounded from coast to coast within the Communist Party and its horde of satellite organizations made up of fellow travelers and party sympathizers. Following some of the recent Supreme Court decisions, Communist Party functionaries came out into the open and proclaimed themselves to be respectable citizens under the authority of the Supreme Court of the United States. They called brazen press conferences and quoted the Supreme Court decisions to prove that the Communists were law-abiding and respectable citizens, while the investigative committees of the Congress were nothing but "Fascist-reactionary forces" which are in business to take away the civil liberties and civil rights of American citizens.

Mr. SOURWINE. Mr. Bundy, did the Supreme Court decide, for instance, in the Smith Act cases, that the defendants were not guilty, or did the Supreme Court decide that on the basis of a technicality the cases against them should be dismissed?

Mr. BUNDY. Well, some of them were declared not guilty and turned loose, in the case of the 14 in California, while as to others the case was remanded back to the lower courts on a technicality.

Mr. SOURWINE. In the California case do you recall how many of the defendants were declared by the Supreme Court not guilty?

Mr. BUNDY. I believe there were five.

Mr. SOURWINE. Did they make that declaration on the facts as a jury would or on the basis of some other point?

Mr. BUNDY. They acted as a jury, which they had no right to do.

Mr. SOURWINE. They acted as a jury?

Mr. BUNDY. That is right.

Mr. SOURWINE. Go ahead.

Mr. BUNDY. This brings to mind the magnificent speech which the Director of the Federal Bureau of Investigation, Mr. John Edgar Hoover, made before the 1957 National Convention of the American Legion in Atlantic City. One particular sentence should be recalled at this time:

We face a regenerated domestic branch of the international conspiracy, making plans to exploit recent court decisions and highly optimistic for the future.

Not only has the Communist international conspiracy within the United States made such plans, but Communists are already exploiting the recent court decisions and have recruited many self-styled liberals to join their loudmouthed fanfare from one end of the country to the other.

Mr. Chairman, might I interpose at this time, because this came in yesterday's mail before I left Chicago to come down here.

One of the most blatant examples of how self-styled liberals are being used over this country to uphold these decisions of the Supreme Court while attacking the investigative processes of the Congress is found in this publication which is entitled "The Classmate," February 1958, seemingly innocuous when you look at the outside cover—a picture of beautiful pine trees covered with snow, a winter scene, and a poem called The First Snow.

And when you turn to the inside you find an article entitled "The National Outlook," by D. F. Fleming, "The Supreme Court Ends the Heresy Hunt." And then you have a cartoon here—the Supreme Court gavel coming down, "End of Witch Hunt."

This is one of the most vicious attacks I have ever read upon the investigative committees of the Congress of the United States. I have never read anything in my years of intelligence work or work with the antislavery committee of the American Legion in any of the Communist publications more blatant than this.

The interesting thing is that this gentleman, D. F. Fleming, is chairman of the political science department of Vanderbilt University, which is training thousands of young people. He was also the gentleman who wrote a letter to Mr. Alger Hiss during his trial deploring the fact that Mr. Hiss was on trial, saying that Mr. Chambers was the one who should be put in jail, and that if a committee for the defense of Mr. Hiss were formed he would like to help out and contribute to that financially.

The saddest thing of all in this article, which I would like to have the committee enter into the record, make a photograph of—

Senator JENNER. It may go into the record and become a part of the official record of this committee.

(The article above referred to follows:)

[From *Classmate*, February 2, 1958, pp. 13, 14]

THE NATIONAL OUTLOOK

By D. F. Fleming

THE SUPREME COURT ENDS THE HERESY HUNT

"The power of inquiry is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress."—The Supreme Court in *Watkins v. United States*.

June 17, 1957, will go down in our annals as the day on which the United States Supreme Court ended the great postwar hunt for ideological heretics, legally at least.

This search for heresy was born of an almost fierce determination that no Communist or leftist ideas make progress in this country as a result of the World War II upheaval. Communist ideas or associations were the focus of the crusade, largely because the war extended communism over East Europe and east Asia.

This unpleasant development gave rise to the cold war, which entered on a mighty resolve to prevent communism from extending any further, and to the internal drive to stamp out Communist ideas and Communist people. Inevitably, too, the term "Communist" came to mean almost any idea which ultra-conservatives and patriots disliked.

Then the Korean war turned fears and passions loose and the movement for suppressing hated ideas and disliked people got out of hand. The term "witch hunt" came into general use, because there were so many resemblances between the hysteria which swept over the land and the early hysteria in New England when women were condemned and executed as witches.

The aroused citizens who led and followed the movement resented the idea that we had developed a national hysteria, but as McCarthy and others of his kind seized its leadership and were among the most powerful people in the land there was no longer any doubt that we suffered from a dangerous national sickness.

Ways around the Constitution

The most basic of our individual liberties—freedom of thought—was attacked on many fronts, a difficult thing to do in view of its many explicit guarantees in the Constitution and the Bill of Rights.

A way around this difficulty was found in two devices. One was to declare communism to be an international conspiracy, and as such an enemy of the Constitution and beyond its protection. The Smith Act of 1940 was the main legislative expression of this idea, and under it successive groups of leaders of the Communist Party were imprisoned, in various parts of the country.

Exposure in Public Pillory

However, the main vehicle of the heresy hunt was the Congressional investigating committee. As conceived originally by Representative Martin Dies in the House Committee on Un-American Activities, this was a kind of public grand jury, operating not in complete secrecy but in the full blaze of publicity—evenually with radio and television coverage—and armed with the power to compel testimony under pain of imprisonment for contempt.

This device enabled the heresy hunters to evade all of the constitutional and procedural protections surrounding criminal procedure. Their proceedings were not trials, but they killed reputations, blasted professional careers, destroyed livelihoods, ruined many lives and caused suicides.

Even the remote past ideas and associations of a Canadian Ambassador, often cleared by his own Government, were brought up so often that he killed himself last spring, and on June 17, on the very day that the Court handed down its four momentous decisions a west coast scientist, William K. Sherwood, killed himself.

A subcommittee of the House Un-American Activities Committee had gone there to investigate "Intellectual Infiltration"—an open confession of inquisitorial purpose—and had subpoenaed Sherwood. They also proposed to televise the proceedings, in flat defiance of a House rule to the contrary. Having "a fierce resentment against being televised," Sherwood wrote a farewell note saying: "My life and my livelihood are now threatened by the House Committee . . . I will be in two days assassinated by publicity," and then swallowed poison.

The Investigators curbed

It was this kind of thing which the Supreme Court halted on June 17. In the *Watkins* case a young labor organizer had been grilled by the Un-American Activities Committee on his past associations and he had freely confessed his Communist past. He was even willing to identify people he believed were still Communists, but refused to name others that he thought no longer were. He was therefore cited by the House for contempt, convicted and sentenced.

In freeing him the Court granted a wide field of essential activity to investigating committees, but reminded the Congress that some legislative purpose must be involved. The power of inquiry "is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress."

"No inquiry is an end in itself," continued the Court, and "Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible." Also, "The Bill of Rights is applicable to investigations," and "The mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of governmental interference."

Also, said the Court, the effect on the lives of witnesses "may be disastrous" when the forced revelations concern matters that are unorthodox, unpopular, or even hateful to the general public." The Court held, accordingly, that investigations must help Congress to frame laws, that their legislative purpose must be clearly and definitely defined in the enabling resolution and that this purpose must be explicitly explained to all witnesses.

What is "Un-American?"

The Court found that almost anything could have been done under the grant of authority to the Un-American Activities Committee, and it asked the deadly question: "Who can define the meaning of 'un-American?'"

This is the question which has cried out for judicial asking ever since this committee was organized. In a free country nobody has any right to define what is un-American for his fellow citizens. Crimes can be defined. Treason has been. Standards for good conduct can be set up by churches and other agencies, but it is the very essence of freedom that no tribunal can say what is unpatriotic, un-

American. The very idea of such a body ranging over the entire field of ideas and condemning all and sundry whom it happened to dislike as unpatriotic, disloyal, or subversive is a negation of freedom. Such a roving inquisition would be incredible in a really mature democracy, such as Britain or Sweden.

Suppression by intimidation

In the United States these committees, while ostensibly pursuing "subversion," in reality themselves crossed the bridge to subversion when they upset the presuppositions of our legal system, bypassed the functions which the courts were set up to carry out and proceeded to try people in the blazing arenas of public opinion, made angry and alarmed by the cold war. As Walter Lippmann put it, these committees sought "to suppress by intimidation what cannot be suppressed by due process of law."

Red conspiracy taint limited

While restoring the reign of law in the United States the Court also cut away most of the foundations of the Smith Act. In two previous cases in May it had overruled two State courts for refusing admission to the bar to men who had radical views or had been Communists years ago.

These decisions disallowed the favorite assumption of our thought police that "once a Communist always a Communist," or at least a suspect to be watched and distrusted for life. Then in the June 17 west coast Communist Party leaders case the Court upset the conviction of a batch of Communist leaders on the assumption that their faith committed them to violent overthrow of the Government.

Advocacy of such a course, said the Court, must be such as to lead to action. Men could not be imprisoned for general abstract talk about overthrowing the Government. They indicated also that mere membership in the Communist Party was not criminal.

If we do manage to miss an atomic holocaust, future Americans will think it strange that we ever imprisoned large numbers of people, not for any act which they had committed but because of acts which we thought they intended, or simply because of dangerous ideas believed to be in their heads. Our descendants will think we must have been fearful indeed to take action so violative of all our traditions.

John Stewart Service vindicated

In the Sweezy case the Court ruled that the States also could not police the thoughts of schoolteachers and others, and in the case of John Stewart Service it restored him to his job in the State Department with full rank and privileges, after he had eked out a living in obscurity for 6 years. Service had been cleared 8 times, by 3 kinds of tribunals, but he had been fired on the ninth round, in violation of the State Department's own rules, because some China lobbyists and others did not like his ideas. The ouster of Service was McCarthy's first triumph.

Again, future Americans will wonder how a faithful public servant could be hounded from one inquisition to another over so many years, in a country which claimed to be the leader of the "free world."

Leader of the free peoples

Fortunately, after a long, dark 10 years, the Supreme Court has finally restored, insofar as it could, our right to lead the democratic peoples. We can now begin to escape from the judgment of the rest of the world that "the Americans no longer believe in freedom." The only principles which give us any right to lead other peoples have at last been reasserted by the highest court in the land.

This is a very great gain, for which we owe the Supreme Court our heartfelt thanks and support.

But can we make peace?

Now the most important question of all remains: Can we stop the greatest arms race of all time, before the pitiful and tragic end toward which all history points?

Here too the Court decisions give hope. The summer of 1957 was a bad time for the enforcers of cold war orthodoxy. Our own were greatly downgraded. In China dissent was openly invited and in Russia Molotov and other apostles of orthodoxy lost their jobs and power.

In both the West and the East the moderate men were prevailing over the extremists. On all sides of the cold war curtains the lessening power of the thought police freed men's minds for new solutions, especially for making

peace. But we are still a long way from being ready to make peace. This requires qualities which cold warriors do not possess, and greater adjustments than our most dedicated ones can make.

Mr. BUNDY. The saddest part is that this is an official publication of the largest Protestant denomination in the United States.

Senator JENNER. What church is that?

Mr. BUNDY. The Methodist Church. And it is a young people's publication. It is reaching millions of young people throughout this country.

And, Mr. Chairman, I have had Methodist ministers, good, sound Americans and Methodist people, who have contributed to the building of this denomination, deplore this sort of thing up and down the country, but they have no voice of answer to this sort of thing because they absolutely refuse to print a reply. And this is only one of a series which started last October by this same man who has attacked our national defense program, our security program, the investigative committees of the Congress, and is influencing millions of young Americans over this country.

I cite that as an example of how these decisions of the Supreme Court are being used.

The result of all this has been a demoralization of the anti-Communist forces within this country. People interested in good government and countless thousands of patriotic leaders in our most notable patriotic societies have thrown up their hands in disgust and have said:

What can one do any more when the highest judicial body of the United States joins hands with the Communist conspiracy, whether knowingly or otherwise, and renders the internal security program of this country of no effect?

On April 22, 1954, J. Edgar Hoover addressed the Continental Congress of the National Society of the Daughters of the American Revolution in this, the Nation's Capital. At that time he said:

To me, one of the most unbelievable and unexplainable phenomena in the fight on communism is the manner in which otherwise respectable, seemingly intelligent persons, perhaps unknowingly, aid the Communist cause more effectively than the Communists themselves. The pseudoliberal can be more destructive than the known Communist because of the esteem his cloak of respectability invites.

In various parts of this Nation I have heard the pseudoliberals screaming against Members of the Congress, the patriotic organizations, and those charged with our internal security because of any criticism which these groups might have made against the Supreme Court of the United States and its recent decisions. It has now become almost "lese majeste" to take issue with any members of the Supreme Court.

I think it needs to be made clear, once and for all, to the people of these United States that the Supreme Court as an institution is a highly respectable body in the same sense that the executive branch and the legislative branch of the Government are. However, individuals who make up that Supreme Court are fallible men. They are not above the criticism of the people, for government comes from the people, and the men who occupy the high bench are accountable to the people whether some of them believe it or not.

One is not against apples when he opposes having a bad apple in a barrel. When one criticizes members of the Supreme Court, he is not

criticizing the Supreme Court as an institution, any more than one is opposed to the executive branch of the Government when he discovers an Alger Hiss working within that branch.

As a citizen of this beloved country, and one who has served for 17 years on active and inactive duty with the United States Air Force, in the field of intelligence, I strongly urge you to pass Senate bill 2646 intact. It is well-written, all-inclusive, and will provide the remedy which is needed to curb the misappropriation of power by the Supreme Court of the United States, which power was never given to it by the framers of the Constitution nor the American citizens of subsequent generations.

Thank you very much, Mr. Chairman, for this opportunity to present my views on behalf of the membership of the Abraham Lincoln National Republican Club, and of the many more of my fellow citizens who have communicated with me from coast to coast.

Senator JENNER. Thank you, Mr. Bundy.

Mr. SOURWINE. May I inquire, Mr. Chairman?

Senator JENNER. Yes; you may proceed.

Mr. SOURWINE. Mr. Bundy, you used at least once and I think more than once in your discussion the phrase "if this decision is allowed to stand," referring to some particular decision of the Supreme Court.

Mr. BUNDY. Yes.

Mr. SOURWINE. You understand, of course, that the enactment of S. 2646 will not reverse any of the decisions.

Mr. BUNDY. It is not retroactive. I understand that, yes, sir.

Mr. SOURWINE. The Communists who have been freed will stay free.

Mr. BUNDY. That is correct.

Mr. SOURWINE. Acts which have been declared null and void are null and void so far as the decision in that case. It is *res adjudicata*.

Mr. BUNDY. Yes, sir.

Mr. SOURWINE. Well what did you mean in speaking about "if the decision is allowed to stand?"

Mr. BUNDY. My idea is this, sir—

Mr. SOURWINE. You mean stand unchallenged?

Mr. BUNDY. Yes, stand unchallenged. And, secondly, I realize that some people in this country might construe the passage of Senate bill 2646 as closing the barn door after the proverbial horse has flown, but at least we might keep a lot of the other horses from fleeing in the future if this legislation is enacted.

Mr. SOURWINE. I have no other questions.

Senator JENNER. Thank you, Mr. Bundy.

The next witness will be Rev. Robert G. Forbes.

Mr. SOURWINE. Mr. Chairman, Mr. Forbes has submitted some biographical material. I would like to ask if he desires that to go into the record.

Mr. FORBES. Not necessarily, sir.

Senator JENNER. Are you here as an individual, Reverend Forbes?

Mr. FORBES. Yes, sir.

Senator JENNER. Do you have a prepared statement?

Mr. FORBES. I do, sir.

Senator JENNER. This biographical sketch on the witness will go into the record and become part of the record.

(The biographical sketch of Rev. Robert G. Forbes follows:)

Personal: Born in Ahsoske, N. C., on April 9, 1922.

Education: Attended public schools in North Carolina. Graduate Chowan College, North Carolina. Graduate Wake Forest College, North Carolina. Graduate Crozer Theological Seminary, Chester, Pa. Attended Union Theological Seminary, New York City. Air Command and Staff School of the United States Air Force.

Studies in the following fields: (a) Theory and application of Marxism; (b) office and staff administration; (c) personnel counselling.

Military service: Voluntarily entered the United States Air Force in 1940 as a chaplain. Duty in the Korean war.

Civilian employment: Congregational minister and staff of Human Events.

Senator JENNER. You may proceed, Reverend.

STATEMENT OF REV. ROBERT G. FORBES, CONGREGATIONAL MINISTER AND MEMBER OF THE STAFF OF HUMAN EVENTS, WASHINGTON NEWSLETTER

Mr. Forbes. Mr. Chairman, I am with the staff of Human Events in Washington, with Mr. Frank Hanighen.

I am grateful for this opportunity to appear on behalf of S. 2640, introduced by the distinguished Senator from Indiana—a bill to limit the appellate jurisdiction of the Supreme Court in certain cases. I appear as a private and, I hope, informed citizen. Certainly I appear as a citizen deeply concerned over the fact that events of the past months have been of such a nature as to give rise to the need for such legislation.

With your permission, Mr. Chairman, I propose to share with the committee some of my own observations, research and study along the lines of this proposed legislation.

Specifically, sir, while I come from a theological background and not a legal background, I hope to show this committee that such action as is proposed in S. 2640 is nothing startling, nothing new, nothing unusual, and is not a radical departure from previously established precedents.

Coming from a theological background, I prefer to use a text. This text will be the 10th amendment to the Constitution of the United States:

The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States, respectively, or to the people.

Mr. Chairman, some of my statement may well be what has been called "the unctuous elaboration of the obvious." However, I believe that, upon every available occasion, we should remind ourselves of the fundamental principles which constitute the very foundation of our existence as a free people.

The Declaration of Independence and the Constitution of the United States are the greatest liberal and liberating documents ever placed on parchment. Those documents were not written by reactionaries, nor was the American Revolution fought by Tories.

The Constitution is the dike which our fathers erected against the tossing seas of despotic power, whether of dictators or mobs, whether of the classes or the masses. That Constitution lodges supreme power nowhere. The men who wrote that Constitution knew that liberty

is safe and the rights of man secure only when power is widely distributed, and never when it is concentrated.

The checks and balances of the Constitution are there to prevent any governmental department from obtaining supreme power. They are there to prevent totalitarian government. They brought an end to the idea that man is but a cell in the totality called "the state," a species of human cattle to be ordered around by men with whips.

Those checks and balances were the beginning of the "citizen." They said that the citizen has certain inalienable rights, rights which did not come from any government, State or Federal, rights which no government can lawfully take away, and which even the citizen himself cannot lawfully give away. Those rights came from the Creator, and the citizen is the trustee of those God-given rights, for himself and for his posterity.

When the Constitutional Convention adjourned, Benjamin Franklin was asked by one who had not been in on the secret deliberations of that body what kind of government had been devised. Franklin, with his usual wit and wisdom, replied: "We have a Republic—if we can keep it."

The strength and glory of our Republic derives, first, from the dual form of government under which, in that Constitution of 1789, the people of the several States delegated certain powers to the Federal Government but reserved all other powers to themselves; and, second, from the principle of the separation of powers under which, in both the Federal Government and the State governments, the legislative, executive, and judicial authorities are wisely balanced so as to prevent usurpation and tyranny by any one authority.

Those two principles of government have made our Republic stand forth as unique among the nations of the world for 167 years.

It is, therefore, one of the strangest lunacies of history that the men and women who now stand for the kind of government our fathers established are denounced as "reactionaries," while those who would return to the concentrated political and economic power our fathers crossed the stormy North Atlantic to escape are pleased to call—or, rather miscall, themselves "liberals."

No representative government since the birth of civilization has existed successfully for so long a time as has the constitutional Government of the United States, though, as history measures time, sir, we are still young in the sisterhood of nations. The system under which we live—the division of powers under our Constitution between the States and the Federal Government—has been the chief contributor to the continuation of our form of government, and our Constitution is the pillar upon which that system rests.

I hold it, sir, a fundamental truth that the maintenance of States' rights is indispensable to the preservation of human rights.

Once the right of a sovereign power to exercise exclusive jurisdiction over a local problem is lost, human rights and liberty and freedom will perish.

When the United States of America was formed and the Constitution was written, the people of the several States were insistent and demanding that local government be forever preserved in all its dignity and with all its safeguards. In the drafting of that Constitution, it was specifically provided that the right and authority of each

State to conduct its own affairs should be preserved inviolate, and there was conferred upon the Federal Government only so much power and authority as was necessary to control and regulate the relationships of the States, one with another, and the conduct of this Nation's foreign affairs and unified defense.

Even so, out of an abundance of caution, the States refused to ratify that Constitution until they had received further definite and positive assurances that this fundamental concept of government should be unmistakably set forth in the first 10 amendments to the Constitution, the Bill of Rights.

This Bill of Rights consists of two kinds of guaranties: guaranties of the rights of individuals, and guaranties of the rights of the several States. It cannot but be obvious to all who can hear or read how great and how serious has been the attempt to abrogate those guaranties.

True Americanism, born in the hearts and minds of those who founded this Nation and bought its freedom with their blood and the blood of their children, is a thing apart from control by any government, be it local, State or Federal. Under God, the Author of Liberty, we stand for individual freedom and personal dignity as an American citizen, as a citizen of our State, and as a person. With devotion and vigor we must resist the invasion, by whatever kind of government, of the basic rights, privileges, and immunities of the individual.

In 1946, a friend of mine with a gift for satire, observation, and expression, and perhaps a gift for prophecy as well, wrote this little satirical essay which I quote:

There ought to be a law. My next-door neighbor has a lot more flowers in his yard than I have.

While his favored brats eat their meals at a table decked with gay flowers, my poor kiddies have little appetite for their meals, served at a table bare of decoration. What will this discrimination do, both to the bodies and to the psychological processes of my poor kiddies?

Where is the Constitution? Where equality? Where the simple justice our forefathers guaranteed us?

A few hundred million dollars would correct this deplorable situation and give my poor kiddies the equality of opportunity which our Constitution intends each innocent child to have.

A Federal Fair Gardening Practices Administration, given adequate funds and police powers, could force my neighbor to destroy his excess flowers, to work not more than one afternoon per month in his yard, and to cut flowers for his house not more than once each week.

And not that it matters, but incidentally, the program would not cost anybody anything. The Government could just issue bonds—or whatever you call them. Or, in the time released from this incessant gardening, my neighbor could work longer at his dirty money-grubbing business and so pay larger taxes which would more than support the Federal Fair Gardening Practices Administration.

Surplus funds created in this way might well be used to finance another administrative authority, an Administration to Provide Minimum Flowers for the Tired and Underprivileged. This Administration would buy flowers from our good neighbors of other countries, thus serving the twice-blessed end of putting flowers three times each week on every bare table in the land, and also at the same time priming the pump of foreign trade.

Many of my friends have approached me with the request that I sacrifice the personal interests which have prevented my doing any gardening, and offer my services as Administrator of both the Fair Gardening Practices Administration and also of the Administration to Provide Minimum Flowers for the Tired and Underprivileged. I am loath to make the sacrifice, but who am I to stand against the mandate of the people?

Senator JENNER. Do you mind giving the committee the name of this prophet?

Mr. FORBES. Privately, sir, I would be happy to.

Senator JENNER. Privately? All right; I would like to know.

Mr. FORBES. He is a lawyer.

Senator JENNER. He is a rather good prophet. How long ago was this?

Mr. FORBES. 1946, sir.

Senator JENNER. All right; go ahead.

Mr. FORBES. That would be funny if it were not so tragic.

But an even greater danger to our rights and liberties arises from the tendency to merge our dual system of State and Federal Governments into one single, consolidated national system. This tendency now threatens to destroy entirely the Federal principle and to convert the States into compliant and parasitic subdivisions of a central government. To accept this tendency, on the ground that it promotes material welfare and expedites foreign relations, is nothing less than an abdication of constitutional government in favor of tyranny. It reduces free citizens to the condition of pensioners and slaves. No matter under what plausible name this system masquerades, it is contrary to the letter and to the spirit of the Constitution, abhorrent to American traditions and principles, and subversive of religion, culture, and the freedom and responsibility of the individual.

Social and economic justice, desirable as they are, cannot be attained or safeguarded by violation of the Constitution, but only by a strict adherence to the Federal Constitution and the constitutional rights of every State and of every individual.

The Federal Government, both in size and in function, must be maintained in constitutional balance to the several States, for it is the several States, through their constitutions and their laws, that establish the spiritual, economic and cultural conditions under which the peoples of the several States wish to live.

Each State must retain full and complete control of education, police power, use of the ballot, marriage, transportation, health, welfare, and all such matters which preserve the peace and good order within the sovereign States; and Federal invasion of those States' rights must be brought to a halt. The full and sovereign rights of the several States, guaranteed by the Constitution of the United States, must be protected from usurpation, whether such usurpation be by the Federal Executive, or by the Congress, or by the courts through a process of "judicial legislation."

Thomas Jefferson, that great Democrat, in his first inaugural address, demanded:

The support of the State governments, in all their rights, as the most competent administrations for our domestic concerns and the surest bulwark against anti-Republican tendencies.

Abraham Lincoln, that greatest of Republicans, said:

To maintain inviolate the rights of the States to order and control, under the Constitution, their own affairs, by their own judgment exclusively, is essential to the preservation of the balance of power on which our institutions rest.

Franklin D. Roosevelt said:

We are safe from the danger of departure from the principles on which this country was founded just so long as the individual home rule of the States is scrupulously preserved and fought for whenever it seems in danger.

Mr. Chairman, the sound thinking of these great men is shown by the fact that the shores of history are strewn with the wreckage of nations which patterned their governments after ours, but failed to provide

for or preserve that balance of power, that division of authority, between local and national government.

We sometimes forget that the States, no less than the agencies of the Federal Government, are guardians of the United States Constitution, and that the States, through their several constitutions, are made the direct guardians of the rights of their citizens.

Therefore, any State, when confronted with an unconstitutional exercise of Federal authority upon the citizens of that State, whether such exercise be by the executive, legislative, or judicial arm of the Federal Government, has not only the clear right but also the absolute duty to interpose its State sovereignty to check and hold in abeyance the abuse until the abuse be remedied by legislative action, or the controverted question be settled by amending the Federal Constitution through the prescribed processes.

As alternatives for constitutional liberty, there are State socialism, totalitarianism, and dictatorship. If these evils should ever prevail amongst us, America will be leveled off to the mediocrity of the other nations of the world; our strength will be shorn, our freedom gone, and our people will degenerate to a depth of weakness equal to the height of our present greatness.

It seems obvious that the real political division today is not between the Democratic and Republican parties. The real division is between, on the one hand, those men and women in both parties who believe in the freedoms as originally intended and actually written into the Constitution and, on the other hand, those men and women in both parties who maintain that such provisions have failed to give us the freedoms desired, and who hold that we must now submit our fate to a government which, whatever its name or label, will be a species of national socialism.

I submit, then, that if what Abraham Lincoln once called "this last best hope of earth" is to be the legacy of our children, all good Americans, whether nominally Democrat or Republican, can and must stand together and support the Constitution, which has made ours the greatest nation in the world.

Mr. Chairman, in the past 19 months the Supreme Court has reviewed 10 cases that bear on internal security. In all 10 cases, sir, the Court has found in favor of those who appealed against one or another law designed to protect the Nation against internal subversion. These decisions, sir, are as follows:

1. *Communist Party v. Subversive Activities Control Board*. The Court refused to uphold or pass on the constitutionality of the Subversive Activities Control Act of 1950. This destroyed the effectiveness of the act and muzzles the SACB.

2. *Commonwealth of Pennsylvania v. Steve Nelson*. The Court ruled it to be unlawful for the sovereign Commonwealth of Pennsylvania to prosecute a Penns. Ivania Communist Party leader under the Pennsylvania Sedition Act. As a result the anti-sedition acts in 42 States, Alaska and Hawaii cannot be enforced.

3. *Yates, et al. (Fourteen California Communists) v. United States*. The Court ruled (and parenthetically overruled two Federal courts) that advocating forcible overthrow of our Government, even with evil intent, was not punishable under the Smith Act, as long as it was "divorced from any effort to instigate action to that end." Five Communist Party leaders were freed, and new trials given nine others.

4. *Cole v. Young*. The Court did grant the right of the Federal Government to dismiss employees "in the interest of national security of the United States," but said it was not in the interest of national security to dismiss an employee who contributed funds and services to a concededly subversive organization, unless that person was in a "sensitive position."

5. *Service v. Dulles*. The Court set aside and reversed two Federal Courts which had refused to set aside the discharge of John S. Service by the State Department—this in spite of the fact, sir, that the FBI had a recording of a conversation between Service and an editor of the pro-Communist magazine, "Amerasia," in which Service spoke of military plans which were "very secret."

Mr. Chairman, will our military secrets ever be secure if such a criterion is allowed to stand as the order of the day?

By that I mean, Mr. Counsel, stand unchallenged.

6. *Slochow v. Board of Higher Education of New York*. New York was told it could not discharge one of its own State-paid teachers who took the Fifth Amendment when asked about Communist activities.

There was no Federal aid to education in that either, sir.

7. *Sweezy v. New Hampshire*. The Court reversed the Supreme Court of New Hampshire and held that the attorney general of New Hampshire was without authority to question Professor Paul Sweezy, a lecturer at the State University, concerning suspected subversive activities, including a certain lecture given by the professor.

Mr. SOURWINE. Pardon me at that point. The attorney general in that case was acting in his own capacity or as the agent of the State legislature? Do you recall?

Mr. FORBES. Sir, as I remember—and I am a layman—I believe it was under the New Hampshire Communist Control Act, sir. I am not sure, sir.

Mr. SOURWINE. He was acting specifically, I will say for the record, as the agent of the State legislature in conducting an investigation ordered by the legislature.

Mr. FORBES. Under that——. Yes.

Mr. SOURWINE. So that it was a State legislative prerogative which was being challenged.

Mr. FORBES. Yes.

Mr. SOURWINE. You will recall, will you not, that the Supreme Court in that case expressed its opinion to the effect that it could not conceive how the State of New Hampshire could be interested in such matters?

Mr. FORBES. Yes; I recall that. Yes; thank you, sir.

Mr. SOURWINE. Proceed.

Mr. FORBES. 8. *Konigsberg v. State Bar of California*. The question put to Mr. Raphael Konigsberg, candidate for admission to the bar, was this: "Are you a Communist?" And a series of similar questions. The Court ruled that it was unconstitutional to deny a license to practice law to an applicant who refused to answer such a question put by the bar committee.

9. *Jencks v. United States*. Clinton Jencks was convicted of filing a false non-Communist affidavit. The Court ruled that he must be given the contents of all confidential FBI reports made by any Government witness in the case. Jencks had only asked that these rec-

ords be made available to the trial judge for his inspection and determination as to whether and to what extent the reports should be made available.

10. *Watkins v. United States*. A Federal district court and six judges of the Court of Appeals of the District of Columbia were reversed. The Court held that the House Committee on Un-American Activities could not require a witness who admitted "I freely co-operated with the Communist Party" to name his Communist associates, even though the witness did not invoke the fifth amendment.

Mr. Chairman, these decisions, and others based on them, have greatly favored the Communist Party and its membership. The effectiveness of Congressional investigations and of United States intelligence agencies has been seriously set back.

What has been the reaction of the Communist Party and its many, many front groups to these decisions? These decisions have been greeted enthusiastically by the Communist Party, USA, and by the mother party in the Kremlin. If I remember the now dormant *Daily Worker* correctly, several Communist Party bigwigs have publicly praised these decisions as a great victory for the Communists.

May I have your indulgence to quote some of these Communist statements concerning these decisions:

(1) "It may still be too early to say that 'calmer times' are here, but Monday's Supreme Court decisions (June 17, 1957: *Paul M. Siceczny v. State of New Hampshire*; *John T. Watkins v. United States of America*; *Oleta O'Connor Yates et al. v. U. S. A.*; *Al Richmond and Philip Marshall Connolly v. U. S. A.*; and *William Schneiderman v. U. S. A.*) go a long way toward restoring civil liberties for all Americans. These landmark rulings in one great flash illuminate the recent McCarthyian darkness and light up the promise of a restored Bill of Rights." (See *Daily Worker*, June 19, 1957, p. 1.)

Now, Mr. Chairman, I have other quotes. With your permission I shall skip those and ask that those be entered in the record.

Senator JENNER. I appreciate that. They will go into the record and become a part of the record.

Mr. FORNES. They are official quotes of the *Daily Worker*, sir.

(The quotations referred to follow:)

(2) "A wave of elation and relief broke over democratic-minded America yesterday (June 18, 1957) with news of the battery of decisions from the Supreme Court that go far to cleanse the air of the smog of McCarthyism."

(3) "A Communist Party club up in the Kingsbridge area of the Bronx (New York City) has set itself the job of raising \$800 for the *Daily Worker's* \$100,000 fund appeal. One of its members, a faithful plugger for our paper named Bernie, turned over \$200 of it yesterday (June 18, 1957). But Bernie was so elated over the Supreme Court decisions handed down Monday (June 17, 1957) that he drew out an additional \$100 of his own money to add to the \$200 collected by the club thus far." (See *Daily Worker*, June 19, 1957, p. 1.)

(4) "The Supreme Court decision in the California Smith Act case marks another important step in the restoration of the first amendment. * * * The 'Communist conspiracy' hoax which Monday's decision (June 17, 1957) in effect rejected is written into the congressional 'findings of fact' of the Internal Security and Communist Control Acts. It has provided the basis for the conviction—many of which will now require reversal of—114 persons under the Smith Act * * *. Undoubtedly the reactionaries will attack the Court for Monday's far-reaching action. But all liberty-loving Americans will greet the decision, and, I am confident, seize the opportunity it gives to administer further rebuffs to the advocates of cold war * * *." (See statement of Eugene Dennis, secretary of national affairs, Communist Party, U. S. A., *Daily Worker*, June 19, 1957, p. 5.)

(5) "Amid the general elation among democratic-minded citizens over yesterday's Supreme Court decision (June 17, 1957) on the California Smith Act case,

several score Communist leaders were studying the Court's words carefully both because of their general political significance and the effect on their personal lives." (See *Daily Worker*, June 18, 1957, p. 1.)

(6) "• • • the decisions were a great victory for the democratic rights of all Americans. When the rights of Americans, including Communists, to engage in their constitutional advocacy of socialism are upheld, the Bill of Rights is thereby strengthened in its traditional protection of free speech, free association, and free press for all varieties of opinions." (See statement of Dorothy Healey Connelly, chairman of Los Angeles Communist Party, *Daily Worker*, June 21, 1957, p. 1.)

(7) "We rejoice. Victory is, indeed, sweet. Especially a victory so long in coming. A victory that was gained against what seemed like insuperable odds when the fight began. Of course, we are elated that two of this paper's editors, Al Richmond and Philip M. Connelly, were fully vindicated by the Supreme Court. We regard their direct acquittal by the Nation's highest tribunal as a resounding triumph for freedom of the press • • • We know that • • • thousands share in our jubilation. Let this wonderful enthusiasm and optimism and sense of self-confidence, generated by last Monday's victory (June 17, 1957) now be transformed into the will and energy to reap the fruits of victory by ensuring the continued existence and growth of the People's World." (See *People's World*, June 22, 1957, p. 1.)

(8) "This decision (*Olga O'Connor Yates et al. v. United States of America*—June 17, 1957) is the beginning of the end of the Smith Act • • • By this victory for the rights of Communists, freedom of political opinion for all Americans has thereby been made the safer from the inroads of the inquisitors and the witch hunters. It was the growing revulsion of the American people to these witch hunts which has turned the tide. The Supreme Court has heeded this sentiment, and acted in the best traditions of American democracy • • • The decision of the Supreme Court, while it did not deal directly with the issue, also struck a blow at the big lie that the Communist Party advocated the violent overthrow of the United States Government" (Statement of the 14 Defendants, *People's World*, June 22, 1957, p. 12.)

(9) "Recent Supreme Court decisions in the areas of civil rights and civil liberties reflect mounting domestic and international popular pressures, mirror the deep hold in our country of traditions and conceptions of individual freedoms, and themselves enormously stimulate, of course, the continuing effort to eradicate the last vestiges of McCarthyism • • • While there remains a tendency toward 'moderation' in the Supreme Court so far as implementing its generally antisegregation views is concerned, and a pronounced ambiguity—to put it mildly—when it comes to the rights of Communists and radicals in any organizational sense, the present Court is notably strong in defending civil liberties as these pertain to persons in their individual capacities." (See *Ideas In Our Time*, by Herbert Aptheker, *Political Affairs*, July 1957, pp. 1 and 2.)

(10) "The National Lawyers Guild • • • has consistently maintained that the Smith Act violates the guarantees laid down in the first amendment and that the type of inquisition carried on by congressional committees and under State authorities under the pretense that all kinds of questions could be asked of people regarding their political beliefs, have represented a dangerous trend in American life. We, therefore, hail the action of the Supreme Court in these cases as a great victory for the principles upon which our country was founded." (See statement by Royal France, executive secretary of the National Lawyers Guild, *Daily Worker*, June 18, 1957, p. 7.)

(11) "The Eisenhower-Warren Court has made an impressive and heartening start on the job of digging the Bill of Rights out from under the rationalizations by which a fear-ridden decade had buried it." (See *National Lawyers Guild quarterly*, *Lawyers Review*, fall 1957, p. 70.)

(12) "The recent Supreme Court decisions have opened a new era of freedom for all of us. The first amendment has been put back into the Constitution. Once more it may become possible for the nonconformist to say what is on his mind without fear of going to jail, losing his job, being blacklisted, or hounded into suicide • • • Our most important task, at the moment, is to back up the Bill of Rights by writing our Senators, Congressmen, and editors in support of the Court's decisions." (See Emergency Civil Liberties Committee letterhead, July 1957.)

(13) "A return to sanity.—The combined effect of the rulings announced Monday (June 17, 1957) and other recent ones is to reaffirm the basic constitutional rights of individuals, to suggest definite limits on the powers of congressional

investigating committees, and to warn the Government against abuse of its powers. Although the Court has overturned no existing laws, it has by now set up a body of opinion to curb the Government's reckless treatment of the individual in the name of "national security." (See National Guardian, June 24, 1957, p. 1.)

(14) "Here at home, a heartening aspect of the recent Supreme Court decisions is the fact that they go a long way toward destroying one of the main pretexts for the cold war—the alleged worldwide conspiracy headed by the U. S. S. R. for the violent overthrow of capitalist governments including our own. This, according to Justice Harlan's opinion on behalf of six Supreme Court members, the Government has been unable to prove in the California Smith Act case." (See Bomb Tests Must End, by Jessica Smith, New World Review, July 1957, p. 4.)

Mr. FORBES. The advantages which the Communists and Communist fronts have taken of these decisions and the high, wide, and handsome manner in which they are now conducting their propaganda and other activities in the labor field are illustrated by the following incidents.

I shall read one and request the rest be entered in the record, sir.

Senator JENNER. That will be done, sir.

Mr. FORBES. On January 6, 1958, 8 persons were brought to trial in Federal Court in Cleveland, Ohio, on "charges of conspiracy to file false Non-Communist Union Officer Affidavits (Form 1081) with the National Labor Relations Board" under a provision of the Taft-Hartley Law. According to a Department of Justice release dated January 23, 1957, the indictment alleged these individuals "were aware that statements and representations * * * made in the affidavits" denying membership in the "Communist Party, were false." The indictment accused the defendants of conspiring "to fake resignations from the Communist Party and conceal the plot by using aliases, secret codes and other deceptions." (See the Evening Star, Washington, D. C., January 24, 1957, p. A-30.)

(The additional incidents referred to follow:)

Two of the defendants, Marie Reed Haug and her husband, Fred Haug, are also charged with having signed false non-Communist affidavits in a previous indictment. The other six defendants who allegedly conspired with the Haugs to willfully violate the Taft-Hartley law provision were Edward Joseph Chaka, Hyman Lumer, Sam Reed, Andrew Remes, Eric Jerome Reinfaltner, and James S. West. This case was the first of its kind in which prosecution was instituted by the Department of Justice. The indictment charged a direct relationship between alleged subversives in the labor field and national leaders of the Communist Party, U. S. A. Listed in the indictment as coconspirators but not as defendants were the following eight known Communist officials: Joe Brandt, Martin Chancey, Gus Hall, Frank Hashmall, Anthony Krcmarek, Steve Nelson, Sidney Stein, and John Williamson. Since their January 1957 indictments, the defendants have been supported by two newly created defense organizations in the Midwest. According to recent letterheads, Mrs. Betty Chaka is secretary of the Committee for Taft-Hartley Defendants, room 202, 2014 East 103th Street, Cleveland 6, Ohio, and Rev. Harold H. Hester and Harry J. Canter are affiliated with the Provisional Committee To Aid Victims of Taft-Hartley, room 402, 189 West Madison Street, Chicago 2, Ill. (See National Guardian, December 23, 1957, p. 3.)

As chairman of the Provisional Committee To Aid Victims of Taft-Hartley, Canter is a veteran of the Communist movement in the United States. In 1930, he was a Communist candidate for Governor of the Commonwealth of Massachusetts. During that period, he served 1 year in a Massachusetts jail for carrying a banner "in Boston's Sacco and Vanzetti demonstration, denouncing Governor Fuller as the murderer of these two workers * * *." Canter was listed as an instructor at the Communist Abraham Lincoln School in Chicago, Ill., during its 1943 fall session. (See Special Committee on Un-American Activities, appendix IX, 1944, p. 292; Special Committee To Investigate Communist Activities in the United States, Investigation of Communist Propaganda.)

ganda, pt. 5, vol. 4, 1930, p. 757; and HUAC, Guide to Subversive Organizations and Publications, 1937, p. 5.)

In 1953, Canter was secretary of the James Keller Defense Commission, of room 325, 431 South Dearborn Street, Chicago 5, Ill. This organization was apparently a defense front for James A. Keller, who had been "ordered deported in 1953 on charges of past membership in the Communist Party." A 1955 indictment against Keller was dismissed last year when the Supreme Court ruled in the case of *United States of America v. George I. Witkovich* that "an alien awaiting deportation was not compelled to answer questions about Communist activities." According to the June 23, 1957 issue of the Worker, Sunday edition of the recently defunct Communist Daily Worker, Canter wrote a congratulatory letter to this paper's editor. (See Daily Worker, May 17, 1957, p. 3, and Firing Line, July 1, 1957, pp. 6 and 7.)

The Provisional Committee To Aid Victims of Taft-Hartley is currently using the office facilities of the Chicago Joint Defense Committee To Defeat the Smith Act. Formerly known as the Claude Lightfoot Defense Committee, the Chicago Joint Defense Committee's October 1957 letterhead reflects their following officers: Leon Katzen, chairman; John T. Bernard, vice chairman; Geraldine Lightfoot, projects director; and Richard Criley, publicity and research. Katzen, Bernard, and Criley were identified as members of the Communist Party before the House Committee on Un-American Activities in 1952. Both Katzen and Criley have been listed as Communist leaders. Like Canter, Geraldine Lightfoot and Katzen are former instructors of the aforementioned Abraham Lincoln School. (See HUAC, annual report, 1952, pp. 29 and 31, and HUAC, Testimony of Walter S. Steele Regarding Communist Activities in the United States, 1947, p. 52.)

Mr. FORBES. Mr. Chairman, surely, it is clear that these Court decisions have brought glee to the mortal enemies of our Republic—both domestic and foreign. At this point, Mr. Chairman, I request that a lengthy historical study I have made on the power of the Court be entered into the record as an appendix to my statement. Should the Chair desire, I will be glad to read this study. If not, I request that it be made a part of the record.

Senator JENNER. It may go into the record and become a part of the record.

Mr. SOURWINE. As part of the appendix?

Senator JENNER. As part of the appendix.¹

Mr. FORBES. Mr. Chairman, S. 2646 would remedy this state of affairs, which I have outlined, and ward off any further attacks on our internal-security program. In the historical study I have submitted to you, I have attempted to show that this proposed legislation is not recommending any radical departure from previous legislative actions taken by the Congress with reference to the appellate powers of the Supreme Court. None of us questions the original powers of the Court, which the Constitution establishes. What is being questioned now is the appellate power which Congress not only has the power but the duty to prescribe and define, so that in the future there can be no doubt as to the power of the Court in these matters of internal security.

If this is done, Mr. Chairman, we can then proceed to rebuild our system of internal-security controls. In approving this proposed legislation and in seeing it successfully through the Senate, this committee would not be departing from the past, but would be following sound precedent. In so doing they would strike a body blow at future Communist subversion and conspiracy and would reaffirm their faith in the 10th amendment.

¹ See appendix II.

Mr. Chairman, our Constitution is a vast reservoir of moral and spiritual strength. Under it, the traditional American way of life can once again set the souls of men afire and light the dark paths ahead.

Communism, to paraphrase the author of the bill before this committee, is the most monstrous lie ever concocted in the history of man. Communism is a vast conspiracy to enslave. It denies the validity of ethical standards. It is grounded in atheistic materialism. It has no morality or integrity.

If we follow the admonitions of the founders of this Nation, that "eternal vigilance is the price of freedom"; if we are on guard and take the simple steps necessary to stop the spreading of this atheistic conflagration, then, and only then, will the American way prevail and we remain a free people. If we do not take the simple, yet essential, precautionary action, not only our beloved country but the whole world will be subjected to stultification, slavery, strife, and tyranny as never known before.

What is more, and what is not generally understood or appreciated, is that we, the American people, can do it through you, our duly elected representatives in Congress. We can do it in the regular American way, following sound precedents, and not deviating one iota from the way prescribed in the Constitution and the Bill of Rights. We must not lose sight of the fact that this Constitution and Bill of Rights have served us well for nearly two centuries and that, under it, with it, and through it, these United States of America have grown from a few fledgling colonies to the greatest nation on this earth.

The legislation proposed in this bill before you does not mean any abridgment of civil liberties in order adequately to safeguard national security. No national police system will ever be established under the proposed legislation. The Communists and their friends know that the FBI, the Internal Security Subcommittee, the Un-American Activities Committee, and the various State commissions fighting subversion are not Gestapo outfits. These Communists and their friends scream and protest invasion of civil liberties because their deeds are evil and because they know that, once fully exposed to the white glare of truth and publicity, their evil machinations and designs will spell their own doom.

I believe that the recent decisions of the Supreme Court, referred to above, and other decisions are aiding and abetting the Communist Party, U. S. A., and, consequently, the Communist Party of the Soviet Union.

I believe, in the 10th amendment, that our fathers knew full well what they were doing when they made provision for a maximum amount of local home rule, and that such provisions, sir, are just as wise and appropriate today as they were when enacted 170 years ago.

The answer to the Communist menace—and, Mr. Chairman, I speak as one who accompanied our troops as spiritual counselor, friend, and reader of the office for the dead through Korea—is a thoroughly aroused and alerted citizenry, a people at the grassroots, in the respective States, in the county seats, cognizant not only of the evils of the philosophy of Marx and Lenin but also of the techniques and strategy of communism, and ready to work and sacrifice for the promotion of the principles of our Republic. America's belief in free government, her belief in the ability of the States and the States'

citizens through their own conscious efforts to shape their future destinies--this is the hope of tomorrow.

I believe that we all agree that the heart of America at the grass-roots is strong and is dead set against communism as a way of life. Their trouble has been and is that they do not know what they, as individuals, can do about it. A basic answer to the wishes of the people is this bill before you.

Last week, this Congress gathered to listen to Washington's Farewell Address. The Congress heard this admonition to all who live under the Constitution of the United States:

The Constitution which at any time exists till changed by an explicit and authentic act of the whole people is sacredly obligatory upon all. * * * But let there be no change by usurpation; for though this in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed.

I implore your favorable action on this bill.

Senator JENNER. Reverend Forbes, we thank you very much for coming before the committee and for your well-prepared documentation that you have presented to us.

Mr. FORBES. Thank you, sir.

Senator JENNER. It having reached the hour of 12 o'clock, we will stand in recess now until 2:30 this afternoon. We will conclude then with the balance of witnesses scheduled for today. We have three witnesses left.

We stand recessed until 2:30.

(Whereupon, at 12:07 p. m., the subcommittee recessed, to be reconvened at 2:30 p. m., this date.)

AFTERNOON SESSION

Senator JENNER. The next witness will be Mr. Burdette.

STATEMENT OF WILLIAM M. BURDETTE, JR., ARLINGTON, VA.

Mr. BURDETTE. Mr. Chairman, members of the subcommittee, Mr. Counsel, these books—I am not going to read from them. They are just props.

Senator JENNER. I understand. Where do you live, Mr. Burdette?

Mr. BURDETTE. I live at 2015 Second Road North, Arlington, Va.

Senator JENNER. Are you appearing here as an individual or for someone?

Mr. BURDETTE. Yes. I am appearing as an individual. I am employed by the General Accounting Office.

I have here, Mr. Chairman, volume 16 of *Corpus Juris Secundum*. This volume was issued about 19 years ago, about 3 years after I started to practice law. Up until about a year ago this constituted all the constitutional law. It is an encyclopedia of all the constitutional-law cases decided from 1920, from 1920 to 1939, and all cases, State and Federal, have references in here. It wasn't until last year that I received these two volumes and that I knew exactly the extent of what has been done by the Supreme Court and to this general body of constitutional law in this country.

Heretofore, we have been getting yearly accumulative supplements that take the place of all the changes throughout the United States of constitutional law. This [indicating] is the 1949 supplement. It

is the last one I happen to have. There are some a little later, but they are not much bigger than this. This took care of 10 years of changes in our fundamental laws, this small supplement here.

Then about a year ago, I received these two volumes [indicating] in the mail on constitutional law from the publishers, 16 and 16A. Along with this volume was this yellow card, and I would like to read it:

KEEPING UP WITH OUR FUNDAMENTAL LAW

In the 17 years --

incidentally, this is dated June 1956.

In the 17 years since publication of volume 16, *Corpus Juris Secundum*, the subject of constitutional law, comprising our fundamental law, has undergone unprecedented growth and change.

Over 40,000 times during this important period our high courts were called upon to interpret and decide constitutional questions. The personal, civil, and political rights guaranteed by the Constitution were invoked more frequently than at any other period in our history. The equal-protection and due-process clauses, and the subject of separation of the powers of government also formed the basis of much litigation.

These many developments and modifications have made necessary the accompanying new volumes 16 and 16A.

And note this, Mr. Chairman.

The text throughout has been revised and many new sections added to fully reflect today's interpretation of our fundamental law.

A decimal system of numbering provides for the necessary expansion of the valuable reading notes. To illustrate, we invite your attention to pages 1044-1046 and pages 80.1 and 80.13 in your volume 16.

Incidentally, I turned to those notes, and I found as of 1927 in Minnesota it was still constitutional to read from the Old Testament in a school. Now, whether it would be now or not if that same question came up, I don't know.

In these two new books, you have the most modern and authoritative coverage of our fundamental law yet published.

Your original volume 16 should now be removed from your set.

Of course, all the new decisions reported are not those of the United States Supreme Court, hereafter referred to as the "U. S. S. C.," but every change of the law by the U. S. S. C. starts a chain reaction of decisions in State and Federal courts.

The pocket part I have here to the old volume 16 is dated 1949. There are some more recent pocket parts which I do not have, but they are not much larger than this one. This pocket part incorporates citations to all constitutional-law cases decided from 1939 to 1949 yet the changes wrought by the present U. S. S. C. over a period of 3 years require not only an additional volume, but require the complete rewriting of the body of constitutional law. I know of nothing that so conclusively demonstrates the violence done to our fundamental law by this Court. It is even more alarming when one considers that the rewritten volumes 16 and 16A do not even include some of the more recent and more damaging decisions of this runaway Court. At the rate they are now going, volumes 16 and 16A will grow to volumes 16B and 16C and will have to be completely rewritten every 3 or 4 years.

There have been many able criticisms of the long list of Court decisions that are changing our form of government. I think *Corpus Juris Secundum* furnishes graphic proof of the validity of such criticisms. The list grows longer month by month. To name only a few that come unbidden to memory: The Mallory case, the Slochower case, the Steve Nelson case, the Jencks case, the Watkins case, the Brown case, the Sweezy case, and the Koenigsberg case.

They show a tender concern for Communists, murderers, and rapists and a ruthless disregard for constitutional government. Had Girard been a Communist I think he would not have been surrendered to the Japanese. The Court would have had to make a hard choice between one-worldism and communism, but the latter would have won out in my opinion. With each new decision this Court deals an American institution another blow that may be fatal unless the Congress acts.

I have here a blue card received from the lawbook company with new volumes 4 and 4A entitled "Appeal and Error." The message on the card reads: "To *Corpus Juris Secundum* subscribers."

I might add that this is an associate subject with constitutional law, the subject of Appeal and Error, and since we are considering this bill on jurisdiction, I thought it proper to read this.

Over 150,000 appeal-and-error questions have been determined by our courts since the C. J. S. volumes covering the subject were published 20 years ago. In addition, modern statutes and court rules have made great changes in the mode and manner of appellate review.

A complete rewriting of this subject has become imperative. The accompanying new volumes 4 and 4A give you this completely modern and up-to-date presentation of all phases included in over 1,200 sections of the old title.

The wealth of material in the new volumes is set out in concise statements so that only a minimum of time is required to cover the entire law on any given point.

The basic arrangement is retained with new text, factual reading notes and new sections clearly setting out all changes. A completely revised and up-to-date subject-matter index is an additional timesaver.

The thousands of times the courts have quoted and cited the CJS volumes on appeal and error attest to their authoritative nature and to their acceptance by the courts.

THE PUBLISHERS.

Underneath this is a line that says:

CAUTION—The original volumes 4 and 5 should be retained in your set until further notice.

I wonder if this was prescience on the part of the lawbook company? Did the lawyers working on this revision feel confident that the Congress would not let the Court get by with this change?

I have not brought the four volumes one now has to consult on appeal and error because of their sheer bulk. In time I should like to receive the following message from the lawbook company:

Please remove new volumes 4, 4A, 16, and 16A from your shelves.

I should like to mention that there is only one other volume in the C. J. S. that has been expanded—and this is approximately a hundred or so volumes—by an additional volume. It is No. 26 which begins with the title "Debt."

It should be evident by now that the Supreme Court is composed of willful men of little depth or wisdom who are openly contemptuous of constitutional restraints. They have probed and probed to ascertain the temper of the people and of the Congress. Up till now they have found in the main only an indifferent, placid, caricature of the American spirit. Encouraged by the feebleness of resistance, these tyrants have become more arrogant and more grasping of power. Unless the sleeping Gulliver soon shakes off his lassitude he will be bound by these nine Lilliputians so firmly he will never break free.

I should like to, if I may—I have about six lines here. Everybody has quoted George Washington this morning, so I would like to quote this. I haven't included this in my presentation.

In his Farewell Address, he says:

If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong let it be corrected by an amendment in the way which the Constitution designates, but let there be no change by use of usurpation, for though this in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed.

I should like to call the attention of the subcommittee to this cartoon which appeared in National Review of July 27, 1957.

The United States Supreme Court is represented by an animated scroll which says:

What we're really trying to tell you is that the Constitution (and these differences are subtle and sometimes difficult to grasp) is unconstitutional.

Gentlemen, thank you for this opportunity.

Mr. SOURWINE. Pardon me. At this point, have you read the news reports of the action taken by the American Bar Association with respect to a resolution concerning the bill, S. 2646?

Mr. BURDETTE. No, sir, I haven't.

Mr. SOURWINE. As reported in the New York Times under the byline of Anthony Lewis, I quote:

The bar group's house of delegates voted to oppose the Jenner bill as "contrary to the maintenance of the balance of powers set up in the Constitution between the executive, legislative and judicial branches of our Government."

I wondered, since the bill purports to exercise a regulatory and restrictive power written into the Constitution in article III, section 2, paragraph 2, as a check and balance, whether the statement here that the exercise of that power is contrary to the maintenance of the balance falls within the scope of your suggestion that the Constitution is unconstitutional.

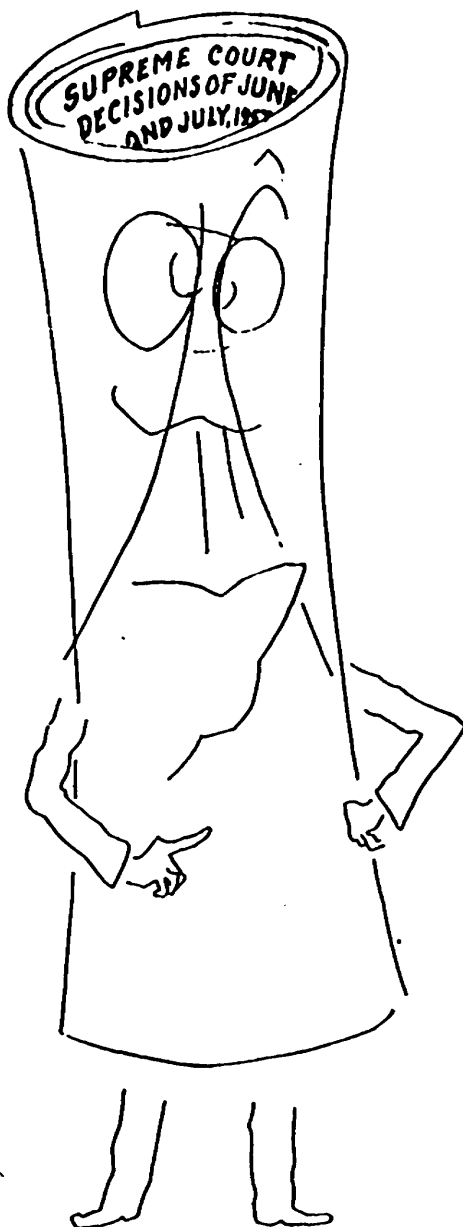
Mr. BURDETTE. Well, I think it does, and that is why I brought this cartoon because the caption to me expressed——

Senator JENNER. I would like that cartoon made a part of the record by reference.

Mr. BURDETTE. It so well expresses just the——

Senator JENNER. I want to put it in the record as a part of the record, the cartoon.

(The cartoon referred to is as follows:)



Kreuttner

"What we're really trying to tell you is that the Constitution (and these differences are subtle and sometimes difficult to grasp) is unconstitutional!"

Mr. BURDETTE. Thank you, gentlemen, for this opportunity.

Senator JENNER. Thank you, Mr. Burdette. We appreciate your coming before the committee and expressing your views on this important matter.

Now, do we have another witness here?

Kitty L. Reynolds.

Mr. SOURWINE. Mr. Chairman, while Miss Reynolds is coming to the witness table, I would like to call the Chair's attention to the fact that we had one other witness scheduled for today, Margaret Parent, representing the Brookland Citizens' Association. She was here this morning when the committee recessed until 2:30. She said she would be unable to remain to testify this afternoon. She wrote out a short statement in longhand and asked that it be inserted in the record in lieu of her testimony.

Senator JENNER. All right. It may go into the record and become part of the record.

(The document referred to is as follows:)

FEBRUARY 20, 1938.

Concerning S. 2040

SUBCOMMITTEE ON THE JUDICIARY:

The Brookland Citizens' Association fully endorses the passage of this bill with all its provisions.

MARGARET PARENT,

6804 16th Street NW., Washington, D. C.

Senator JENNER. Miss Reynolds.

STATEMENT OF MISS KITTY L. REYNOLDS, ARLINGTON, VA.

Miss REYNOLDS. I didn't send in my statement because I didn't get my notice, and then when I called today she said for me to come on in here.

Mr. SOURWINE. I might say the failure of notice was the fault or clerical error on the part of the committee. The letter was addressed to District of Columbia instead of Arlington. The street address was right. It came back this morning "address unknown."

Senator JENNER. The address here is Washington.

Mr. SOURWINE. It is a clerical error. She actually lives in Virginia, as I understand.

Senator JENNER. I see.

Are you here as an individual or are you representing some organization?

Miss REYNOLDS. I am here as an individual.

Senator JENNER. All right; you may proceed.

Miss REYNOLDS. And I am here—I think the 10th amendment to the Constitution brought me here because the 10th amendment said that the powers not delegated to the United States by the Constitution or prohibited by it to the States are reserved to the States.

Now, to me that is just as though you took a knife and cut a line straight down. You have powers here and you have powers here and you have powers there and I think that is really what has caused our trouble because the powers are not being divided and the Supreme Court has begun to legislate in certain fields, that is, by making decisions, it has begun to legislate. At least that is the way it seems to me.

My statement is prepared and I will read it.

Senator JENNER. Proceed.

MISS REYNOLDS. According to a report of the committee on Communist strategy and tactics of the American Bar Association, the greatest asset the Communists have at the present time is not the hydrogen bomb, nor Soviet satellites, but world ignorance of their tactics, strategy, and objectives. Therefore, it is up to each of us to keep informed on the menace of communism and abreast of their objectives, which at present are (1) Repeal or weaken the anti-Communist legislation on the books, especially the Smith Act, the Internal Security Act, and the Subversive Activities Control Act; (2) discredit and hamper the Senate Internal Security Subcommittee, the House Un-American Activities Committee, and State officials investigating communism; (3) weaken the effectiveness of the FBI and reveal its sources of information and (4) destroy the Federal security system. Most of us are not well-versed in Communist tactics, but this is not true of the Supreme Court. Yet in decision after decision, our security laws have been weakened or made inoperative, and the investigating committees of both the Senate and House have been hampered. Why is the Supreme Court overzealous in protecting the Communists' so-called rights under the Constitution?

Actually Communists should be given no protection under our Constitution, since the Communist faith overrides a man's normal loyalties to his country.

When the Red dictatorship takes over the United States, and that day is coming as sure as the sun rises in the East says William Z. Foster, head of the Communist Party in the U.S.A., the Justices of the Supreme Court will be exterminated along with the rest of us, if any of them are capitalists. According to the Communists, they understand capitalist motivation as the automatic outcome of capitalist economics. Since the root is evil the fruit must be so. It is their duty to destroy the root and frequently the fruit. Communism rests on a class concept. They believe the proletariat class is the progressive class of history, and that the capitalist classes, the degenerate classes are discarded by history and must be destroyed.

Dr. Frederick Charles Schwarz, executive director, Christian Anti-Communist Crusade, threw some light on what the Communist intend to do to us in his testimony before the Committee on Un-American Activities. This is what he had to say:

When they conquer the world, they are left with those people who have been brought up in the capitalist environment. They have had their experiences. It has formed their character and personality. Naturally, if you leave the babies and the children with them they will impress that character and personality upon them; so the Communists are confronted with a problem of what to do with the adults of established character and personality once they have conquered the world.

Being thoroughly materialist scientists, they do not hesitate. They say they have no alternative. Naturally, they must dispose of these classes. To them it is not murder. Murder is a bourgeois term which means killing individuals for bad reasons. They are going to kill classes for good reasons.

One of the members of the staff, Mr. Richard Arens, asked Dr. Schwarz if the practice of communism is consistent with the theory of communism? This was Dr. Schwarz's reply.

Exactly. Inherent within the theory of communism is the greatest program of murder, slaughter, and insanity conceivable.

Mr. Arens asked Dr. Schwarz another question.

Could I interpose this question to perhaps clarify our record; Khrushchev, as we all know, had charge of the liquidation of the Kulak class. About 10 million of his countrymen were liquidated, what we would call murder. A crime of such enormous scope that the average human mind could not begin to comprehend it. In your appraisal of the Communist philosophy and motivation in life, could Khrushchev, as a dedicated Communist, have a twinge of conscience about these murders?

Dr. SCHWARZ. None whatsoever.

Mao Tse-tung in his recently published Peking speech of February 1956 admitted that the Chinese Communists completed the "liquidation" of 800,000 persons between October 1949 and January 1954. The report published June 16, 1957, by the Senate Internal Security Subcommittee said that more than 15 million persons have been executed in Red China since 1951.

Forty years ago, communism was just a plot in the minds of a very few peculiar people. Today, it is a world force, holding 900 million people in subjugation. Communism's first big victory was through bloody revolution. Every one since has been by military conquests, or internal corruption.

The Communists have penetrated labor unions, professional groups, teacher organizations, political bodies, religious bodies and racial groups, and wherever they have entered they have caused discord and strife. Certainly with such widespread infiltration in every walk of life, we need to strengthen our laws against subversion. We need both Federal and State laws, the Senate Internal Security Subcommittee, the House Un-American Activities Committee, and we need an FBI which can accomplish its task without interference.

However, instead of strengthening our laws, they have been weakened by decision after decision of the Supreme Court. As a result of these decisions, the Smith Act is no longer in effect, congressional committees are hampered in questioning witnesses, and the FBI has to now open its files to the enemy.

To remedy this bad situation, a bill has been introduced in the Senate to limit the appellate jurisdiction of the court in certain cases. This is bill S. 2046 and it is sponsored by Senator Jenner. The bill proposes to limit the appellate power in five respects. The first section of the bill involves the investigative power of the Congress. The second would take from the court its appellate jurisdiction over the Government's security program. The third is designed to protect the rights of the people to protect themselves against subversive activity at the State level. The fourth is designed to preserve home rule over our schools, and the fifth is designed to protect the freedom of States to determine the qualifications of admission to the practice of law.

The Congress has been given by the Constitution, power to curtail or limit the appellate jurisdiction of the Supreme Court. After vesting the whole "judicial power of the United States" in "one Supreme Court" (and in whatever lower courts Congress might establish), article III turns around and qualifies the grant: "the Supreme Court," clause 2 of section 2 provides, "shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make." This provision is an instance of the Constitution's built-in "checks and balances."

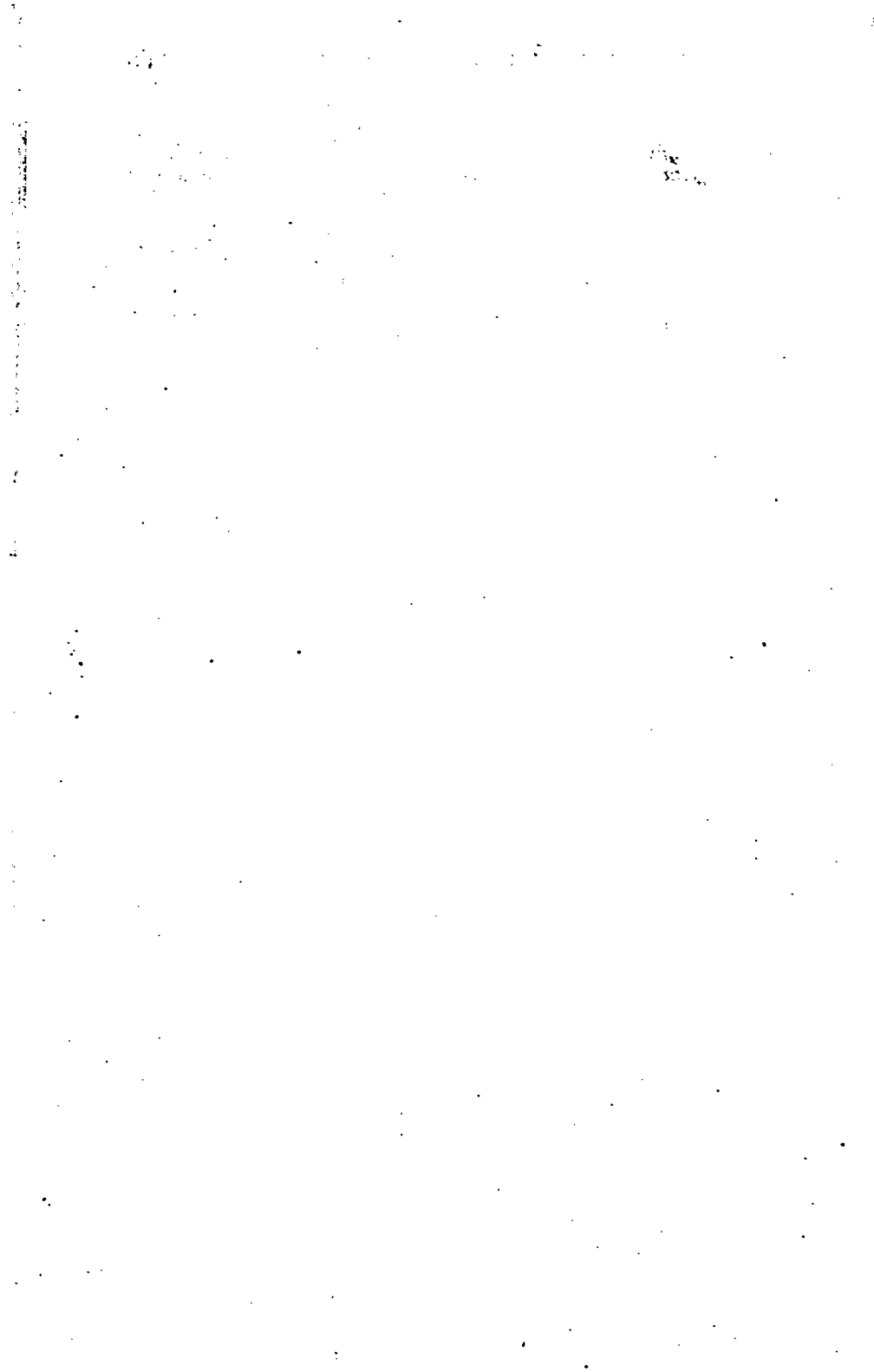
In the final analysis, I think the bill is for the purpose of determining whether the law of the land is what the Supreme Court says it is, or whether the Constitution, and the laws of the United States which shall be made in pursuance thereof, shall be the supreme law of the land.

I think it is a good bill and deserves my support.

Senator JENNER. Thank you, Miss Reynolds. We appreciate your coming here and expressing your views on this important bill.

The committee will stand in recess, then, until 10:30 tomorrow.

(Whereupon, at 2:55 p. m., the subcommittee recessed to reconvene at 10:30 a. m., Thursday, February 27, 1957.)



LIMITATION OF APPELLATE JURISDICTION OF THE SUPREME COURT

THURSDAY, FEBRUARY 27, 1953

**UNITED STATES SENATE,
SUBCOMMITTEE TO INVESTIGATE THE ADMINISTRATION
OF THE INTERNAL SECURITY ACT AND OTHER
INTERNAL SECURITY LAWS, OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D. C.**

The subcommittee met, pursuant to recess, at 10:30 a. m., in room 424, Senate Office Building, Senator William E. Jenner presiding.

Also present: J. G. Sourwine, chief counsel; Benjamin Mandel, research director; and E. W. Schroeder, chief investigator.

Senator JENNER. The committee will come to order.

Good morning, Senator. We are happy to have you appearing before us this morning, and you may proceed.

STATEMENT OF HON. STROM THURMOND, UNITED STATES SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND. Thank you very much.

Mr. Chairman, it is a great pleasure to come before this committee and I feel honored to appear with such an able and distinguished chairman of this subcommittee, my friend, Senator Jenner.

I am pleased to have this opportunity to make a brief statement in support of Senate bill 2646, to limit the appellate jurisdiction of the Supreme Court.

This is a matter of particular interest to me, because I have had a lifelong interest in all things pertaining to the delicate balance of powers existing between the three branches of the Federal Government and between the Federal and State Governments.

In the present instance, we are confronted by an alarming trend on the part of the judicial branch of the Government, headed by the Supreme Court, to usurp fields of responsibility that belong elsewhere.

Not only has the Court dealt deadly blows to the constitutional principle of States rights and to the lawmaking power of the legislative branch of the Federal Government, but the Court has also struck at the fundamental authority vested in the executive branch.

The time is long past due for action by the Congress to call a halt to this unconstitutional seizure of power by the third branch of the Government.

We are confronted today by two methods by which the Supreme Court is undermining constitutional government in this country.

The first of these methods is through seizure of power. Although the Court was conceived by the framers of the Constitution to be a weaker branch than the legislative and executive branches, the Court has consistently moved to expand its powers, until it threatens to be the dominating power in the Government.

Secondly, the Court has moved, perhaps unconsciously, to set itself up as the guardian of subversive elements, encouraging these people to continue their work against constitutional government.

Senator Jenner's bill is a particularly timely one because it throws up a defense for the Constitution against attack from both of these directions. It would remove from the Supreme Court some of the powers it has preempted for itself and for the Central Government. At the same time, it would remove the protective cloak that the Court has thrown around subversives.

In *Watkins v. United States*, the Court attempted to prescribe rules to govern the conduct of congressional investigating committees. Note that this was, in the general sense, an effort to limit the power of the legislative branch. In the specific sense, by limiting the power of committees to investigate subversive activity, it had the effect of shielding Communists.

The same pattern may be seen in *Konigsberg v. California* and in *Schwartz v. Board of Bar Examiners*. The broad effect of the decisions was to limit the power of State governments to deny licenses to practice law. The specific, or narrow effect, was to secure law licenses for persons suspected of subversive activities.

Again, in *Nelson v. Pennsylvania*, wherein the sedition laws of 42 States were rendered ineffective, we again find the double impact to constitutional government. First, State authority was smashed down, and, simultaneously, the rights of suspected Communists were enlarged.

The same is true in *Slochower v. Board of Education*, *Yates v. California*, *Service v. Dulles*, and a number of other cases that have come into the purview of this committee in its study of Senate bill 2646.

In most of these cases, the Supreme Court has made the error of setting itself up as a judge of character. The cases involved persons who may or may not have been Communists, subversives, or security risks. In each case, the court of the first instance had made this determination and the Supreme Court reversed the initial decision by applying its own standards.

Now, judging character is not an easy matter. As Justice Frankfurter wrote in his dissenting opinion in *Schwartz v. Board of Bar Examiners*, in which the Court tried to satisfy itself concerning the moral character of Schwartz:

* * * satisfaction of the requirement of moral character involves an exercise of delicate judgment on the part of those who reach a conclusion, having heard and seen the applicant for admission, a judgment of which it may be said * * * that it expresses an "intuition of experience which outruns analysis and sums up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth."

It is impossible for the Supreme Court, as an appellate court, to study a case so thoroughly and so carefully that it can exercise that "delicate judgment" which is so essential to a proper determination of character. Even if it could, the fact that the lower court looks to the Supreme Court for precedents, means that a set of arbitrary rules must replace judgment.

While I favor all of the provisions of the bill, I am particularly interested in the one that would prevent the Supreme Court from reviewing cases challenging the statutes and executive regulations of the States pertaining to subversion against the States. In the case of *Nelson v. Pennsylvania*, the Court overturned a conviction obtained under the Pennsylvania Sedition Act, which forbids the knowing advocacy of the overthrow of the Government of the United States by force and violence, by holding that it had been superseded by the Smith Act, a Federal law forbidding the same conduct.

In effect, the Supreme Court nullified the antsubversion laws of 42 States by holding that the Federal Government had preempted the field.

Congress never intended such an effect of the Smith Act. As the three dissenting Justices pointed out in *Nelson v. Pennsylvania*:

The Smith Act appears in title 18 of the United States Code, and section 3231 provides, "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof. * * *"

Here is clearly another example of how central authority can needlessly replace local authority; in fact, it would seem, the Supreme Court holds to the notion that central authority necessarily excludes local authority from whatever field of law the central authority preempts.

Senator JENNER. May I interrupt right there, Senator?

Senator THURMOND. Yes, sir.

Senator JENNER. If this theory would hold true, couldn't it be projected to the effect that since the Federal Government levies taxes, that the Federal Government has preempted the authority of the States and therefore the States couldn't operate and couldn't exist?

Senator THURMOND. It would seem if this principle is followed that the statement that the distinguished chairman made would necessarily follow if the Federal Government saw fit to go that far.

This same point—the sedition laws of the States—is covered in another bill pending before the Judiciary Committee, Senate bill 2401. This bill, one introduced by me during the first session of this Congress, also would restrict the jurisdiction of the Supreme Court in reviewing the validity of statutes and regulations pertaining to the operation of public schools in the several States. It appears to me that the last stronghold of our system of local self-government lies in local control of the public school systems, and that, by interposing itself into a field properly occupied by State school boards and local authorities, the Supreme Court has struck at the very foundation of constitutional government.

The choice we face in this country today is judicial limitation or judicial tyranny.

Judicial limitation will strengthen the ramparts over which patriots have watched through the generations since 1776. Judicial tyranny will destroy constitutional government just as surely as any other type of tyranny.

If the Supreme Court can assume power without rebuff, the complete tyranny of the judiciary is close at hand. Then the Federal Government will cease to be Federal and become national in nature, imposing its will upon the States and local governments of this great country.

The Supreme Court must be curbed. If it continues in the direction it is headed, we shall all become the victims of judicial tyranny.

Senator JENNER. On behalf of the committee, Senator Thurmond, I want to thank you. We know how busy you are as a Senator and appreciate your taking time to come before this committee and express your views and thoughts on this bill.

Thank you, sir.

Senator THURMOND. Thank you very much.

STATEMENT OF ERNEST ANGELL, CHAIRMAN, BOARD OF DIRECTORS, THE AMERICAN CIVIL LIBERTIES UNION

Senator JENNER. Will you give us your full name, sir?

Mr. ANGELL. Ernest Angell.

Senator JENNER. And where do you live?

Mr. ANGELL. New York City.

Senator JENNER. What address?

Mr. ANGELL. My home address is 156 East 66th Street. I am a lawyer by profession, and my office is 1 East 44th Street.

Senator JENNER. Are you here as an individual or representing some organization?

Mr. ANGELL. I am representing an organization. I appear on behalf of the American Civil Liberties Union, of which I am chairman of the board of directors.

Senator JENNER. How large an organization do you represent, the American Civil Liberties Union?

Mr. ANGELL. Approximately 40,000 members, Senator, who are scattered in every State of the Union.

Senator JENNER. All right, you may proceed. You have a prepared statement?

Mr. ANGELL. I have a prepared statement, sir, which I will offer in evidence, but will not take your time to read all of it. I would like to comment orally as I go along on portions of it and add something of what I think is relevant to the prepared statement which I have here, that is, the written text.

Senator JENNER. It will become a part of the record, and you may proceed.

(The statement follows:)

STATEMENT OF ERNEST ANGELL, CHAIRMAN, BOARD OF DIRECTORS, AMERICAN CIVIL LIBERTIES UNION

My name is Ernest Angell, I am appearing in behalf of the American Civil Liberties Union as chairman of its board of directors.

The American Civil Liberties Union is the oldest private, nonpartisan organization dedicated to the preservation of personal liberty guaranteed by the Bill of Rights. As such, we have functioned for 38 years; and thereby bring with our opposition to S. 2646 a sense of responsibility that comes from such experience.

I think it relevant to emphasize that the sole purpose of our work, the preservation of civil liberties, is an anathema to the Communists. We are bitterly opposed to Communist totalitarianism, as well as to all other forms of totalitarianism. The committee might also be interested in knowing that, so far as we are aware, we were the first organization formally to exclude members of the Communist Party and adherents to its principles from our governing bodies and staff—a step we took 18 years ago.

I emphasize the formal antitotalitarian position of the ACLU because our opposition to Senator Jenner's proposal is a consequence of this position.

In the latter part of 1788, and in early 1789, James Madison corresponded with Thomas Jefferson, then our Ambassador to Paris. In this exchange of letters, Madison in preparation for the coming debate in Congress reevaluated the necessity for the adoption of the first 10 amendments.

Jefferson on March 15, 1789, wrote Madison commending him for his brilliant analyses, and then made a comment which could not have been more relevant if made today. He wrote:

"In the arguments in favor of a declaration of rights, you omit one which has great weight with me; the legal check which it puts into the hands of the judiciary. This is a body, which, if rendered independent and kept strictly to their own department, merits great confidence for their learning and integrity. In fact, what degree of confidence would be too much, for a body composed of such men as Wythe, Blair, and Pendleton [my comment: these eminent judges constituted at that time Virginia's High Court of Chancery]. On characters like these, the 'civium ardor prava jubentium' (frenzy of the citizens bidding what is wrong) would make no impression."

Jefferson recognized then that a formulation of guaranties in the first 10 amendments would focus the right to judicial review of the denial of one's liberty. This he considered basic. And it is in this context that the judiciary is the chief ultimate protector of individual rights.

The relationship of the Supreme Court to our Federal system was well expressed in a statement repudiating attacks on the Supreme Court signed by former Senator George Wharton Pepper and 100 other lawyers, which incidentally, was inserted by Senator Martin of Pennsylvania into the Congressional Record of January 10, 1957. It said in part:

"The Constitution is our supreme law. In many of its most important provisions it speaks in general terms, as is fitting in a document intended, as John Marshall declared, 'to endure for ages to come.' In cases of disagreement we have established the judiciary to interpret the Constitution for us. The Supreme Court is the embodiment of judicial power, and under its evolving interpretation of the great constitutional clauses—commerce among the States, due process of law, and equal protection of the laws, to name examples—we have achieved national unity, a nationwide market for goods, and Government under the guaranties of the Bill of Rights. To accuse the Court of usurping authority when it reviews legislative acts, or of exercising 'naked power' is to jeopardize the very institution of judicial review * * *."

The proper functioning of the Federal judiciary, with its 11 circuits, particularly in interpreting basic constitutional provisions, dictates the necessity for maintaining generally the appellate jurisdiction of the Supreme Court, and precisely in the 5 areas which S. 2046 would strip away.

We think this, not because we can be sure the Supreme Court will decide cases the way we would like to have it decided. We think this because the areas S. 2046 seeks to preclude from Supreme Court jurisdiction reflect the most difficult and perplexing questions of the status of the individual in our society.

These are the areas involving individual liberty and security in which we need the Supreme Court the most. We need its strength, its tradition. Its power, as the great arbiter of individual and society in the way conceived by Jefferson in 1789.

Judge Learned Hand in his recent Oliver Wendell Holmes lectures at the Harvard Law School said:

"* * * it was probable, if indeed it was not certain that without some arbiter whose decision should be final the whole system would have collapsed, for it was extremely unlikely that the Executive or the Legislature, having once decided, would yield to the contrary holding of another 'department,' even of the courts * * * By the independence of their tenure (the courts) were least likely to be influenced by diverting pressure. It was not a lawless act to import into the Constitution such a grant of power."

The Supreme Court is part of an inner strength in our Nation which should not be diluted by passage of S. 2046.

With all respect to Senator Jenner, his speech on the Senate floor introducing this bill on July 26 of last year, which he incorporated into his testimony before this committee on August 7, indicates that he was motivated by disagreement with recent decisions of the Supreme Court.

Accordingly, it would be well to examine some of the Senator's criticism of specific decisions.

In discussing the opinion in *Jencks v. United States*, decided on June 3, 1957, Senator Jenner said that the Supreme Court in effect held that "Jencks could paw through the FBI files to his own satisfaction, without any interference from a judge."

This is not what the Court held or suggested. It held merely that if a witness for the Government against the defendant testifies that he has submitted reports to the FBI on this same subject matter, the defendant is entitled to examine these reports. This does not hold nor mean that the defendant can paw through these files.

Further, it is interesting to note that when Attorney General Herbert Brownell later testified on the O'Mahoney bill, now Public Law 269 of the 85th Congress, he said:

"The issue in the Jencks case involves the procedure under which a defendant may inspect a statement of a Government witness, in order to impeach the credibility of such witness. The argument of the case centered on whether it was necessary for the defendant to establish a foundation of inconsistency between the testimony of the witness before the statement was made available to the defense. The Court held that numerous lower court cases holding such a foundation was necessary were wrong, and that statements which relate to the testimony of the witness must be made available to the defense without requiring the defense first to establish some inconsistency. We accept this principle." [Emphases ours.]

If the decision created a problem to our administration of justice, it was later lower court rulings which, purporting to follow the Jencks decision and presumably based upon it, suggested that the defendant was entitled to pretrial production of Government files. Production of such reports at this stage of a prosecution was not involved in the Jencks case ruling.

Senator Jenner sharply criticized Mr. Justice Harlan's majority opinion in *Yates v. United States*, decided on June 17, 1957, for construing the word "organize" in the Smith Act so narrowly that it virtually emasculated the use of the Smith Act. The Court in construing the word "organize" was following one of the most basic maxims in the history of criminal law, stated by Chief Justice Marshall more than a century ago in *U. S. v. Wiltberger* (U. S.) 5 Wheat. 70): A criminal law must be given its most narrow meaningful construction. I submit to this committee that by no means did the Court depart from this most orthodox, long accepted conception of the law.

Senator Jenner charged the Supreme Court in its opinions in the *Communist Party v. Subversive Activities Control Board* case, decided April 30, 1956, with sending the case back to the Board because " * * * three of the hundreds of sources of evidence were tainted * * *"

The Court held that because newly available evidence established that witnesses upon which the Board relied on in part had given perjurious testimony in other similar proceedings, the Board was obligated to rehear the case. If there is any criticism of this case, it should be directed at the Government for having relied on such witnesses when there were presumably, in Senator Jenner's own words, many other sources of evidence. The Supreme Court did nothing more than to see that proceedings of Federal courts maintain a scrupulous respect for the highest principles of judicial administration.

Whatever disagreement Senator Jenner or others might have with the language in *Watkins v. United States*, decided on June 17, 1957, no one devoted to our system of law could knowingly quarrel with the law upon which the decision was rested: that a witness under subpoena " * * * is entitled to have knowledge of the subject to which the interrogation is pertinent. That knowledge must be available with the same degree of explicitness and clarity that the due process clause requires in the expression of any element of a criminal defense."

If a person is to be charged with criminal contempt for refusal to answer a question put by a congressional committee, he should be afforded the same basis for predicting the consequences of his conduct as he does with respect to every other criminal conduct.

The ability to foresee the criminal consequences of one's act is perhaps the most basic difference between life in our society and life in a Communist society. That is the principle which the Court sustained in *Watkins v. United States*.

I respectfully urge this committee not to approve S. 2046. To tamper with our basic institutions, to change the mosaic in our structure of freedom, to dilute the strength of our system of checks and balances, should be done, if at all, only on a showing of the highest need—a consistent and glaring perversion of long-accepted constitutional power and duty. There is no such showing.

The only showing that has been made to support Senator Jenner's proposal is capricious disagreement with recent Court opinions. At best, the showing rests on a few opinions about which some men disagree in part with other men.

To suggest profound changes in the function of the Supreme Court, as the bill does on such a flimsy basis, would undermine the structure of American society.

Mr. SOURWINE. Would you prefer that questions be interpolated as you go along or that they be reserved until you finish?

Mr. ANGELL. As you please, Mr. Sourwine.

Mr. SOURWINE. Has this statement previously been released by you to the press before your appearance here?

Mr. ANGELL. Just today, that is all, and concurrently.

The American Civil Liberties Union is the oldest private nonpartisan organization dedicated to the preservation of personal liberty guaranteed by the Bill of Rights, and as such we have functioned for 38 years.

We are opposed to S. 2616, with full respect to you, Senator Jenner, as the proponent of it.

I think it is relevant to emphasize that we recognize that the sole purpose of our work of the American Civil Liberties Union is the preservation of civil liberties, which is an anathema to the Communists. We are bitterly opposed to Communist totalitarianism, as well as to all other forms of totalitarianism. You may be interested to know that so far as we are aware we were the first organization formally to exclude members of the Communist Party and adherents to its principles from our governing bodies and staff. That is a step we took 18 years ago.

Now, this formal antitotalitarian position of the union leads us to our opposition to this bill.

I would like to comment briefly and in general upon the functions of judicial review as developed in our courts almost from the beginning of the Federal Union. The written statement on page 1 quotes an exchange of correspondence between James Madison and Thomas Jefferson in 1789, in which Jefferson, who was then our Ambassador to Paris, wrote to Madison, who, as we know, was the chief architect and proponent of the Bill of Rights which became part of the Constitution in 1791.

Mr. Jefferson spoke with emphatic approval of the confidence which should be vested in the learning and integrity of the highest courts, and alluded specifically to the caliber of justices, who were then of the High Court of Chancery of Virginia.

Mr. SOURWINE. Before you leave that statement, I take it you do not intend now to read from Jefferson's letter?

Mr. ANGELL. I don't believe it is necessary since it is in my written statement.

Senator JENNER. I put the whole written statement in the record.

Mr. SOURWINE. There were three points in connection with that statement of Jefferson's which I thought might be worth bringing out.

Mr. ANGELL. Yes, sir.

Mr. SOURWINE. One, speaking of the judiciary, Mr. Jefferson said:

This is a body, which, if rendered independent and kept strictly to their own department, merits great confidence for their learning and integrity.

Do you feel that the Supreme Court has kept strictly to its own department?

Mr. ANGELL. Yes, I do.

Mr. SOURWINE. In other words, there is in your judgment no basis for any bill restricting the Court in the activities of the Court itself; it has not transgressed its bounds; it has not attempted to impose its will on either of the departments of the government?

Senator JENNER. In other words, it hasn't made legislation by judicial enactment.

Mr. ANGELL. It is an interesting question, Senator.

Senator JENNER. Yes, it is.

Mr. ANGELL. And it goes somewhat to the heart of your bill and to the views of those who support it. It depends in part upon what is meant by making legislation or making law. Courts do not legislate as such in the strictest sense of the word, in my belief. However, particularly the high courts do make law, and they always made law from the time the independence of the courts was established.

Senator JENNER. Law but not legislation.

Mr. ANGELL. Law but not legislation. There is a profound difference, because of the misunderstanding which can attach to either of those or other synonymous terms. I think that our high courts do make law and necessarily make law where there is either a gap in legislation, leaving the adjudication of rights, whether private or public, to the determination of the courts, or in interpretation of statutes and constitutions. Our constitutions were wisely framed in almost all respects, and particularly the Federal Constitution, in broad and general terms, so that as Marshall said, "They might endure forever."

From almost the beginning of our Federal system our courts, particularly the Federal courts, have found it necessary to interpret the Constitution. For example, take the broad phrase of power in the commerce clause, if you will. What is commerce? The views of the courts as to what is commerce between the States have changed over the years. Witness the fairly recent decision of the Supreme Court, to the great consternation of many people of the highest integrity, that insurance came under the commerce clause. It had been held to the contrary many years before. That is not legislation, Senator; that is making law in the sense of adaptation, of the constitutional broad phrase of power to regulate commerce between the States, to newer views of the developing society.

Mr. SOURWINE. In other words, it is merely changing the meaning of the Constitution in accordance with the Supreme Court's findings according to the social atmosphere of the country?

Mr. ANGELL. Social atmosphere, practical necessities of the society, business demands, the growth of industry beyond the capacity of a single State unit effectively to control it—there are many reasons for adaptation.

Senator JENNER. That brings up an interesting question: Do you think the Supreme Court, in view of these recent decisions—you know what I am referring to—has taken cognizance of the fact that there is a Communist conspiracy that is out to overthrow and destroy not only this free government but all free governments of the world? Do you think they have taken that into consideration?

Mr. ANGELL. I haven't the slightest doubt of it, Senator. I think every intelligent, reading, thoughtful American knows that a primary

characteristic of communism as principally directed from the Kremlin is the conspiracy against the structure of society of the free world. It is inconceivable to me.

Senator JENNER. I wanted to get your opinion on that.

Mr. ANGELL. It is necessarily a matter of guess on my part. I am not in the personal confidence of the Justices of the Court.

Senator JENNER. But you have read these decisions?

Mr. ANGELL. I have read them all; yes.

Mr. SOURWINE. I had just two more questions about this passage from Jefferson. As you pointed out, he spoke very highly of the capabilities of Wythe, Blair, and Pendleton, who were at that time the judges of Virginia's High Court of Chancery. Would you express a judgment as to whether the present Justices of the Supreme Court are comparable to the judges of that day?

Mr. ANGELL. Isn't that a question in which I would be impertinent to offer a comment of comparison? Caliber of judges varies very much from one court to another and from time to time.

Mr. SOURWINE. Jefferson's statement made it appear that he considered it very important.

Mr. ANGELL. Yes, he did, and, of course, it is important. The judges are human beings and they vary in their abilities, that peculiar quality which makes for or against being a great judge.

Mr. SOURWINE. The third question about this passage from Jefferson: You did not, of course, intend to set Mr. Jefferson up against the Constitution?

Mr. ANGELL. Far from it.

Mr. SOURWINE. So that it would appear that you were arguing here not the constitutionality of what is proposed in this bill, not Congress' right to do it, but merely the advisability of doing it?

Mr. ANGELL. Precisely.

Senator JENNER. In other words, you realize Congress has the authority to do it under the Constitution?

Mr. ANGELL. As specified in Article 3. I am glad you brought it up, Mr. Sourwine. It is a very, very pertinent question, I might say.

Senator JENNER. You may proceed.

Mr. ANGELL. I would like to refer you to the very considered statement which was put out in the fall of 1956, and later introduced into the Congressional Record in January 1957, which is quoted on page 2 of my written statement, by a group of lawyers headed by Senator George Wharton Pepper on the function of the Supreme Court and its relationship to our whole Federal system. I think that statement is worth my reading aloud, sir, if I may. It is so much in point.

Senator JENNER. Go right ahead.

Mr. SOURWINE. Before you read it, do you know any of the signers of that statement or the majority of them, perhaps?

Mr. ANGELL. I know personally quite a number of them, certainly not all of them.

Mr. SOURWINE. Do you know how that statement was initiated?

Mr. ANGELL. Yes, I do.

Mr. SOURWINE. Could you tell us?

Mr. ANGELL. I had a hand in initiating it.

Mr. SOURWINE. Yes, sir.

Mr. ANGELL. There were several of, may I say, us, who later became signers of that statement, who quite separately one from the other as

lawyers—this is in my private capacity as a lawyer and had nothing to do with my position in the Civil Liberties Union—became very much disturbed by the nature and absurdity of some of the attacks upon the Supreme Court, which were then already current; and two or three of us, together with Senator Pepper—probably the dean of the American bar, who was greatly revered in our profession—brought this to his attention with the suggestion that a careful statement on the function of the Supreme Court in our whole legal system and in our structure of government should be prepared after due investigation and circulated among a representative group of American lawyers in the hope that they might adhere to it and authorize the use of their signatures. That is the procedure which was followed. The statement was prepared. It was circulated in advance to about 150 American lawyers in practically every State of the Union.

The circulation was originally undertaken from Senator Pepper's office in the summer of 1958 after it had been prepared. At that point, being then, well I forget whether it was 89, or some such age, nearly that, he became ill and couldn't go to his office regularly. The devolvment happened upon me as one of the original starting group, and I sent out the statement to this larger group after some 30 or 40 of us had already indicated our approval of it. When the letters of approval, all of them in writing, had come in from slightly over a hundred lawyers, we then put it out as a public release and statement. It appeared in the American Bar Association Journal.

Mr. SOURWINE. It was very widely printed?

Mr. ANGELL. Yes; it was very widely printed. We produced it in whole or in part in a great many newspapers around the country and in full in a number of local bar associations.

Mr. SOURWINE. You drafted the statement?

Mr. ANGELL. I had no part in drafting the statement. It was done by a man who is a scholar in constitutional law, one of the original group whom we drew in one of the small conferences with Senator Pepper.

Mr. SOURWINE. Who was the drafter?

Mr. ANGELL. Professor Paul Froyen, of Harvard Law School, who in his younger years had been a secretary to one of the Justices of the Supreme Court. I have forgotten now which one.

Mr. SOURWINE. His name is well known.

Mr. ANGELL. Yes; he is recognized as an outstanding scholar.

Mr. SOURWINE. I thought it was of considerable interest to develop that.

Mr. ANGELL. I would like to read the statement if I may.

Senator JENNER. Go ahead.

Mr. ANGELL (reading):

The Constitution is our supreme law. In many of its important provisions it speaks in general terms, as is fitting in a document intended, as John Marshall declared, "to endure for ages to come." In cases of disagreement we have established the judiciary to interpret the Constitution for us.

Mr. SOURWINE. If I may interrupt, sir, at that point. Is there any judicial decision on that point? Is there authority for that statement that the judiciary was established to interpret the Constitution that you know of offhand?

Mr. ANGELL. I am not sure I understand your question, Mr. Sourwine. Doesn't it go back at least to *Marbury v. Madison* in 1809, which

for the first time in the Federal courts, I believe, announced an implied power of judicial review, so-called judicial supremacy with respect to acts of other of the branches of the government?

Mr. SOURWINE. I wouldn't press the point, but I wondered if it were a matter of interpreting the Constitution or expounding and applying it.

Mr. ANGELL. I don't appreciate any difference between those terms, at least in my understanding of your use of them, I would say.

Mr. SOURWINE. There would be no disagreement if you would interpret it to mean expound and apply.

Mr. ANGELL. (reading) :

The Supreme Court is the embodiment of judicial power, and under its evolving interpretation of the great constitutional clauses—commerce among the States, due process of law, and equal protection of the laws, to name examples—we have achieved national unity, a nationwide market for goods, and government under the guarantees of the Bill of Rights. To accuse the Court of usurping authority when it reviews legislative acts, or of exercising "naked power" is to jeopardize the very institution of judicial review * * *

Mr. SOURWINE. Might I ask you a question, sir, about the passage you have just read? You speak of its evolving interpretation. By that you mean the changes in meaning which the Court has brought about through the years?

Mr. ANGELL. Both development and application of the meaning where there had been no previous occasion to apply this.

Mr. SOURWINE. But you had pointed out there had been changes in meaning.

Mr. ANGELL. Secondly, changes.

Mr. SOURWINE. That is right. Then you speak of " * * * we have achieved national unity, a nationwide market for goods, and government under the guarantees of the Bill of Rights" under this evolving interpretation as you have defined it. Did you mean to say that these things were in any sense the result of the changes the Supreme Court had made in the meaning of the Constitution, or did they simply occur concurrently with the changes?

Mr. ANGELL. Probably both, Mr. Sourwine. That is such a large question. Without question it would take economic development and national resources.

Mr. SOURWINE. It would appear you intended to give the Supreme Court some of the credit for the development in this country of national unity, of a nationwide market for goods, and government under the guarantees of the Bill of Rights.

Mr. ANGELL. Yes; definitely.

Mr. SOURWINE. Now, one more question. You say: "To accuse the Court of usurping authority when it reviews legislative acts," acts being acts of Congress and actions being things which the legislative body does pursuant to its legislative function other than the enacting of legislation. Do you see the difference?

Mr. ANGELL. You mean the investigative process, for example, normally done through committees?

Senator JENNER. That would be one example.

Mr. ANGELL. Do I see any difference?

Mr. SOURWINE. Between Supreme Court control over legislative acts rather than actions.

Mr. ANGELL. Not in the difference of the powers of the Court unless one wishes to challenge the concept of the doctrine of judicial review as to the constitutionality of statutes.

Mr. SOURWINE. You think the Court has always had the right to supervise the actions of the legislative branch?

Mr. ANGELL. Within the application of constitutional principles, yes, but that doesn't mean supervision in every respect, of course.

Mr. SOURWINE. Of course, they haven't asserted it in every respect yet.

Mr. ANGELL. That ends my quotation from that statement of the lawyer group headed by Senator Pepper. I do submit, sir, that the proper functioning of the Federal judiciary, particularly in interpreting basic constitutional provisions, dictates the necessity for maintaining the appellate jurisdiction of the Supreme Court generally and in the same five areas which this bill under discussion would strip away.

Mr. SOURWINE. Do you think the Congress has any discretion with respect to the appellate jurisdiction which the Supreme Court shall have?

Mr. ANGELL. Yes, there is. If this is the same matter we alluded to before, was it not, Mr. Sourwine, the clause in article III of the Constitution?

Mr. SOURWINE. Yes.

Mr. ANGELL. That is why I inserted that word "generally" in here so you wouldn't be making an assertion to the contrary.

Mr. SOURWINE. Exactly.

In other words, the Supreme Court has no vested interest in any of its present appellate jurisdiction?

Senator JENNER. No.

Mr. ANGELL. Well, by vested interest do you mean a constitutional right of appellate review?

Mr. SOURWINE. That is right, to hold onto any particular segment of its appellate review authority.

Mr. ANGELL. I do not think that it has. I believe the contrary view was at one time expressed by Mr. Justice Story, of course, 125 years ago, that the Supreme Court under the Constitution had an inherent judicial power of appellate review. It was a very interesting theory that was expressed by him, but I think that has been abandoned.

Mr. SOURWINE. What Story said, wasn't it, Mr. Angell, that the Constitution in article II gave the Supreme Court appellate powers, and that the powers stem from the Constitution, subject to restriction and regulation by the Congress, rather than stemming, as the weight of authority has been, from the judiciary act and subsequent acts of Congress?

Mr. ANGELL. I think that is a correct statement.

Mr. SOURWINE. The major holding has been that the Supreme Court had no appellate jurisdiction except what Congress by act gave it, and Mr. Story's view, which has been followed in some cases, was that the appellate authority flowed from the Constitution itself, but subject to the restrictions and regulations of the Constitution. Would that accord with your memory of the thing?

Mr. ANGELL. That accords with my memory. I haven't read that in a long time, and I didn't come here intending to discuss that particular point.

MR. SOURWINE. The most interesting factor in that point, it would appear, is it not, that if the appellate authority stems from the Constitution, then if Congress should repeal all of the judiciary acts, the Supreme Court would still stand vested with complete appellate authority?

MR. ANGELL. Under that original view, yes.

MR. SOURWINE. And in that case everybody would have a right of appeal to the Supreme Court in every case, wouldn't he?

MR. ANGELL. I suppose so.

MR. SOURWINE. Which is probably why, is it not, that the Judiciary Act even a hundred years ago gave the Supreme Court the power to grant or withhold certiorari, because otherwise they would be deluged with cases, if there were an absolute right of appeal to the Supreme Court?

MR. ANGELL. Obviously.

MR. SOURWINE. Yes.

MR. ANGELL. As many of us have noted with great interest in the last 2 or 3 weeks that the revered Judge Learned Hand, retired judge of the second circuit, has been delivering the Oliver Wendell Holmes lectures at the Harvard Law School, and many of us are extremely eager to obtain the full text of those lectures that are about to be published.

MR. SOURWINE. So is the committee, sir. We have attempted to get them for the record.

MR. ANGELL. There is a quotation which I would like to read, being brief. It appears at the top of page 3 of my written statement—I think it is textually correct—in which the judge said, discussing apparently this very same subject matter, although not your specific bill, Senator Jenner—I mean the subject matter itself—and I quote:

* * * It was probable, if indeed it was not certain that without some arbiter whose decision should be final the whole system would have collapsed, for it was extremely unlikely that the executive or the legislature, having once decided, would yield to the contrary holding of another "department" even of the courts * * * By the independence of their tenure (the insertion of the words "the courts" there is necessary to give it proper meaning) (the courts) were least likely to be influenced by diverting pressure. It was not a lawless act to import into the Constitution such a grant of power.

That concept of the function of the courts has been there for the last 140 years.

MR. SOURWINE. Do you agree with Judge Hand that it was imported into the Constitution?

MR. ANGELL. It is not there by any specific grant of language, no question about that.

I think it is quite relevant to cite to you, sir, the apparent fact—perhaps I am being unduly cautious in the use of the adjective "apparent"—it is my legal training—that the high courts of every one of the 48 States have assumed, each of them on numerous occasions, to exercise this same function of judicial review, sometimes characterized as judicial supremacy, meaning with respect to the constitutionality and legality of acts or actions of the legislative branch and executive branch of the Government, and it is further interesting that in none of the State constitutions, I believe, is there any such express proscription of judicial power. The high courts of the States have assumed and exercised that same function in power as has the Supreme Court and the courts of appeal of the Federal system.

Mr. SOURWINE. You are saying that whereas the Constitution does have an inhibition on the Court in that Congress may regulate or restrict appellate jurisdiction of the Court, in the States the State high courts have no provision by State law or State constitution?

Mr. ANGELL. I am not going as far as that, sir.

Mr. SOURWINE. I misunderstood.

Mr. ANGELL. The question is an excellent one because it should be understood to be a proper limit to my statement. Whether there is any proscription in the various State constitutions as to the power of the State legislatures to grant, exclude, or limit appellate jurisdiction of their own high courts, I do not know.

Mr. SOURWINE. I don't, either. I think it would not be strange if there were none, because, after all, isn't it true that the power of the Federal Government, including the judicial power, is only such power as the people of the States grant it in the Constitution. All of the rest of it was withheld for the States. So, the judicial power of the Federal Government is only what the people granted in the Constitution and subject to the restrictions they put in the Constitution, and all of the rest of the judicial power is vested back in the States.

Mr. ANGELL. I agree, but the Federal Constitution, as we all know, contains no proscription of power of judicial review in the sense that you or I are using the term.

Mr. SOURWINE. You are making a distinction, and a very proper one, between judicial review and appellate jurisdiction.

Mr. ANGELL. I am talking about the function of judicial review, generally.

Mr. SOURWINE. Judicial review is merely the right of the individual to have the Court pass upon some act which he says infringed his rights.

Mr. ANGELL. And the power of the Court to declare that some act of government has infringed his rights, either by so-called unconstitutional application of a valid statute or executive regulation or by the fact that the Court finds the statute or the executive act is unconstitutional.

Mr. SOURWINE. But, in that sense, judicial review may be original jurisdiction. It doesn't have to be appellate jurisdiction.

Mr. ANGELL. Maybe.

Mr. SOURWINE. Appellate jurisdiction is something entirely separate. A man has judicial review or a court exercises the power of judicial review, but it need not be an appellate court that does it. It may be a district court or an intermediate appellate court.

Mr. ANGELL. It may be a court of intermediate appeals; I quite agree. In this same connection, Mr. Chairman, I would like to call to your attention, briefly, and necessarily in almost general terms, the expressions of approval of the functions of judicial review in our courts, particularly the Supreme Court, by leading personalities of the past and a few of the present. There is the famous passage that is known to many of us lawyers in a lecture or essay by Mr. Justice Holmes, when he was on the Court, in which he said, and I quote:

I do not think the United States would come to an end if we lost our power to declare an act of Congress void. I do think the Union would be imperilled if we could not make that declaration as to the laws of the several States, for one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the commerce clause was meant to end.

Then judge, as he was then, of the New York Court of Appeals, the State court later, Mr. Justice Cardozo wrote in his book, *The Nature of Judicial Process*, and this, again, is a brief quotation, Senator:

The great ideals of liberty and equality are preserved against the assaults of the expediency of a passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles by enshrining them in constitutions and consecrating to the task of their protection a body of defenders. By conscious or subconscious influence, the presence of the restraining power aloof in the background, but, nonetheless, always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle to hold the standard aloft and visible for those who must run the race and keep faith.

And just a few years later, in 1924, President Calvin Coolidge in a speech said:

If the powers of the Supreme Court were curtailed, particularly the power of judicial review, the historian would close a chapter of American history with the comment that the people had shown they are incapable of self-government and the American Republic had proved a failure.

I cite to you, sir, that in 1923 the Massachusetts Bar Association unanimously resolved it was opposed to any alteration in the authority and power of the Supreme Court.

Mr. SOURWINE. Have you left the point of judicial review, or do you have more quotes?

Mr. ANGELL. There are a few more here which I would like to refer to, if I may.

Mr. SOURWINE. Go ahead.

Mr. ANGELL. President Wilson, in his book, *The Constitutional Government of the United States*, said:

The constitutional Government of the United States and the constitutional power of the courts constitute the ultimate safeguard alike of individual privilege and of governmental prerogative and that our judiciary is the balance wheel of our whole system.

Dean Eugene Rostow, the great scholar of the New York Law School, wrote, in his *Spirit of the Common Law*, that the doctrine of supremacy of law and consequent judicial power over unconstitutional legislation is bitterly attacked in the land of its origin and is endangering the independence and authority of the Court, which is the central point of the Anglo-American system.

I have a number of other similar references which I will not read in detail here. Suppose I merely refer to the writers.

Mr. SOURWINE. Do you want to offer them for the record?

Mr. ANGELL. Well, not in this particular form. It is too lengthy. That is all, Mr. Sourwine. Let me give you the names and references.

Mr. SOURWINE. You have the specific quotes?

Mr. ANGELL. Yes.

Mr. SOURWINE. If you do, you can submit that, and all that will be in the record at this particular point is what you have marked.

Mr. ANGELL. I will do so.

Mr. SOURWINE. You can mark it at the end of the hearing and submit it for the record at this point, if the chairman will so rule.

Senator JENNER. I will so rule, and it may be inserted in the record.

Mr. ANGELL. I will mark these and give them to you afterward then.

Senator JENNER. That will be fine.

(The material is as follows:)

Cahn, Edmund, Supreme Court and Supreme Law, 1954, introduction, page 19: "Judicial review is always more than pure and simple enforcement of the Constitution; in addition, it always comprises express or tacit interpretation of the Constitution, or, in other words, a continual process of adjusting and adapting the fundamental fabric. The sanction which Marshall installed in *Marbury v. Madison* should be seen as having served both purposes; it has maintained the Constitution not only by giving it legal force but also by providing in a substantial measure for continual reshaping and development."

Dean Eugene Rostow, of the Yale Law School:

"The power of constitutional review, to be exercised by some part of the Government, is implicit in the conception of a written constitution delegating limited powers. A written constitution would promote discord rather than order in society if there were no accepted authority to construe it, at least in cases of conflicting action by different branches of government or of constitutionally unauthorized government action against individuals." (The Democratic Character of Judicial Review, 66 Harv. L. Rev. 193 (1952).)

Rostow further states: "The political proposition underlying the survival of the power [of judicial review] is that there are some phases of American life which should be beyond the reach of any majority, save by constitutional amendment. In Mr. Justice Jackson's phrase, 'One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections' (*West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 638 (1943))." Id. at 197.

Mr. SOURWINE. All of those persons referring to judicial review and the right of judicial review were extremely knowledgeable people, and it must be presumed that they understand the distinction here between judicial review and appellate jurisdiction, isn't that correct?

Mr. ANGELL. I would think so without doubt, Mr. Sourwine. Surely they must have.

Mr. SOURWINE. Surely.

Mr. ANGELL. I would now like to comment more directly upon the effect of this bill if it became law, in my judgment, sir. I think that one of the important aspects of judicial review by any high court of our Nation or of the States is that uniformity may be thus achieved between otherwise, and inevitably at times, conflicting interpretations of the law, declarations of what the law is, what a statute or constitutional phrase means by inferior courts of that particular system, Federal or State.

If I may use a simple metaphor, sir—and you won't take offense at the language I use, it is not personal, we are talking ideas and concepts—it seems to me that your bill presupposes that a fire has broken out in our constitutional system, particularly in the five areas.

Senator JENNER. Only in the one phase.

Mr. ANGELL. In the five areas which are the subject matter of your bill.

Senator JENNER. That is right.

Mr. ANGELL. And you are going to put out the fire, so to speak, by this bill. I think the effect of this bill, if it were adopted, would be to stamp upon the fire, but simply to spread the sparks wider. I think the result would be not only would you have other courts, lower Federal courts, I am talking about, and high courts of the States probably, following the decisions already announced, upon which I take it your bill is based. You are in disagreement with those decisions and many others have disagreed with them, of course. But there then would be a willful act of uniformity in those areas of the law where uniformity is highly important. I made quite an exami-

nation of the last two published volumes of the Supreme Court decisions and of the so-called advance sheets of more recent cases not yet bound up, and I found there 11 decisions of the Supreme Court in which it appears that the Court granted certiorari addressed to a lower court, Federal or State. Excuse me, these are all cases of certiorari addressed to the lower Federal courts in order to determine a conflict between the decisions of two or more of the Federal circuits on the same or similar point of law.

There are 11 of those cases where the Court took the case from the lower court in order to settle conflict between the circuits on matters of Federal law, and they were not in these particular areas, sir, which your bill is.

Mr. SOUTHWINE. Do you know, sir, in how many cases in recent years or in any recent year the Supreme Court has granted certiorari with the ultimate effect of reversing what theretofore had been a uniform rule of the circuit court?

Mr. ANGELL. No; I do not. These 11 cases, for example, and I shall not trouble you with the citation of the names, it is not particularly relevant here, but those cases dealt with such widely varying subjects of Federal law as the Robinson Patman Act, the question of whether a civilian dependent accompanying the Armed Forces overseas may be tried by an American court-martial, the power of the district court to suspend sentence after the prisoner has begun to serve a cumulative sentence, the Surplus Property Act of 1912, the Portal to Portal Act in relation to the Fair Labor Standards Act, two of these cases had to do with sections of the Internal Revenue Code, another with the Fair Labor Standards Act, one had to do with the right to appeal certain decisions, venue for certain Federal offenses, and the Federal Communications Act of 1934 with respect to wiretapping.

I think uniformity in most of the respects at least to which your bill is address, sir, is of vital importance. I think that matters of subversion attempts against the security of our Government, that there must be a uniform rule, one uniform interpretation of the constitutional provisions and of any of the statutes.

May I say that point in parentheses, as it were, that although I appear here in my capacity as chairman of the board of the American Civil Liberties Union, of which I have stated the purposes, I think it is understood, I believe, that my own experience has been such as to give me—I don't wish to claim qualities of experience beyond their fair scope—I have had practical direct experience with the problem of subversion, security, of loyalty of Government employees. For 2½ years I was the chairman of the Federal Review Board for the States of New York and New Jersey, having power over—and our board sat upon the loyalty under the earlier form of the Executive order of the President during the presidency of Mr. Truman—all of the Federal employees in the States of New York and New Jersey, and there are more Federal employees in New York than anywhere else except in the District of Columbia. We had a large board. We had a great many hundreds of so-called files of the FBI to examine. I gave a great deal of time actively to that work. I have therefore had some experience with and some knowledge of the problems in this area, part of which, sir, your bill is addressed. I am not unmindful of those problems, I beg you to believe.

In my earlier years as a young man I was an officer of the American Army for nearly 2 years in France in the First World War, and most of that time I was in the counterespionage branch of our military service. That wouldn't involve Communists, it happened to involve the Germans at that time, but the basic problems are much the same.

Mr. SOURWINE. Sir, does it concern you that the Supreme Court, by its decision in the Nelson case, has overthrown the antisubversion acts and activities of 42 States and has done so on the basis of the claim that the Congress by enactment of the Smith Act had preempted the field, and the Court then, in the Yates case, has made a shambles of the Smith Act and made it useless for all practical purposes as against Communists and it has resulted in the freeing of virtually all of those convicted under the Smith Act?

Senator JENNER. And dismissals of many cases pending.

Mr. ANGELL. Let's take the two cases one at a time.

Mr. SOURWINE. I want to know whether you are concerned with the net effect. In other words, the States can't act against subversion because the Court says the Smith Act is the predominant act in the field, and the Smith Act is tossed out of the window, so what is left? Does that situation concern you?

Mr. ANGELL. If that were the full result, I would be concerned. I doubt it is, sir. I differ with what I understand to be your characterization of the effect of those two decisions. Take the Nelson case first. Note that the holding that the adoption of the Smith Act by the Federal Congress had preempted the field of legislative control over subversive action against the National Government was announced and applied by the Supreme Court of Pennsylvania. The decision of the Supreme Court was an affirmation of that holding. As I read that decision it is not a holding either that Congress could not, by an amendment to the Smith Act or by a new statute, expressly state its intention to leave to the States the power to enact supplementary or parallel controlling legislation with respect to acts of subversion against the National Government, and that the States could not enact their own statutes with respect to sedition against the State governments.

Now, the opinion in the Nelson cases notes in quotation, I believe, from the opinion of the Supreme Court of Pennsylvania which it affirmed, that there was nothing in the record of the case as developed at trial in the State courts of Pennsylvania to show that there had been any act of subversion against the State of Pennsylvania. The acts of Nelson et al., the defendants accused and convicted, were directed against the Federal Government.

The decision of the Supreme Court, in my belief, Mr. Sourwine, is one of interpretation of the intent of Congress in the Smith Act, namely, to take unto itself exclusive jurisdiction. It is not, I believe, a holding that Congress could not by express enactment permit the States also to legislate even against subversion directed toward the National Government.

Mr. SOURWINE. You know, do you not, that since the decision in the Nelson case, State court after State court has held that its State's anti-subversive law was no longer valid and effective?

Mr. ANGELL. Because of the decision?

Mr. SOURWINE. It was the effect I was discussing. I wasn't attempting to go into the decision. The effect has been that, on the judgment

of a series of State supreme courts, the State acts are now null and void.

Mr. ANGELL. I believe in many of these States it was so viewed.

Mr. SOURWINE. Do you have any question that the Supreme Court in the Yates and Schneiderman case has rendered the Smith Act for all practical purposes useless in combating subversion?

Mr. ANGELL. I wouldn't agree with that conclusion, Mr. Sourwine.

Mr. SOURWINE. I wouldn't want to force it on you.

Mr. ANGELL. The decision in the Yates case, as I understand it, is twofold. One, as to subsection (b), I think it is, of paragraph B of section 2 of the Smith Act, interpretation of the meaning of the word "organize" and "organizing," and in accordance with a time-old rule of criminal legislation that the narrowest meaningful interpretation shall be put upon a statute of criminal penalty in general protection of the accused whatever their political stripe may be.

Mr. SOURWINE. But that important word there is meaningful, isn't it.

Mr. ANGELL. I agree it is meaningful.

Mr. SOURWINE. The important word is meaningful. You agree there is also a rule of statutory interpretation that the legislative body shall never be presumed to have done a vain and void thing in which there is an interpretation.

Mr. ANGELL. I agree.

Mr. SOURWINE. At the time the Smith Act was enacted there had been no reorganization of the Communist Party in 1945, had there, because that day had not yet come?

Mr. ANGELL. That is right.

Mr. SOURWINE. So under the interpretation which the Supreme Court has placed upon the Smith Act, the organizing section would have been void at the time it was enacted.

Mr. ANGELL. What the Court did in the Yates case in the interpretation of the organizing question was to deal with the statute of limitations. It remains for the Congress, of which you are a distinguished Member, Senator Jenner, to enlarge the statutory period of proscription or narrow it, as you please. That is a matter clearly within the power of the Congress.

Mr. SOURWINE. You will agree, won't you, however, that if the interpretation the Supreme Court places upon this had been placed upon it as of the time it was enacted, then as of that time it would have had no effect against any person in the Communist Party?

Mr. ANGELL. I am not disagreeing with you when I say frankly I am not sure I follow you.

Mr. SOURWINE. The Communist Party had been organized many years prior to the enactment of the Smith Act, and the reorganization which the Supreme Court now says was the last organization of the party took place in 1945, which was after the enactment of the Smith Act, so at the time of the enactment of the Smith Act organize meant to form the party. Then the act was inoperative as against Communists.

Mr. ANGELL. Because the organizing period went back to many years before.

Mr. SOURWINE. Many years before this statute.

Mr. ANGELL. Well, you would agree at the same time, I take it, that acts done before a criminal statute is adopted cannot be made *ex post facto* criminal, of course.

Mr. SOURWINE. That principle isn't involved here, though.

Mr. ANGELL. There again, it simply remains for the Congress to adopt an amending statute, a broadening statute of the Smith Act.

Mr. SOURWINE. But the Supreme Court has said, has it not, that at the time the Congress passed that act it had no applicability to Communists?

Mr. ANGELL. Well, unless the organization of a particular branch of the Communist Party in the United States, I don't know, a State branch, for instance, might have taken place in subsequent years.

Mr. SOURWINE. But the Supreme Court has negatived that in its decision in the Smith case, in defining organization, that organizing local units or sections is not what is contemplated by the law. That is what I was asking you; were you concerned about the total effects of this, not as to the particular rightness or wrongness, but the total effect of it to first invalidate the State laws and then to invalidate the Federal law?

Mr. ANGELL. The whole effect of the holding in the Yates case was that, as was charged by Judge Medina to the jury in the Dennis case, to bring the acts of one accused of violation of the Smith Act within the scope: there must be more than merely words of advocacy. There must be either an overt act, although paragraph A, section 2, does not speak itself of an act, but the effect of the words used, the advocacy must be an incitement to action, not necessarily at the moment but at some time in the future.

Mr. SOURWINE. The Supreme Court, in other words, said that mere advocacy of violent overthrow of the Government of the United States is not unlawful and illegal under the Smith Act unless it involves an incitement to action.

Mr. ANGELL. An interpretation of the meaning of the Smith Act language is used, as I understand it, and that has been in accordance with earlier holdings of the Supreme Court on the other statutes.

Senator JENNER. Would you explain to me what does the Supreme Court mean by that?

Mr. ANGELL. You are asking me, sir, to explain what is intended in the language of the justices? Once again, sir, that is perhaps a presumptuous thing on the part of a private individual to say what the Court means by its language.

Mr. SOURWINE. Can you say this, sir: Can you tell us how it is possible to advocate the overthrow of the Government of the United States by force and violence without inciting to action?

Mr. ANGELL. That depends always, I believe, upon the particular circumstances of the kind of words used, the circumstances under which they are used, and you will find a good many of the cases since the decision in the *Schenks v. United States* case, which was the application of the Espionage Act of 1917 and the whole line of cases in which that problem is involved. It is the same problem that you put to me a moment ago, Senator Jenner. I think it has been dealt with by the Court in determining whether the acts of the convicted accused who comes before the Court on appeal, ultimate appeal, are either overt acts in the legal sense of that word or are incitements to action. I note

that many of those decisions where the clear and present danger rule, that famous rule originated with Holmes and Brandeis, was announced, resulted often by a divided Court, but occasionally by a unanimous Court in upholding the conviction because the words used, written or spoken were held by the Court to be an incitement to action forbidden by the statute and clearly within the power of the legislature to penalize. It is a problem of particular circumstances, sir. I don't think anyone can give, certainly least of all I, a rule of thumb answer in general terms which will hold good and carries an analytical meaning.

Mr. SOURWINE. You do not think then that the decision in the Yates case has rendered the Smith Act virtually unenforceable?

Mr. ANGELL. No, I don't think so, sir. I am not a prosecutor, but frankly, I doubt it.

Mr. SOURWINE. You know that the Federal prosecutors have dismissed virtually all of the Smith Act cases which were pending.

Mr. ANGELL. I have read that a good many of them have been dismissed.

Mr. SOURWINE. That must have been based on their judgment that the act was now unenforceable; if they thought they had cases, they would have gone ahead.

Mr. ANGELL. Is that a reason for stripping the Supreme Court of jurisdiction?

Mr. SOURWINE. I am sorry. I didn't mean to be argumentative. I am attempting to get your views. If you say it is not, that is what we want to know.

Senator JENNER. Let's proceed here as fast as we can with the witness and counsel because we have two other witnesses and it is now 18 minutes of twelve.

Mr. ANGELL. May I comment briefly, sir. I do this with some sense of diffidence at least because I am now criticizing some of your own testimony and remarks on the Senate floor in support of this bill, but I am confident, may I say, that you recognize that honest men may differ in their views and that all reasonable views may properly be expressed.

Senator JENNER. May I say I am used to criticism, so go right ahead.

Mr. ANGELL. I think, sir, that your statement as to the Jencks decision, that Jencks could paw through the FBI files to his own satisfaction, without any interference from a judge is mistaken.

Senator JENNER. Don't you think the Attorney General felt the same way or else we wouldn't have had to rush legislation last session to correct the situation?

Mr. ANGELL. I say there again there is a difference as to what somebody else thought.

Senator JENNER. Surely.

Mr. ANGELL. I think the rush for the legislation and the passage of that bill which became Public Law 269, I think, was prompted largely by what I venture to believe was a misunderstanding. This does sound presumptuous, I know. I hope it won't be taken ultimately to be as such. A misunderstanding of the Jencks case by some of the lower court judges and others who thought that the effect of the Jencks decision would be to permit the counsel for the defense at the customary pretrial proceeding to obtain access to the FBI files,

including, of course, previous statements made by one who was going to be a witness against the accused. I don't think that the Jenks decision had anything to do with pretrial examination. I think that the general decision only was an application of a long-established general rule that where X appears as the witness for one party against the other, the opposing party may say, "Did you ever give a report or a statement on this subject matter of your present testimony?" If the witness says, "Yes, I did," and often they have forgotten—it is true in negligence actions, for instance, where the investigators for the street railway company or the railroad come around to the witnesses and get statements from them and counsel for the other side then says, "Produce that statement," so as to enable him to see whether the testimony then being given accords with what the man said at the time he gave the statement, which was at the time of or shortly after the occurrence in question. It is to enable him to test the credibility of the witness, both as to honesty and accuracy of his recollection. That is an old, old rule, not only in civil cases but in criminal cases. That is my understanding of the basis of the Jenks decision, and not that it gave the accused the liberty, as you put it dramatically, to go pawing through all the FBI files. I quite agree that shouldn't be done, of course. There shouldn't be general access to the FBI files. I know too much about what they contain. I have had occasion at the time I mentioned myself to read and study too many hundreds of those files.

Mr. SOURWINE. You know that legislation has been passed to deal with the Jenks case?

Mr. ANGELL. Yes.

Mr. SOURWINE. And that it is not involving Senator Jenner's bill 2646?

Mr. ANGELL. Yes.

Senator JENNER, a moment ago you spoke of what the views of the Attorney General were. There is quoted on page 3 of my written testimony here, my written statement, something of what Mr. Brownell did say at that time about the principle of the Jenks decision, which I think is quite a relevant one. I hope that you may think the remainder of my written statement, which I will not take the time to read, worth reading.

Senator JENNER. It is all in the record.

Mr. ANGELL. It is all in there. I think this legislation is unnecessary, sir. I think, with all due respect to you, it is highly unwise.

Senator JENNER. We are certainly glad you have appeared, and we are very glad to have your views.

Mr. ANGELL. Thank you for the reception.

Senator JENNER. The next witness will be A. J. Muste.

Mr. SOURWINE. Mr. Chairman, we have a telegram from Mr. Muste stating that he will not be able to appear because he has been called to Los Angeles and that he will communicate later about filing a statement with the committee.

Senator JENNER. All right.

(The telegram and correspondence are as follows:)

THE FELLOWSHIP OF RECONCILIATION,
New York, N. Y., February 19, 1958.

Mr. J. G. SOURWINE,
United States Senate Office Building,
Washington, D. C.

DEAR SIR: I have been informed in a general way of the contents of Senate bill 2046 and am told that there are to be hearings on this bill.

I am willing to ask, in the first place, if you will send me a copy of this bill promptly and also of any material relating to it that may be available.

In the second place, it would appear that this bill has a fundamental bearing on certain basic civil liberties and this is a matter in which the Fellowship of Reconciliation has always been deeply interested. On behalf of the National Council, therefore, of the Fellowship of Reconciliation, I request the opportunity of appearing at these hearings on the bill and I should appreciate some indication from you when it would be convenient.

Sincerely,

A. J. MUSTE.

FEBRUARY 21, 1958.

Mr. A. J. MUSTE,
The Fellowship of Reconciliation,
New York, N. Y.

DEAR MR. MUSTE: Responding to your letter of February 10, here is a copy of the bill S. 2046, together with a printed copy of the previous hearing held on this measure.

In accordance with your request, time has been allotted you to testify on this bill on Thursday, February 27. The hearing will convene at 10:30 a.m. in Room 424, Senate Office Building.

Your attention is called to the rule of the committee requiring that any witness having a statement to present to the committee submit copies 24 hours in advance of his testimony.

Sincerely,

J. G. SOURWINE, Chief Counsel.

LOS ANGELES, CALIF.

J. G. SOURWINE,
Senate Judiciary Committee,
Senate Office Building, Washington, D. C.:

Regret being called Los Angeles and consequent inability act upon your courteous offer regarding testimony Thursday. Will communicate later about filing statement with committee.

A. J. MUSTE.

Senator JENNER. George J. Thomas.

You may be seated. Will you give the committee your full name?

STATEMENT OF GEORGE J. THOMAS, EXECUTIVE DIRECTOR, THE CONGRESS OF FREEDOM, INC.

Mr. THOMAS. My name is George J. Thomas, of Omaha, Nebr.

Senator JENNER. Where do you reside in Omaha?

Mr. THOMAS. 1330 Turner Boulevard.

Senator JENNER. Are you here as an individual or are you representing some organization?

Mr. THOMAS. I am the executive director of the Congress of Freedom. That is an organization which holds annual conventions.

Senator JENNER. What is the membership of this organization?

Mr. THOMAS. The membership is around 500 in that its members represent other organizations.

Senator JENNER. Oh, I see.

Mr. THOMAS. So that we really have no idea of how many people it does represent, but they come from all over the United States.

Senator JENNER. You may proceed then. You have a prepared statement?

Mr. THOMAS. Yes, sir.

Senator JENNER. Proceed, please.

Mr. THOMAS. Thank you, Mr. Chairman, for the privilege of appearing before your most important committee on this all important subject of Senate bill 2646, to limit appellate jurisdiction of the Supreme Court.

To identify myself, I am the executive director of The Congress of Freedom, Inc., with headquarters in Omaha, Nebr. I am also the editor of the Greater Nebraskan, a magazine of political opinion. I have had an active interest in the government of our Nation for many years. My home has been in Nebraska all my life and in Omaha for the past 25 years.

In the personals of the want ads of our daily paper, we often read something like this: "Mr. Carlisle Jones hereby serves notice that hereafter, he will not be responsible or liable for any bills or debts incurred by Phoebe May Jones." Financially Mr. and Mrs. Jones have come to the parting of the ways.

If the Senate bill 2646, the need for which we are testifying to today, should finally become law, it would also serve notice that the appellate jurisdiction of the Supreme Court had been limited to the extent that it could no longer hear cases or actions—

(1) Against a witness charged with contempt of Congress, or of any committee or subcommittee of the United States Congress;

(2) Against any officer or agency of the executive branch of the Federal Government in the administration of any program established pursuant to an act of Congress for the elimination from service as employees in the executive branch of individuals whose retention may impair the security of the United States Government;

(3) Any statute or executive regulation of any State, the general purpose of which is to control subversive activities within such State;

(4) Any rule, bylaw, or regulation adopted by a school board, board of education, board of trustees, or similar body, concerning subversive activities in its teaching body; and

(5) Any rule, law, or regulation of any State, or of any board of examiners, or similar body, or any action or proceeding taken pursuant to any such law, rule, or regulation pertaining to the admission of persons to the practice of law within the State.

I have copied, of course, your bill, Senator.

In other words, the Supreme Court of the United States would have lost its access to the privilege of having the last word in cases coming under the categories described above. With that we are in full accord.

The record of the decisions that have been handed down during the past 4 years having to do with communism and Communists by the majority of our United States Supreme Court reads like what one might expect to read in a tale of the "Fall of an Empire." That record of something that has occurred in this land of freedom is unbelievable.

Former Senator Herbert R. O'Connor, chairman of the American Bar Association's committee on Communist tactics, strategy, and objectives, has reported that "modern history is filled with the wrecks of republics which were destroyed from within." Some of them have

been the German Republic, the Kerensky government of Russia, and the Republics of Czechoslovakia, Poland, and China. They tried to coexist with the Communists who responded by destroying them.

The National Review, in its issue of February 15, 1958, states that within the past 19 months the Supreme Court has reviewed 10 cases that bear on internal security. In all 10 the Court has found in favor of those who appealed against one or another law or administrative regulation designed to protect the Nation against internal subversion. These cases have now become almost national red lights of warning of the destruction of our Government and our liberties, if nothing is accomplished to nullify their results.

The Communist Daily Worker described the effect of these decisions as follows:

The Court delivered a triple-barreled attack on (1) the Department of Justice and its Smith Act trials; (2) the free-wheeling congressional inquisitions; and (3) the hateful loyalty-security program of the executive. Monday, June 17, is already a historic landmark.

The repeal or the weakening of these anti-Communist laws and committees is in the forefront of the program of the Communist Party of the United States today.

Already the Supreme Court has dealt a succession of blows at key points of the legislative structure erected by Congress for the protection of our internal security against this Communist conspiracy. Time after time Congress has moved to restore legislative bulwarks, and time after time the Supreme Court has knocked out the props from under these laws.

There was a time when the Supreme Court conceived its function to be the interpreter of the laws. But for some time now, it has apparently considered its function to be the making of the laws. Today, the members of the Court go even further. They keep changing the laws, and even change the meaning of our Constitution. The lower courts have recognized this situation and now at times withhold decisions awaiting a new decision by the Supreme Court.

David Lawrence wrote:

The most spectacular and yet the most sensational happening of our times is the manner in which the 48 States are being deprived of their rights by the Supreme Court of the United States.

He was commenting on the decision of the Court that a worker must join a labor union or be deprived of his job with the railroad. The case had originated in Nebraska which has a right-to-work amendment in its State constitution. The decision took from the States their power to regulate employment relations. In his concurring opinion, Justice Frankfurter virtually acknowledged that the Supreme Court is a political body which changes its views with the whims of popular opinion. He lauds this as a virtue. This view is contrary to one expressed by Charles Evans Hughes, who, as Chief Justice back in 1935, stated that "extraordinary conditions do not create or enlarge constitutional power."

There is no question but that the Supreme Court is taking undue advantage of our Nation's laws and security. There is no way for Congress to invalidate or repeal a decision of the Supreme Court, even when that decision is legislative and policymaking in nature. Congress can in some cases, according to Senator Jenner, strike

down judge-made law by enacting a new law or by correcting the Court's error respecting the intent of the law by a new declaration of intent. The Court has to all practical purposes become a legislative branch of the Government and its feats are not subject to review. Two Members of Congress last night at Catholic University called it an oligarchy. Could the dictates of a Tito or a Khrushchev be more arbitrary? These men of the Court have been appointed for life. They can decide to hear or not to hear the various cases. They control in the ultimate all the lower courts. They choose to hear, usually, only about 10 percent of the cases that they are requested to hear.

The Justices of the Supreme Court have some 18 clerks. They are usually honor graduates of our various law schools. These clerks do a great deal of the footwork for the Justices, especially in petitions for certiorari.

According to one, William H. Rehnquist, who was a clerk for the late Justice Jackson, some of these clerks could have something to do with the opinions rendered by the Court. Some are imbued with deeply held notions about right and wrong and in some of their youthful exuberance permit their notions to engender a cynical disrespect for the capabilities of anyone, including Justices, who may disagree with them. These clerks are known to have considerable to do with formulating and the writing of some of the opinions handed down by the Court. During the period Rehnquist was connected with the Court, some of the tenets of the "liberal" point of view which commanded the sympathy of a majority of the clerks were extreme solicitude for the claims of Communists and other criminal defendants, expansion of Federal power at the expense of private, great sympathy toward any governmental regulation of business—in short, the political philosophy now espoused by Chief Justice Earl Warren. This particular bias of the clerks could have affected the Court's certiorari decisions. Where any such bias did exist, its direction was to the political left.

An earlier clerk in the Supreme Court was Alger Hiss, whose employer was Justice Frankfurter. And Felix Frankfurter was a very close friend of Justice Oliver Wendell Holmes. George S. Montgomery, Jr., a prominent lawyer of New York City, in a speech before our Congress of Freedom in the Veterans' War Memorial Auditorium in San Francisco in 1955 described this strange relationship between these two men.

It began in 1916, when Holmes was 75 and Frankfurter 23. It lasted through the years and resulted in the publishing recently of two volumes of letters. These volumes are very appropriately introduced by Mr. Felix Frankfurter, with the salutation "Dear Felix" on every other page.

You will find many significant things in these letters but probably the most significant is the great tie that these two men had in that they had an utter contempt for God, not merely for God, because they did not believe in God, but for the very ideal of God, and for any human being who was so stupid as to believe in God or the things of the Spirit.

Oliver Wendell Holmes also had the utmost contempt for our American Constitution and during his long career we find instance after instance where he did his best to circumvent the restrictive provisions of

it. Is it too far a stretch of the imagination to believe that his friend and admirer, Felix Frankfurter, a leader in our Supreme Court, is carrying on in the Holmes tradition?

On Monday, May 17, 1954, the Supreme Court handed down its well-known decision in the school-segregation case. Ignoring all custom and tradition of a great region in our country, disregarding judicial precedent and basing its decision on sociological and psychological textbooks written by Socialists and leftwing sympathizers, it reversed the "separate but equal" system that had been promulgated by its predecessors for 60 years.

The decision was inexcusable. It has brought strife where there was no strife. It has torn down in a few brief years all the progress made in race relations throughout the preceding 90 years. James J. Byrnes, himself a former member of the Court, said the decision expanded the Constitution by reading into it something which was never there.

An editorial in the Omaha World-Herald asked the question:

How did the Court find something in the 14th amendment that justified a Federal order integrating local schools? Not through legal precedent. All the precedents are the other way. Where does the Court go when it casts aside legal precedents? To "modern authority" said the Supreme Court. Not modern legal authority but "modern psychological authority". In a footnote the Court listed as its "modern authority" the writings of seven sociologists.

Chief of these authorities was Dr. Gunnar Myrdahl, who had been brought here from the University of Sweden in 1937 by the Carnegie Foundation for Peace. He called himself a social engineer. Senator Eastland says he was a Socialist who had served the Communist cause. He had no knowledge of the Negro problem in this country, but he was hired to investigate race relations in this country. He was a man who believed that the American Constitution was "impractical and unsuited to modern conditions" and that "its adoption was a plot against the American people."

Dr. Myrdahl was assisted by a staff picked by the Carnegie Foundation, and he was allowed plenty of money to do the work. His resulting compilation, a book entitled "An American Dilemma" had 1,400 pages. His helpers were social experts and contributed 272 articles to the collection. Some of these social experts had long lists of connections with Communist organizations or Communist-front groups. One of these was W. E. duBois, another E. Franklin Frazier with 18 citations by the House Un-American Activities Committee, and another, Theodore Brameld, who had had 10 known connections with communistic, Communist-front or Communist-dominated organizations.

The Supreme Court of today, bypassing judicial precedent, has undertaken a campaign to level every existing barrier against Communist penetration into our Government. It seems to have also taken a special interest in the criminal. Since 1950, crimes have increased 4 times as fast as the population. A major crime is committed every 12½ seconds, a murder every 4½ minutes, and a raping every 26 minutes.

One of the men who contributed to this sickening total was a resident of the District of Columbia. His name is Andrew R. Mallory. He was convicted of raping a defenseless woman as she washed the family clothes in the basement of her apartment. His conviction, upheld by the circuit court of appeals, was reversed by the Supreme Court. The decision was written by Justice Felix Frankfurter who referred tenderly to the rapist as a 19-year-old lad. The Court did not

find Mallory innocent. It did not suggest that there was any doubt about his guilt. It simply made a new rule denying the police the right to question a suspect before arraignment. The rapist walked out of jail a free man, who may commit another rape in another basement. Of this verdict, Assistant Attorney General Olney is reported to have said:

A great many serious crimes will go unpunished because of the procedures set up by the Court in this case.

This past week, 1,200 Methodist ministers and laymen gathered in this city. They came to plan action in view of the seriousness of the explosive situations now developing in many of our large cities. One of the greatest migrations of all history is that of the people moving from the country to the city. The seriousness of the situation was particularly impressed upon them by the warning here in Washington that it was worth one's life to walk the streets of the city of Washington, the Capital of the strongest nation in the world, after 8 in the evening.

The Nation has already been apprised of this situation by headlines such as appeared in the U. S. News & World Report about—

In Washington they are easing up on murderers. Why? It is possible to get away with murder now in the Nation's Capital under certain conditions. Why? Decisions of the Supreme Court provide new loopholes. There is fear in the streets of the Nation's Capital. People attacked, suspects freed. Supreme Court gets the blame.

So it appears that not only has the Court taken away from the State the right to regulate its employment relations and the right to protect itself from crime, but it has also taken away from the State the right to protect itself against Communist insurrection and infiltration. That question was settled in the Steve Nelson case against the State of Pennsylvania. An admitted Communist, Nelson was freed by the Court when it held that the State antisedition laws were invalid on the ground that the Smith Act, a Federal law dealing with sedition, had superseded the State laws dealing with it.

Ironically enough, according to Judge Robert Morris, this Supreme Court has supplemented the decree nullifying the right of the States to defend themselves by eliminating also, for all practical purposes, the right of the Federal Government to check subversion and insurrection. Virtually every Communist whom the internal-security officials in our Justice Department have caused to be convicted may be liberated in the days ahead as a result of these Court decisions.

In Massachusetts 15 Communists against whom action had been taken by the State had to be liberated and allowed to continue on with their subversive work. The senior Senator from New Hampshire has stated that if the situation becomes any more serious in his State, the people will have to take the law into their own hands.

Just a week after the rendering of the decision in the Nelson case the Court held in the Slochower case that a municipality could not remove or get rid of a Communist professor. New York had to rehire some of its teachers and give them back pay. Professor Slochower was indemnified to the tune of \$40,000. In this case, despite every argument that proved the recklessness of the Supreme Court's decision, the Court was unmoved.

Three weeks later, on April 30, 1950, after having demolished the legislative power of the States in the field of subversion in its decision in the Nelson case, and having crippled the powers of the municipalities to rid themselves of subversive employees by its decision in the Slochower case, the Supreme Court completed the full circle by dealing a devastating blow to the executive branch of the United States Government. This was the case of the *Communist Party v. The Subversive Activities Control Board*. For 6 years, the Justice Department had made exhaustive efforts to prove that the Communist Party was subversive. It had hundreds of testimonies to prove its case. The Supreme Court threw them all out and remanded the case for reassessment because, it said, three of the testimonies were tainted.

In the Watkins case, the Court dealt a devastating blow to the power of Congress to inform itself. It is now possible for reluctant witnesses to stop an investigation in its tracks. Chief Justice Warren wrote the decision in the Watkins case, concluding with the false statement:

This new phase of legislative inquiry involves a broad-scale intrusion into the lives and affairs of private citizens.

In this final case, which has a bearing on the proposed law under consideration, Raphael Konigsberg, of California, had applied for admission to the bar of the State. Konigsberg was for years a Communist of the shabbiest type, according to the California Committee on Un-American Activities. He was listed among "notorious Stalinists who have consistently followed the twists and turns of the Stalinist line." He was one who had a long record of duplicity and betrayal of the interests of labor, minorities, and liberal groups.

Despite this unspeakable record, this Konigsberg had the gall to apply for admission to the California bar. After extensive hearings, in which he followed the usual evasions and provocations of the Communists, the bar committee refused to certify that Konigsberg was a person of good moral character. The State supreme court upheld the committee, but the United States Supreme Court reversed the ruling. Justice Black wrote the opinion, and, according to him, mere membership in a conspiracy that for 40 years has sought the destruction of our country is no blemish on one's character nor a sufficient reason to deny one the right to practice law in the courts of the United States.

As one reads the record of the decisions of our Supreme Court, he is astounded at their evident determination, not only to arouse and instigate confusion and ill will among our people, but to erase every barrier against the destruction of our Nation in favor of the Communists and their fellow travelers. This Court should be circumscribed in every way possible, if it cannot be impeached. Even should that happen, the Nation would undoubtedly be faced again with a court of similarly minded men. The interests that have secured the appointment of this Court could force the selection of another.

The position taken today by the United States Supreme Court seems indefensible to me. It is striking at the very roots of our Republic. Why, I cannot say, other than to believe that the Court is evidently influenced by foreign ideologies. This bill seeks to, at least, push the judiciary back into its own territory, thus restoring the constitutional plan. It is the duty of our political branches of government to recover

their power to decide these issues. It is their duty to us, as citizens. We have, as L. Brent Bozell writes in this week's *National Review*, a constitutional right to popular control of our political affairs.

The time is at hand when we who believe in America and who recognize the danger that is within our midst, as it is so glaringly disclosed by these decisions of the Supreme Court, must bend every effort to correct the situation. The passage of the proposed law which we have had the privilege of discussing and endorsing today would be a major assist in this direction.

Senator JENNER. Thank you, Mr. Thomas.

Mr. SOURWINE. I have one question, Mr. Chairman. Did you mean to say that Alger Hiss had been law clerk to Mr. Justice Frankfurter?

Mr. THOMAS. That is what I understood.

Mr. SOURWINE. Wasn't it Justice Holmes to whom Hiss was law clerk?

Mr. THOMAS. It might have been, but I know he was clerk.

Senator JENNER. Thank you, Mr. Thomas, for appearing to give your testimony.

There being no further witnesses this morning to be presented—

Mrs. LANE. I understood that I was to be a witness this morning.

Senator JENNER. How long will it take you?

Mrs. LANE. Certainly, not more than 10 minutes.

STATEMENT OF MRS. HELEN S. LANE, ARLINGTON, VA.

Senator JENNER. Give the committee your full name.

Mrs. LANE. Helen S. Lane, Arlington, Va.

Senator JENNER. Are you appearing here as an individual?

Mrs. LANE. As an individual, but, as my talk goes on, I think you will find that I will probably be speaking for other individuals, too, in the same position.

I usually prefer speaking without notes, but I think it will be preferable if I read it, and read it quickly.

Thank you for giving me time to testify in favor of Senate bill 2646, which, I believe, will bring the Supreme Court of the United States into a position more nearly approximating the body it was set up to be, one to protect the freedoms of Americans without protecting the rights of those who would deny to all Americans the freedoms guaranteed to them by our Constitution.

As I am no expert on constitutional law, merely one who through constant study is daily growing in admiration of it, I ask to confine myself to section (4) of the bill, asking that the appellate jurisdiction of the Supreme Court shall not extend to—

any rule, bylaw, or regulation adopted by a school board, board of education, board of trustees, or similar body, concerning subversive activities in its teaching body.

Though I spoke on the Hill last year against Federal aid to education and in favor of local control, yet I am consistent in today asking for Federal aid which will cost the taxpayers nothing but will give them more control over their schools. The nearer people are to the Government, the better can they inform themselves about those who govern them, the more zealously watch and guard and the freedoms our Constitution guarantees them. We on the local level—city, county,

and, to some extent, State—can, if we will, study the actions, as well as the promises, of our representatives in Government.

Senator JENNER. Excuse me. Are you a member of the Arlington County School Board?

Mrs. LANE. Yes.

Senator JENNER. Thank you. Proceed.

Mrs. LANE. And, on the local level, we can often best spot those who do not serve us well. But we have been lulled by the dogma of expertness into forgetting that the price of freedom is eternal vigilance. We are too easily discouraged when the experts in our hire say, "Come to us with your problems and we will listen—and then do exactly as we, in our expert wisdom, wish to do."

In no field has this dogma of expertness been more disastrous than in public education, where the damage has been to our most precious possessions, our children, and this in spite of the thousands of dedicated teachers who have been unable to resist the tide of expertness.

We spend billions on foreign aid which we fondly hope will win friends and hold back the Communist advance. We spend billions on public education only to wake up with a jolt when we learn from former Communist organizers that the Soviet organizers have been continuously engaged in a plan to penetrate our educational institutions at every possible point, thus threatening our security and our very freedoms. Individual excellence and competition has been discouraged (noncompetitive report cards during the best training age of children, as an example) in favor of readiness to learn and group activity and life adjustment; thus weakening the will to work hard and to enjoy the rewards of real endeavor; thus making them ready to depend on a big-brother welfare government; thus making them ready for world government (and communism?).

Those who awaken to the Communist danger in schools are called enemies of public schools for the signs of subversion seem too fantastic to be true. We read, we listen, we study, we look, and gradually pieces of the jigsaw of Communist planning form a pattern. But the most discouraging roadblock to the ones who recognize the danger and who try to rid the school systems of subversive influences has been the growing tendency of the Supreme Court to nullify their efforts by reversing lower-court decisions against Communists.

Even to those who have been aware of the Communist infiltration in churches, foundations, and our very Government, it is amazing to find the control of our public system of free schools—in the philosophy of education, the emphasis on group action, the dogma of readiness rather than on early drill in basic subjects, the emphasis on the whole child by which they grab for themselves dominion over all activities of the child, relegating parents, church, and other civic organizations to a weak position with little authority.

How do we recognize communism in schools? First by reading of their goals and plans in educational journals; then by reading books by educators who themselves recognize the dangers; next by studying the reports of Government hearings, both State and Federal, on Communists in education; and we find that influential leaders in education have urged teachers "to reach for power," to educate children for the "social state in which they are to live," to educate the adults in the community so that their prejudices will not affect their children,

and so forth. We see a soil fertile and ready for Communist cultivation.

When an educator pounds his fist on the table to emphasize his patriotism while refusing to inquire into the speakers brought into the student body (with a long line of Communist-front activities) and even refuses to suggest to teachers in charge who might be brought in, an alarm bell rings.

When a social-studies teacher criticizes the Walter-McCarran Act (one of the chief targets of the Communists) but refuses to allow a student to play a record telling the Congressman's explanation, an alarm bell rings. Is academic freedom not for students?

When a school board grudgingly spends \$3 for 20 copies of *International Communism* (the *Communist Mind*), recommended by Mr. B. M. Miller, the same public-spirited citizen who exposed the subversion in the *Virginia Teachers' Manual* (later removed by the Governor), an alarm bell rings, for that citizen recommended it as a guide to teachers and students in recognizing communism. Yet that board spends \$6,000 annually for 5 issues of a paper to "advertise" the activities the administration wants the citizens to be informed about.

When you see American history books with most of the stories of American heroes and heroic sayings omitted and much emphasis on the wonders of the United Nations, UNESCO, and so forth, a bell rings.

When a 13-year-old boy tells his mother that in general education (Core) his class is setting up panel discussions to decide what to do about the Constitution of the United States which his teacher says is "outmoded"; when that child says that it can't be outmoded because it can be changed by amendment, and the teacher suggests that amending the Constitution is not fast enough to give the President the powers he needs, what is a parent to think? And when she is a member of a school board, what is she to do? I am that parent and member of a school board.

I brought it to the attention of the others on the board in open meeting, saying that this type of attack on the Constitution could not be blamed on the individual teacher (and I didn't name her) but that I wanted to know how this subversive type of thinking was being funneled into our teachers to be passed on to the students, and at a dangerous age when their background of historical knowledge is very meager.

I was accused of bringing in unauthenticated material and told that it shouldn't be discussed. The press didn't mention it, and worst of all, the minutes of the board had omitted every word; and this in spite of the fact that I had repeated Mr. Miller's recommendation to purchase a guide to the recognition of communism and had myself recommended a speech of Senator Nelson Dilworth, of California, entitled, "Our Constitution, Have We Outgrown It?" which has an inspiring and resounding message of "No."

At a recent meeting of the social-studies and general-education teachers a question was raised, "Should communism be taught in the schools? We want to do so but a loud minority won't let us." I read to them from *International Communism* (p. 11):

*** communism should be taught *** but *** it should be taught with a moral directive *** (we) should emphasize the basic foundations of Ameri-

can civilization, revealing the enemy threatening their destruction. If it is presented *without moral direction*, it appears simply as an alternative economic system with certain superior virtues * * * and instead of opposing communism, it tends to recruit to communism." [Italics added.]

So we spent \$3 for 20 copies to bury in libraries of part of our schools and we spent thousands on "educational toys." May I quote further (p. 10) :

The first step of Communist conquest is the ideological conquest of the student mind * * * *Our first step* should be the immunization of the student mind against that conquest * * *

How can we as parents, teachers, school boards, and citizens so "immunize" our children? Only by the vigilance of us all in thoroughly grounding them in the history of man's progress from slavery to liberty, the highest attainment of which we enjoy under the Constitution of the United States. We must exercise our God-given parental rights to guide our children, and our educators' duties to guide the children of others, by ridding our schools of those who would dare to weaken the student's love and appreciation of his own country. Communists and their fellow travelers have a constitutional right to make a living but not at the expense of our American children. To teach is a privilege and an honor and all respect should be accorded the individual in the profession—it is not a right.

But I even hear patriots say that the Constitution is less than perfect, that its weak link is the appellate jurisdiction given the Supreme Court, a power feared by some of the writers of that Constitution. But one has only to read and reread that wonderful piece of paper to realize that God was guiding the minds of its makers—that link, too, is strong, just as strong as Congress chooses to make it. The time has come for Congress to limit the power of the Supreme Court by exercising their constitutional right to make exceptions to the appellate jurisdiction of that body of men. God grant that it is not too late to save our country from Communist engulfment.

Grassroot patriots are answering the question: "Have we outgrown our Constitution?" with a resounding, "No." Will you help them? Will you aid school boards and others in whose trust you have placed your children by limiting the appellate powers of the Court so that they may protect us all from subversion in the educational system, secure in the knowledge that their united and countrywide efforts will not be in vain, will not be nullified by future Supreme Court decisions?

Senator JENNER. Thank you very much, Mrs. Lane.

At this time I want to put into the record an editorial in the New York Times of February 26, 1958, and also a press release that I issued yesterday.

(The editorial and press release follow :)

[From the New York Times, February 26, 1958]

MR. JENNER V. THE COURT

William E. Jenner, of Indiana, who is doing a service to the Nation by retiring from the Senate this year, is author of a bill to limit the appellate jurisdiction of the Supreme Court in certain areas where the Court has been courageously defending some of our basic American liberties.

The Jenner bill was suddenly whisked out of the Senate Internal Security Subcommittee last month: but at the insistence of Senator Hennings, of Missouri,

a longtime champion of the Bill of Rights, it was whisked back again for hearings, and, we hope, for burial. It is no surprise and no comfort that Robert Morris, former chief counsel of the Internal Security Subcommittee and now a Republican candidate for the New Jersey senatorial nomination, strongly endorsed the bill last week on the ground that an "aggressive majority on the Supreme Court has been hastening the decline of congressional investigatory power." This is Mr. Morris' way of saying that the Court has enforced some constitutional limitations on free-wheeling congressional committees, and that the Jenner bill would put a speedy end to that.

Not only would the bill deprive the Court of authority in cases involving congressional investigating committees, but it would do a host of other equally dangerous things as well. It would remove the Court's jurisdiction over Federal loyalty-security programs, or over any State action on subversive activities. Furthermore, it would exempt from review by the Supreme Court local rules on alleged subversion among teachers, and State regulations regarding admission of persons to the bar. In each of these 5 categories Senator Jenner was obviously aiming at 1 or more recent Supreme Court decisions.

In each of these cases the high tribunal decided in favor of individual rights and constitutional liberties; and Senator Jenner evidently figures that if he can't overturn these Supreme Court decisions, he may be able to prevent similar ones in the future.

Legislation of this kind would not merely leave constitutional law in these fields to the lower Federal or State courts, and therefore in a state of confusion. It would do something much worse; strike directly at the independence of the Judiciary. The Supreme Court is not above criticism, and sometimes its decisions may be wrong (though we do not happen to think so in the above cases). But it would be fatal to our form of government, and to civil liberties as well, if Congress punished the Court for unpopular decisions by taking away its authority in certain cases, which is precisely what Senator Jenner would have it do.

[For immediate release from the office of Senator Jenner, February 26, 1958]

The American Bar Association has now declared the Constitution of the United States unconstitutional. Senator William E. Jenner (Republican, of Indiana) observed today.

The Indiana Senator, author of a bill (S. 2040) to limit the appellate jurisdiction of the Supreme Court in certain specific cases, was commenting on a newspaper account of the adoption by the bar association of a resolution opposing the bill. The resolution was quoted as declaring that the Jenner bill is "contrary to the maintenance of the balance of powers set up in the Constitution between the executive, legislative, and judicial branches of our Government."

"All that the bill does," Senator Jenner said, "is to utilize specific authority granted to Congress in the Constitution itself."

Senator Jenner also took note of a press conference statement by Attorney General William P. Rogers that he is opposed to S. 2040 for the same reason he was opposed to the court-packing bill of some years ago.

"There is no court packing involved in any way in my bill," Senator Jenner said. "Furthermore, Mr. Rogers, last February 3, was invited to testify during hearings now in progress on the measure. He replied that he would rather send the subcommittee a statement. The subcommittee has received no statement nor any further communication on the matter by the Attorney General."

Commenting also on a recent New York Times editorial opposing the bill, Senator Jenner observed that the Times has its facts wrong. The editorial described the measure as having been "suddenly whisked out of the Senate Internal Security Subcommittee last month * * * and whisked back again for hearings."

"The facts are," said Senator Jenner, "that the bill was reported favorably by the subcommittee to the full Judiciary Committee last summer. It has remained at the top of the Judiciary Committee's agenda on general bills for months and it was only when opponents of the bill were confronted with a motion to send the measure to the Senate floor for debate that they countered with a demand for more hearings."

"The bill has been in print since its introduction last July. Hearings were in print and distributed months ago and anyone could have expressed himself regarding it at any time. This was not a case of haste on the part of the pro-

ponents as the Times editorial would have its readers believe, but was a delaying action on the part of opponents.

"While the Times thinks the measure is worth a half-column editorial, it failed, so far as I have been able to determine, to print a single word of the testimony of the spokesman for the Veterans of Foreign Wars or other witnesses favoring the bill. It did, however, print the opposition testimony of Joseph Rauh, spokesman for the Americans for Democratic Action."

Mr. SOURWINE. Mr. Chairman, I was asked to secure a copy of the resolution adopted by the American Bar Association with respect to this bill. I offer it for the record.

Senator JENNER. It may become a part of the record of this committee.

(The resolution follows:)

RESOLUTION ADOPTED BY THE AMERICAN BAR ASSOCIATION BY ACTION OF ITS HOUSE OF DELEGATES ON FEBRUARY 25, 1958, IN ATLANTA, GA.

Whereas in 1919 the American Bar Association adopted a resolution urging the Congress to submit to the electorate an amendment to the Constitution of the United States, to provide that the Supreme Court of the United States shall have appellate jurisdiction in all matters arising under the Constitution; and

Whereas S. 2646 now pending before the Congress, if enacted, would forbid the Supreme Court from assuming jurisdiction in certain matters, contrary to the action heretofore taken by this association and contrary to the maintenance of the balance of powers set up in the Constitution between the executive, legislative and judicial branches of our Government: Now, therefore, be it

Resolved, That, reserving our right to criticize decisions of any court in any case and without approving or disapproving any decisions of the Supreme Court of the United States, the American Bar Association opposes the enactment of Senate bill 2646, which would limit the appellate jurisdiction of the Supreme Court of the United States.

Mr. SOURWINE. Here are two statements which have been submitted for the record, the statement of Mr. Robert B. Dresser.

Senator JENNER. It may be made a part of the record.

(The statement follows:)

STATEMENT OF ROBERT B. DRESSER

I. FOREWORD

My name is Robert B. Dresser. I am a member of a law firm with offices at 15 Westminster Street, Providence, R. I. I appear individually, in my own behalf.

II. STATEMENT

S. 2646 now pending before this committee was introduced in the Senate by Senator Jenner. In the language of Senator Eastland, it "would withdraw from the Supreme Court of the United States appellate jurisdiction in certain specified fields, namely, first, with respect to the investigative functions of the Congress; second, with respect to the security program of the executive branch of the Federal Government; third, with respect to State antisubversive legislation; fourth, with respect to home rule over local schools; and, fifth, with respect to the admission of persons to the practice of law within individual States."

The arguments for the bill have been ably presented by Senator Jenner in a speech on the floor of the Senate, the text of which is set forth in the pamphlet reporting the hearing before your committee on August 7, 1957.

At the hearing, Senator Jenner said: "To epitomize, Mr. Chairman, legislation along the lines which I have proposed is necessary because a number of recent decisions of the Supreme Court, lacking solid foundation in either legal principles or commonsense, have challenged the constitutional powers of the Congress, the constitutionally reserved powers of the States, and the power of the Federal Government itself to protect its very existence against subversive conspiracy."

It is, of course, clear that Congress has the power to limit the appellate jurisdiction of the Supreme Court in the manner provided in S. 2646 (*Ex parte*

McCardle, 6 Wall. 318 (1868); 7 Wall. 506 (1869), and a number of later decisions).

I recommend that the bill be passed.

It is regrettable that legislation of this sort should be deemed necessary. However, the action of our Supreme Court has been such as to require remedial action, either by way of legislation or constitutional amendment, or perhaps both.

The duty of the Court is to construe the Constitution, not to rewrite or revise it, and in so doing to follow the earlier decisions of the Court under the doctrine of stare decisis. Unfortunately the Court has frequently violated this rule, particularly in recent years, so that the Constitution today is not what its language would seem clearly to mean, nor what the Court has previously held it to mean, but rather what the Court for the moment says it means, regardless of the language used or its previous decisions.

This tendency of the Court has been particularly manifested during the past two decades in its interpretation of the commerce clause of the Constitution. It has, for example, held that the caretakers of a 22-story building in New York City were covered by the Fair Labor Standards Act of 1938 (which was dependent for its validity upon the power of Congress to regulate interstate commerce), merely because heat was essential to warm the fingers of the seamstresses employed by a clothing manufacturer who rented space in the building and who sold goods across the lines (*Kirschbaum v. Walling*, 316 U. S. 517 (1942)).

A like result was reached in the case of the maintenance employees of the central office building of a manufacturing corporation engaging in interstate commerce in a product coming from plants located elsewhere (*Borden Co. v. Borella*, 325 U. S. 670 (1945)).

Similarly, in the case of the employees of a window-cleaning company, the greater part of whose work was done on the windows of industrial plants producing goods for interstate commerce (*Martino v. Michigan Window Cleaning Co.*, 327 U. S. 173 (1946)).

Overruling decisions of many years' standing, the Supreme Court has held that insurance is commerce and subject to Federal regulation where conducted across State lines.

The changes in the Constitution brought about by the Court during this period have been referred to as the New Deal constitutional revolution.

Other recent examples of judicial legislation by the Supreme Court are the *Tidelands* decision, the anti-segregation decision, and the decision in the *Phillips Petroleum* case regarding Federal control of the price of natural gas.

If the Court is to follow the practice of interpreting the Constitution to mean what it wishes, despite the language used, the value of the Constitution is largely destroyed.

Over 40 years ago Raleigh C. Minor, professor of constitutional law at the University of Virginia, wrote on this subject as follows:

"The writer shall be happy, whatever may be the reader's views of constitutional interpretation, if he shall have impressed upon the latter the jealous caution that should be exercised in enlarging the Federal powers and the necessity of preserving immaculate and untarnished the reserved powers of the States as he sees them.

"Let him beware of the extension of Federal powers by construction, judicial, legislative, or executive, merely because of the argument from convenience or from the inefficiency of the State governments or of State regulation. Nothing is more insidious, nothing more dangerous.

"If a power is one reserved by the States and, after long and patient trial and experiment, the States prove incompetent to exercise it properly, and it is essential that it be so exercised, then let the power be transferred to the Federal Government by amendment to the Constitution. If the necessity is not great enough and evident enough to induce the legislatures of three-fourths of the States to assent to the transfer, it may be fairly assumed that the transfer is not so essential after all.

"But in any event let it not be accomplished by a forced construction of the Constitution. This is even now the canker that is slowly but surely eating away the reserved rights of the States and sapping their powers. If the process be not checked, the time must certainly come when the sovereign States will be nothing more than mere municipal corporations with only such powers left them as the Federal Government may choose to allow.

"God save the fair fabric of the Constitution from such a fate!"

The difficulty of providing a satisfactory remedy is obvious. In flagrant cases one thinks of the possible remedy of impeachment. If, however, the legislation in question is an act of Congress, manifestly the Congress which enacted the legislation is not going to impeach the judges for holding the legislation constitutional. A later Congress conceivably might do so if the membership were radically changed; but here there is the difficulty that only one-third of the Senate, which tries impeachment proceedings under the Constitution, is changed at each election.

Perhaps machinery can be devised whereby the power of impeachment is given to a State body. While subject to obvious objections, such a remedy would probably provide at least partial protection against the abuse of judicial power.

This remedy would require an amendment of the Federal Constitution. Such an amendment might provide for the establishment of a Supreme Court of Review composed of judges appointed by the Governors of the several States with power to impeach a judge who has flagrantly violated his duty to construe the Constitution, and not to amend it, the impeachment proceedings to be initiated by the Governors of legislature of, let us say, any 10 States, prosecuted by the attorneys general of such States, and tried by the Court of Review.

It would, of course, not always be easy to determine whether there had been a flagrant violation of duty by a judge and injustice might in some cases result. However, it is not likely that any perfect remedy for the abuse of judicial power by the Court can be found. The necessity of finding a remedy is manifest if the form of government established by the Constitution is to be preserved.

Such an amendment might be drawn in somewhat the following form:

"SECTION 1. The duty of the Federal courts is to construe the Constitution, not to amend it. Judges violating this rule shall be dismissed from office on impeachment to be conducted in the following manner:

"The governors of the States shall by vote of a majority of all the governors appoint every 2 years 15 outstanding attorneys-at-law as members of a Court of Review, who shall hold office for 2 years and thereafter until their successors are appointed and qualified. The members so appointed shall be residents as far as practicable of different sections of the country and no two shall reside in the same State. This Court shall try all such cases of impeachment. Impeachment proceedings may be brought by the governors or legislatures of any 10 States and prosecuted by the attorneys general of such States."

III. CONCLUSION

In conclusion, therefore, I recommend—

- (1) That S. 2846 be enacted; and
- (2) That consideration be given to the proposing of an amendment to the Constitution of the United States that would give broader and more complete protection against the abuse of judicial power by the Supreme Court.

Mr. SOURWINE. Next the statement of Prof. Harrop A. Freeman, of the Cornell Law School.

Senator JENNER. It may be made a part of the record.

(The statement follows:)

STATEMENT OF HARROP A. FREEMAN,
Professor of Law, Cornell Law School, Ithaca, N. Y.

FEBRUARY 24, 1938.

SENATOR JAMES O. EASTLAND,
*Chairman, Internal Security Subcommittee,
Committee on the Judiciary,
Senate of the United States,
Washington, D. C.*

DEAR SENATOR EASTLAND AND SUBCOMMITTEE MEMBERS: I desire that you place this letter in the record as my testimony on S. 2846, a bill to limit the appellate jurisdiction of the United States Supreme Court.

Elsewhere in my writings I have carefully developed the interrelation of the Supreme Court and Congress as two concurrent and equally respected legal bodies in our democratic Government. Each has its function under a carefully worked out system of checks and balances. Respect for law in this country hangs on a very slender thread: the respect of people for the dignity and objectivity, of the concurrent functions of lawmaking. There can be little doubt

but that legal scholars and ordinary people alike ultimately recognize the wisdom of placing in the Supreme Court authority to interpret statutes and determine their constitutionality and the constitutionality of action taken thereunder. Congress has the function of devising the shorter range policy experiments to handle current problems. The Court has the task of testing these policy decisions against the great ongoing concepts of American democracy and fitting them into the total pattern. This is what concepts like a "Republican form of government," "due process," "equal protection," "first amendment freedoms" and "checks and balances" are for. As I have recently pointed out in the H. A. Carey Lectureship on Civil Liberties, the pattern of our Government is set by the constitutional theory that persons would be protected to debate issues in the open marketplace of ideas as the only way we could bring views to our representatives. The Constitution specifically prevented Congress from providing otherwise. This most clearly marked the constitutional pattern that the Supreme Court was constituted as a protection against improper congressional action. This is not to say that the people, either then or now, failed to trust Congress. It is merely a reflection that the people wanted the Court to keep the avenues of communicating to Congress free, and to keep Congress within its proper sphere.

Recently, the Supreme Court has taken one of the most statesmanlike steps toward recognizing the great functions of Congress. In a series of cases, which during the 1940's would have resulted in congressional legislation being declared unconstitutional, the Court has instead upheld the congressional action and interpreted it in such a way that it comes within our basic constitutional principles. This great deference of the Court to Congress finds expression in precisely those cases which S. 2010 now seeks to overturn. It seems strange to me as a legal theorist that the very cases which try to recognize the proper function of Congress should now be looked upon by this bill as the basis for attempting to deprive the Supreme Court of its proper function.

The Appellate function of the Supreme Court is well stated again and again in such material as 31 B. C. L. Rev. 1, Provisions of the Constitution Concerning the Supreme Court, *Martin v. Hunter's Lessee* (4 Wheat. 301). So far as I can determine, it has never been determined that Congress has a right to take away from the Supreme Court any part of its necessary appellate jurisdiction. Article III of the Constitution is hard to interpret. It vests in the Supreme Court and such inferior Federal courts as Congress may establish, the entire judicial power, extending to all cases arising under the Constitution. At the same time Congress is recognized as having power to make "exceptions" and "regulations" as to the Court's appellate jurisdiction. There is a great difference between exceptions and regulations and absolute barring of appellate review. It is generally agreed that what is intended is to permit Congress to so regulate the procedures for taking appeals that the appellate jurisdiction may be effective. It is quite clear, as has been said in so many cases, that the Constitution does not intend to confer a power (in this case appellate review) in one sentence and then take it away in the next (by exceptions and regulations). To do so is to consider the Constitution self destructive. The most careful consideration of this whole subject shows that Congress may not "destroy the essential role of the Supreme Court (through appellate jurisdiction) in the constitutional plan." See Hart, Power of Congress to Limit the Jurisdiction of the Federal Courts (66 Harv. L. Rev. 1302), and various articles in the American Bar Association Journal (34 ABAJ 1072, 74 ABAJ 438, 75 ABA Rep. 110, etc.); Warren, Legislative Attacks on the Supreme Court of the United States (27 Am. L. Rev. 1, 161).

I would call attention, also, to the fact that subsections (3), (4) and (5) are most clearly unconstitutional. In all these cases, involving State action, "the State shall be Party" and these are by article III of the Constitution within the "original jurisdiction" of the Supreme Court. Congress has been given absolutely no power over the original jurisdiction of the Supreme Court.

If Congress attempts to prevent the Supreme Court from examining questions as to congressional, committee and Executive action under the "appellate jurisdiction" view, Congress may find that the Court will have to declare that it has "original" jurisdiction of all cases involving the constitutionality of Government action. This would mean that the Court was forced back away from its present attitude of respecting Congressional declarations of policy, as it did in the Dennis, Yates, Watkins, Auto Workers Union and similar cases, and instead of interpreting statutes it would declare them unconstitutional. In short, if appellate jurisdiction were not given it to review, then original jurisdiction would be insisted upon to overcome.

It has always seemed to me that the struggle between the Executive and the Court following the civil war and in 1838 was most unfortunate, doing much to discredit both branches. It would be a sad day now if a similar struggle developed between Congress and the Court. Every attack on the Court tends to weaken American Government. At this time of history in the struggle between the democratic concept of a government of checks and balances compared to the totalitarian concept of a monolithic organization, I believe that such action as appears in S. 2646 is most undesirable.

I appreciate this opportunity to submit my views to your committee. I would appreciate it if you would insert them in the record.

Respectfully yours,

HARROP S. FREEMAN.

Mr. SOWINE. I have nothing else to offer.

Senator JENNER. At this time we will stand in recess until 3:30 this afternoon. We have three witnesses to be heard at that time.

(Whereupon, at 12:30 p. m., the subcommittee recessed to reconvene at 3:30 p. m. of the same day.)

AFTERNOON SESSION

Senator DIRKSEN. Is Mr. Michael here?

Mr. Michael, would you come up here close to the reporter?

Mr. Michael, this is a hearing as you know on S. 2646, which was introduced by Senator Jenner to limit the appellate jurisdiction of the United States Supreme Court in certain areas, and I presume you are here to testify on that proposal.

STATEMENT OF W. E. MICHAEL, SWEETWATER, TENN.

Mr. MICHAEL. Yes, Senator, I am prepared to testify on that bill.

Senator DIRKSEN. I notice that you are from a fine town that I have been in a number of times, Sweetwater, Tenn.

Mr. MICHAEL. Yes, Senator.

Senator DIRKSEN. What is your business there; are you an attorney?

Mr. MICHAEL. I am an attorney. I have been in general trial practice for 31 years.

Senator DIRKSEN. Have you served in some judicial capacity?

Mr. MICHAEL. Never except occasionally as a special judge.

Senator DIRKSEN. So you come here as an attorney and as a citizen?

Mr. MICHAEL. On my own behalf.

Senator DIRKSEN. Interested in the jurisdiction of the United States Supreme Court?

Mr. MICHAEL. Yes, sir.

Senator DIRKSEN. I see you have here a statement which we will file in its entirety. I do not know whether you would prefer to read it or whether you would like to let it go in the record as such, and then interpolate the statement.

Mr. MICHAEL. In order to save the committee time, Senator, I would be glad to let the statement go into the record as it is, and then I would like to make a few comments if I may.

(The statement referred to is as follows:)

STATEMENT OF W. E. MICHAEL

I

My name is W. E. Michael. I have been engaged in the general practice of law in the State and Federal courts since 1920. My office is in Sweetwater, Tenn.

I appear in my own behalf, but I believe that my statement will reflect accurately the convictions of thousands of other individuals, situated as I am, with whom I have talked or communicated within the last 4 years.

As a trial lawyer, I have always been reluctant to criticize the courts or to make any derogatory public statements that might undermine the confidence of our people in our courts as an institution of government. Only a grave sense of responsibility to my profession and to my country impels me to appear before this subcommittee in support of S. 2040 which is now being considered by this committee and which was introduced in the Senate by Senator Jenner.

II

S. 2040 would limit the appellate jurisdiction of the Supreme Court of the United States by creating certain exceptions to its jurisdiction under the authority of section 11, paragraph 2 of article III of the Constitution of the United States, which provides in part: "In all the other cases before mentioned, the Supreme Court shall have appellate jurisdictions both as to law and fact with such exceptions and under such regulations as the Congress shall make."

The proposed legislation would deny to the Supreme Court appellate jurisdiction in five specified areas. These are:

- (1) In matters pertaining to the jurisdiction of congressional committees with respect to their investigative functions or their proceedings for contempt.
- (2) The activities of the executive branch of government with respect to its security program.
- (3) State jurisdiction in the control of subversive activities.
- (4) Local rules, laws, and regulations concerning subversive activities within the schools.
- (5) The laws, rules, or regulations of the States and boards of bar examiners concerning the admission of persons to the practice of law.

This legislation has been made necessary by a trend of opinions by the Supreme Court within recent years by which the judicial department of government has repeatedly encroached upon the prerogatives of the legislative and executive branches of government. This usurpation of power, without constitutional authority, not only relegates to subordinate positions the legislative and executive branches, but has the effect of destroying the sovereignty of the individual States, their constitutions and courts, by creating a highly centralized Federal Government headed by a supercourt.

III

Any discussion of this trend of opinion must necessarily be limited and general in nature. Time and space will not permit a discussion of all of these cases but only a reference to some of the leading ones.

The case of *Watkins v. The United States* (351 U. S. 178) involved the investigative function of a congressional committee. He was found guilty of contempt of Congress for boldly challenging the committee's jurisdiction and refusing to answer questions which he, the defendant, contended were outside the scope of the committee's authority. The Supreme Court set aside Watkins' conviction with a reference to "legislative inquiry" involving "a broad-scale intrusion into the lives and affairs of private citizens." The Smith Act was enacted for the specific purpose of providing a method of preventing subversive activities, and particularly subversive activities as espoused and practiced by the Communist Party, as a means to overthrow by force and violence the Government of the United States. In the case of *Nelson v. Pennsylvania* (350 U. S. 407) the Supreme Court released the convicted defendant, Steve Nelson, who was convicted in the Pennsylvania court of sedition, on the alleged ground that Federal legislation had preempted that field of the law and that therefore all State laws dealing with sedition as against the Federal Government were invalid and in conflict with the Federal statutes. The same defendant was also convicted in United States district Court and that conviction was reversed by the Supreme Court because of the questioned testimony of a Government witness.

The decision in the Nelson case, if it is not overthrown, makes it impossible for any State in the Union to prosecute any person for seditious acts against the United States. The Court in its opinion in this case stated that the decision would not apply to seditious acts against the State. This statement can give the States little consolation, however, because the Communist Party, which is the organized effort to destroy our representative form of government, may escape State prosecution by advocating publicly the overthrow by violence of the Federal Government while surreptitiously doing everything within its power to destroy the sovereignty of State Government.

Having rendered the States impotent by the Nelson decision to deal with Communist subversives, the Court then proceeded in the case of *Blockower v. the Board of Education of New York* (350 U. S. 551) to make it difficult if not impossible for municipalities to deal with Communist subversives. Blockower was ordered reinstated as a teacher in the New York school system and allowed to receive a substantial indemnity, although he had violated an ordinance of the city of New York and the school board was simply carrying out its official duty in discharging him.

Having seriously impaired the powers of States and municipalities to deal with subversives, the Supreme Court then proceeded to deliver the knockout blow to Federal enforcement of the Smith Act by continuous succession of opinions making its enforcement difficult if not impossible. One of these decisions was the famous Yates decision involving several Communists who had been convicted in California for openly advocating the overthrow by force and violence of the Government of the United States. This conviction in the United States district court, affirmed by the court of appeals, was overruled by the Supreme Court of the United States on the ground that "mere advocacy" of the violent overthrow of the United States Government was not punishable under the Smith Act unless it was accompanied by a present effort to instigate action toward that end.

In *Jencks v. United States* (353 U. S. 657) the conviction of Clinton Jencks, a confessed Communist and a convicted perjurer, was reversed because the confidential investigative files of the Federal Bureau of Investigation were not made available to the defendant and his counsel.

This decision would make the conviction of subversives even more difficult for a very practical reason. The disclosure of even a limited part of an investigative report might disclose information that would reveal the identity of informers or citizens who were cooperating with the FBI. The fear of such disclosures would no doubt seriously impair the ability of the FBI to obtain information.

In the cases of *Kontberg v. State Bar of California* (353 U. S. 252) and *Schwartz v. New Mexico* (352 U. S. 232), the Supreme Court in effect denied to the States of California and New Mexico, and inferentially to all other States, the right to effectively regulate through local laws, boards, and regulations, the practice of the profession of law in the respective States. In the California case Kontberg was widely reputed to be a member of the Communist Party and to have engaged in its activities. When he appeared before the examining committee for admission to the bar he was interrogated about his membership in the Communist Party. He refused to answer any question with reference to his connection with communism and was denied admission to the bar both by the bar association and by the California courts. The Supreme Court of the United States reversed the California court and ordered his admission. In the Schwartz case the Supreme Court substituted its judgment for that of the Supreme Court of New Mexico and held that Schwartz's membership in the Communist Party in the 1930's could not raise substantial doubts as to his present good moral character. Clearly these cases reflect a usurpation of the traditional sovereignty of the States and the rights of the States through appropriate legislation and boards, to regulate the practice of the professions within their States.

IV

In view of the trend of opinion of which the foregoing citations are a fair sample, it is evident that legislation is imperative to correct some of the manifest errors in these decisions which so widely affect our national security. The enactment of S. 2646 will do much toward correcting these errors.

V

Under our system of government, the traditional function of the Judiciary is to decide lawsuits and to interpret statutes in the light of the basic law, the Constitution. In performing this function it is the duty of the Court to follow earlier decisions of the Court under the doctrine of stare decisis, unless earlier decisions of the Court have been invalidated by constitutional amendments or by appropriate legislation. The Judiciary possesses no power to promulgate public policy. Neither does it have authority to engage in legislation. However, within recent years the Supreme Court of the United States has practically abandoned the rule of precedent or stare decisis and has undertaken not only the functions of policymaking but of devising methods of enforcing its policies.

The Court has usurped the legislative function of Congress and has invaded the sovereign rights of the States. This transgression of constitutional limitation has not been restricted to cases involving Communist or subversive activities. For that reason, I believe it should be made abundantly clear that the advocacy of S. 2040 or its enactment would not, by being silent upon the subject, constitute legislative approval of other decisions of the Supreme Court not specifically covered by the legislation. The enactment of S. 2040 will be a step in the right direction but it should be considered only as a step and not a complete cure.

VI

I refer specifically to the case of *Brown v. Topoka*, and associated cases (317 U. S. 483) and numerous decisions subsequent to that case but which were botomed upon the Brown decision. The Brown case, commonly known as the school integration case, turned upon an interpretation by the 1954 Supreme Court of the 14th amendment to the Constitution, and particularly the provision that no State should deny to any person the equal protection of the laws. This same question had been before the Supreme Court of the United States repeatedly. In the case of *Plessy v. Ferguson* (103 U. S. 537), in *Cummings v. Board of Education* (175 U. S. 528), decided in 1890, *Gong Lum v. Rice* (275 U. S. 78), decided in 1927, and in several similar cases the Supreme Court of the United States had consistently recognized that the regulation of its public school system was a matter wholly within the province of the individual State. Although the case of *Plessy v. Ferguson* was decided in 1896 by a court composed of jurists, all of whom were alive and active in their professions in 1868, when the 14th amendment became a part of the Constitution, the Supreme Court in 1954 asked for further argument on the meaning of the 14th amendment at the time of its adoption. In its opinion the Court confessed its inability to decide with any definiteness what the 14th amendment meant at the time of its passage. It then proceeded to give that amendment an interpretation which was the exact opposite of the interpretation applied by the Supreme Court in 1896 and thereafter for half a century.

We are often told that the decision of the Court is the law of the land. Of course, this is an incorrect statement both of fact and of law. But under the doctrine of stare decisis the decision in *Plessy v. Ferguson*, often affirmed by subsequent Courts and never changed by the legislature nor by the people, was the law of the case and was a binding legal precedent which the 1954 Court undertook to reject.

The basis of this attempted rejection is contained in the Court's opinion. This opinion was not based upon decisions of former Courts, acts of Congress, or new constitutional amendments, but upon the textbook writings of sociologists and psychologists. This is the first time, as far as I can discover, when such questionable authority has been relied upon by any Court to overthrow legal precedent.

As proof that the Court was functioning as a policymaking body and was indulging in legislation, it proceeded to order what it calls full implementation of these constitutional principles. This little known or scarcely noticed philosophy was contained in the Court decree, May 31, 1955 (340 U. S. 753). In that opinion the Court stated—"courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles." The Court left no doubt in this opinion that it intended to lay down a public policy and to provide for its enforcement. In commenting upon the developments subsequent to its 1954 decision, the Court said "The presentations also demonstrated that substantial steps to eliminate racial discrimination in public schools has already taken place, not only in some of the communities in which these cases arose, but in some of the States appearing as 'amicus curiae and in others as well.'" In another part of the decree the Court stated: "In view of the nationwide importance of the decision." It is apparent, therefore, that the Court was not limiting its activities to the parties to the lawsuit but was projecting its policies on a nationwide scale and devising techniques for the enforcement of that policy.

As one of the attorneys for the 16 Clinton, Tenn., defendants I have had an opportunity to observe in a small way the terrific impact of this judicial usurpation of the legislative and executive functions of government.

It is respectfully submitted that a study of the opinions of the Supreme Court of the United States over recent years, and particularly during the last 4 years, will reveal that the Court has grievously erred in the following respects:

(1) It has invaded the province of the legislative branch by seriously impeding the activities of congressional committees in their investigative functions. (2) It has encroached upon the prerogatives of the executive department in the enforcement of security regulations. (3) It has impaired the abilities of municipalities and States to deal effectively with Communist subversives within their respective governments. (4) It has invaded the sovereign rights of the individual States in assuming jurisdiction in matters wherein the 10th amendment to the Constitution denies jurisdiction to the Federal Government and reserves it unto the States and the people. (5) In abandoning the established rule of precedent or stare decisis by overruling and rejecting the established and accepted interpretations of constitutional provisions by former Supreme Courts, when such interpretations have been accepted by the other coordinate branches of government for more than half a century, and when such attempted rejection of established precedent was grounded upon no constitutional or statutory changes justifying a reversal. (6) In predicating its opinion upon the nonlegal textbook writings of individuals whose opinions cannot be considered as authority.

Legislation alone may not suffice to correct all the errors to which reference is made. In addition to the legislation under consideration, it is apparent that there is need for judicial reform. It has been suggested, as one facet of judicial reform, that certain qualifications as to training and experience be required of all persons nominated for appointment to the Supreme Court. It would appear to be only commonsense that before becoming a judge upon the highest Federal Court one so appointed should possess all of the qualifications necessary to perform the duties of that high office. One of such qualifications should be previous experience upon an appellate court and preferably upon the Federal bench.

Another judicial reform and one that could be readily put into effect would be to require that persons serving as clerks to the Justices of the Supreme Court be required to have reasonable qualifications as to education and experience at the bar, and that they be subjected to scrutiny as to their loyalty. In a recent article in the U. S. News & World Report Mr. William H. Rehnquist, former law clerk to Justice Jackson, gives us an interesting insight into the makeup of these young men and the influence which they exert upon decisions of the Supreme Court. The following quotation from Mr. Rehnquist's article will illustrate my point:

"Most of the Clerks are recent honor graduates of law schools, and, as might be expected, are an intellectually high-spirited group. Some of them are imbued with deeply held notions about right and wrong in various fields of the law, and some in their youthful exuberance permit their notions to engender a cynical disrespect for the capabilities of anyone, including Justices, who may disagree with them.

"The bias of the clerks, in my opinion, is not a random or hit-and-miss bias. From my observation of two sets of court clerks during the 1951 and 1952 terms, the political and legal prejudices of the clerks were by no means representative of the country as a whole nor of the court which they served.

"After conceding a wide diversity of opinion among the clerks themselves, and further conceding the difficulties and possible inaccuracies inherent in political cataloging of people, it is nonetheless fair to say that the political cast of the clerks as a group was to the 'left' of either the Nation or the court."

VII

SUMMATION

I appreciate the opportunity to appear before this committee in support of S. 2046. For the reasons which I have stated I would like to see the bill amended to cover the additional areas, not set out in the bill, in which I believe the Supreme Court has exceeded its constitutional authority in usurping legislative functions and in invading the sovereignty of the individual States. If such amendment is not possible, I suggest in the alternative that the bill contain appropriate clarifying language clearly indicating a legislative intent neither to approve the decisions of the Court in areas not covered by the bill, nor to "freeze" such decisions in their present status by noninclusion in the bill. I submit that the job would be only partially done if after the enactment of this legislation the Court is not restricted from further usurpation of legislative or state functions.

ADDENDA TO STATEMENT OF W. E. MICHAEL.

I have referred at some length to the case of *Broton v. Topcka* because in that one case we find dramatic illustration of practically all of the constitutional infirmities urged with reference to the many cases which have been cited on this subject. Wholly apart from the important question of control by the individual States of their respective school systems, and wholly independent of any racial question, this decision is replete with violations of constitutional authority as set out in the first paragraph on page 7 of this statement.

It has been suggested that the Brown case charts the course and outlines the procedure which can and may be followed in such vital matters as the destruction of our system of private ownership of property and private enterprise. Mr. J. Y. Sanders, an eminent attorney of Baton Rouge, La., and, I believe, a son of a former Governor of that State, has prepared and published in the Louisiana Bar Journal of October 1950, a parallel reference illustration demonstrating with alarming clarity how laws protecting private property in this country could be invalidated using substantially the same language and the same authorities used by the Supreme Court in the Brown case. With the consent of the committee, and with Mr. Sanders' consent, I would like to file as a part of or an exhibit to my statement, a reprint of Mr. Sanders' article. I have only one copy available at the present time but I can supply additional copies if desired.

Senator DIRKSEN. Very well.

Mr. MICHAEL. I would like to say in the beginning that I am very reluctant to appear in the capacity of being critical of the courts, and it is only a deep sense of responsibility to my country and my profession that impels me to appear here in support of Senate bill 2046 to limit the jurisdiction of the Supreme Court in the respects specified in the bill.

Senator DIRKSEN. May I interpolate there?

You appear for no organization. You appear only for yourself? You come at your own expense and at your own instance as a citizen and as a lawyer interested in the court system of the country.

Mr. MICHAEL. That is all true, Senator. Every bit of that statement is correct.

I have heard some of the statements made before this committee and very able statements in support of this bill with reference to many of the cases which challenge us at this stage.

I refer particularly to the case of *Watkins*, to the *Nelson* case, the *Slochower* case in New York and to the *Jencks* case. Also to the *Konigsberg* case and the *Schwartz* case, coming from the States of California and New Mexico.

In all of these cases it seems to me that there is a definite trend on the part of the Supreme Court to arrogate unto itself legislative functions and authority never delegated to it by the Constitution, and also to invade the sovereignty of the respective States in violation of the 10th amendment to the Constitution.

Under our system of government, the traditional functions of the judiciary is to decide lawsuits and to interpret statutes in the light of the basic law of the Constitution.

In performing this function it is the duty of the Court to follow earlier decisions of the Court under the doctrine of *stare decisis* unless earlier decisions of the Court have been invalidated by constitutional amendments or by appropriate legislation.

The judiciary possesses no power to promulgate public policy. Neither does it have authority to engage in legislation.

However, within recent years the Supreme Court of the United States has practically abandoned the rule of precedent of *stare decisis*

and has undertaken not only the functions policymaking but of devising methods of enforcing these policies.

It has usurped the legislative functions of Congress and invaded the sovereignty rights of the States.

This transgression of constitutional limitation has not been restricted to cases involving subversive activities. For that reason, I believe it should be made abundantly clear that the advocacy of S. 2646 or its enactment would not, by being silent upon the subject, constitute legislative approval of other decisions of the Supreme Court not specifically covered by the legislation.

The enactment of this bill will be a step in the right direction, but it should be considered only as a step and not a complete cure.

MR. SOURWINE. Mr. Chairman, might I ask the witness a question? Senator DIRKSEN. Yes, indeed.

MR. SOURWINE. I see you are at a good breaking point here, and I would like to inquire whether, in your opinion, the enactment of this bill would be in any sense a punishment of the Court or simply a deterrent on the Court or perhaps in the alternative the fixing of a boundary for Court activity, or do you regard it in some other light?

MR. MICHAEL. I regard it as the performance of a legislative duty which assumes the character of a mandate in my mind under the section of the Constitution which provides that the appellate jurisdiction of the Supreme Court, that the Court shall have appellate jurisdiction both as to law and facts with such exceptions and under such regulations as the Congress shall make.

MR. SOURWINE. In other words, you consider the grant to the Congress of the power to make regulations and exceptions to the Courts appellate jurisdiction as a duty to exercise that power when, in the judgment of the Congress, it should be exercised.

MR. MICHAEL. Exactly, sir.

MR. SOURWINE. You have to add that last clause, don't you?

MR. MICHAEL. Exactly. The legislative branch of the Government has always been vested with the discretionary power, the very act of legislating is in itself the exercise of discretionary powers.

The Constitution specifically gives that exclusive right to the legislative branch of the Government.

Senator DIRKSEN. In a nutshell the authority of Congress to legislate in this field is undisputed.

The remaining question then is one whether it is advisable in the national interest to impose certain limitations.

MR. MICHAEL. I think that is definitely a correct statement of fact, Senator.

While we are at that breaking point, if I may interpolate a matter that is not in my written statement, very briefly, I have mentioned the doctrine of stare decisis about which there seems to be in the minds of the laity at least much confusion.

I believe there is a very precise and a very clear distinction between the application of the doctrine of precedent or stare decisis as affecting decisions of the Court with reference to the interpretation of constitutional provisions or the interpretation of statutes on the one hand, or decisions based upon the common law upon the other hand.

On decisions based upon the common law, those decisions, if they are incorrect, can be corrected by congressional act or legislation.

On matters affecting the interpretation of the Constitution or of the statute, when that decision has been made for the first time, laws can be passed based upon it. Contracts are based upon it. The very way of life could be predicated upon that interpretation.

Now if that interpretation is wrong, it is within the province of the people to change that interpretation by amendment to the Constitution, if it is a constitutional matter.

If it is a matter of statute, it is within the province of the legislature to change that by proper legislation.

But there would be chaos in our whole system of jurisprudence if the judiciary could reject or reverse former decisions affecting the constitutionality, an interpretation of the Constitution, and then have the next term, the next Court to reverse that decision and have it in a constant state of flux. The rule of stare decisis therefore applies with particular emphasis, in my judgment, to cases involving interpretation or definition of terms in the Constitution.

Senator DIRKSEN. Let me ask at that point, Mr. Sourwine, has the whole decision in the Watkins case and in the Slowchower case that Mr. Michael refers to and in the Jennings case been incorporated in the record?

Mr. SOURWINE. Yes, Mr. Chairman, they were put in at the first series of hearings and were printed as an appendix to the hearing record.

Senator DIRKSEN. What about the Konigsberg case?

Mr. SOURWINE. I think it was. Senator Jenner at that time cited all the cases which he thought were involved and requested that they be printed.

Senator DIRKSEN. Good enough.

Mr. MICHAEL. I have just said that the usurpation of functions contrary to the Constitution by the Supreme Court was not limited to matters pertaining alone to Communist subversion.

I refer specifically to the case of *Brown v. Topeka*, and associated cases, and numerous decisions subsequent to that case but which were bottomed upon the Brown decision.

The Brown case, commonly known as the school integration case, turned upon the interpretation by the 1954 Supreme Court of the 14th amendment to the Constitution, and particularly the provision that no State should deny to any person "the equal protection of the laws."

The same question had been before the Supreme Court of the United States repeatedly. In the case of *Plessy v. Ferguson* and *Cummings v. Board of Education*, decided in 1899; *Gong Lum v. Rice*, decided in 1927, and in several similar cases, the Supreme Court of the United States had consistently recognized that the regulation of its public school system was a matter wholly within the province of the individual State.

Although the case of *Plessy v. Ferguson* was decided in 1896 by a Court composed of jurists, all of whom were alive and active in their professions in 1868, when the 14th amendment became a part of the Constitution, the Supreme Court in 1954 asked for further argument on the meaning of the 14th amendment at the time of its adoption.

In its opinion the Court confessed its inability to decide with any definiteness what the 14th amendment meant at the time of its passage. It then proceeded to give that amendment an interpretation

which was the exact opposite of the interpretation applied by the Supreme Court in 1896 and thereafter for half a century.

We are often told that the decision of the Court is "the law of the land." Of course this is an incorrect statement both of fact and of law. But, under the doctrine of stare decisis, the decision in *Plessy v. Ferguson*, often affirmed by subsequent courts and never changed by the Legislature nor by the people, was the law of the case and was a binding legal precedent which the 1954 Court undertook to "reject."

The basis of this attempted rejection is contained in the Court's opinion. This opinion was not based upon decision of former Courts, acts of Congress, or new constitutional amendments, but upon the textbook writings of sociologists and psychologists. This is the first time, as far as I can discover, when such questionable authority has been relied upon by any Court to overthrow legal precedent.

As proof that the Court was functioning as a policymaking body and was indulging in legislation, it proceeded to order what it calls "full implementation of these constitutional principles." This little-known or scarcely noticed philosophy was contained in the Court decree May 31, 1957 (349 U. S. 753). In that opinion the Court stated:

Courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles.

The Court left no doubt in this opinion that it intended to lay down a public policy and to provide for its enforcement.

In commenting upon the developments subsequent to its 1954 decision the Court said:

The presentations also demonstrated that substantial steps to eliminate racial discrimination in public schools has already taken place, not only in some of the communities in which these cases arose, but in some of the States appearing as amici curiae and in others as well.

In another part of the decree the Court stated:

In view of the nationwide importance of the decision.

It is apparent, therefore, that the Court was not limiting its activities to the parties to the lawsuit but was projecting its policies on a nationwide scale and devising techniques for the enforcement of that policy.

As one of the attorneys for the 16 Clinton, Tenn., defendants I have had an opportunity to observe in a small way the terrific impact of this judicial usurpation of the legislative and executive functions of Government.

It is respectfully submitted that a study of the opinions of the Supreme Court of the United States over recent years, and particularly during the last four years, will reveal that the Court has grievously erred in the following respects:

(1) It has invaded the province of the legislative branch by seriously impeding the activities of congressional committees in their investigative functions.

(2) It has encroached upon the prerogatives of the executive department in the enforcement of security regulations.

(3) It has impaired the abilities of municipalities and States to deal effectively with Communist subversives within their respective governments.

(4) It has invaded the sovereign rights of the individual States in assuming jurisdiction in matters wherein the 10th amendment to the Constitution denies jurisdiction to the Federal Government and reserves it unto the States and the people.

(5) In abandoning the established rule of precedent of stare decisis by overruling and rejecting the established and accepted interpretations of constitutional provisions by former Supreme Courts, when such interpretations have been accepted by the other coordinate branches of government for more than half a century, and when such attempted rejection of established precedent was grounded upon no constitutional or statutory changes justifying a reversal.

(6) In predicating its opinion upon the nonlegal textbook writings of individuals whose opinions cannot be considered as "authority."

Senator DIRKSEN. Mr. Michael, at that point let me pose a question.

I have seen it averred that if these limitations were placed on the appellate jurisdiction of the Supreme Court in certain limited areas, that your Federal circuit courts of appeal would then become the courts of last resort with respect to those particular areas, and the cases that might arise under them.

Mr. MICHAEL. I think that is a correct statement of fact.

Senator DIRKSEN. So it would be a fact then that in those 5 categories the 7 circuit courts of appeal would be the courts of last resort?

Mr. MICHAEL. Yes, subject of course to such review, administrative or otherwise, as the Congress may from time to time provide.

It does not mean that they would be left in a straitjacket as I understand it.

Senator DIRKSEN. Only judicially?

Mr. MICHAEL. I want to point out this further fact: that appeal is a matter granted by statute. It is a matter of right only because it is granted by statute.

A fair and impartial trial as provided in the Constitution refers to trial courts, and there is no vested right to have a case heard in three separate courts.

There is no provision that requires the case to be heard in more than 2 courts or, for that matter, more than 1.

But appeal as provided in the Constitution, in the jurisdiction of the appellate procedure of the courts and the Supreme Court, is vested in the legislative branch.

Senator DIRKSEN. Let's take a case—

Mr. MICHAEL. So if there were inaccuracies or if there was any injustice, if there were hardships worked, certain of the legislative branch could correct that by proper amendments.

Senator DIRKSEN. Let's take for instance the Watkins case under the assumption that this was actually the law and that there would be no appellate jurisdiction so far as the Supreme Court is concerned, with respect to that case.

Now it might very well be set down in a bill of exceptions or on error that other matters were the basis for appeal, that it did not constitute a fair trial which does not put exactly the issue before the court, the issue being one of jurisdiction really and one of fact as to whether it is the kind of case which the Supreme Court could not hear on appeal.

Do you think an appeal would still lie where that was incident, let us say, to such a case?

Mr. MICHAEL. If this bill denies appellate jurisdiction within a certain specified area, I think that is final.

I think that is the end of it.

SENATOR DIRKSEN. As a specific case, you might multiply any number of incidents, you might have such a case in the trial court and it goes to the circuit court of appeals, and then an appeal is taken to the United States Supreme Court not on any constitutional issue, not on a question of jurisdiction, but rather there may have been a ruckus in the courtroom. The court may have found one or more counsel guilty of contempt and ordered them out of the courtroom, and taken them out of the trial.

You might have a thousand and one things that could be the basis for exceptions.

Do you think, notwithstanding all that, that you are still closed so far as this is concerned?

You could not go any further under any circumstances except to the circuit court.

Mr. MICHAEL. I think that is correct. The instance that you cite, the problem that you pose, would probably not present any question that would justify the Supreme Court reviewing it, if the Court had authority on purely a question of fact, if it were affirmed by the two courts below.

But I believe the answer to your question is that if it is denied jurisdiction, that jurisdiction is denied for all purposes.

Senator DIRKSEN. Very well.

Mr. MICHAEL. The questions that we just had and the answers led very well to my next point, and that is that legislation alone may not suffice to correct all the errors to which reference is made.

It is regrettable indeed that the legislative branch should have to even consider legislation to curb the power of the judiciary or arrogate it or assume power of the judiciary, but when that condition arises and the power becomes mandatory that it be considered.

In addition to the legislation under consideration, it is apparent that there is need for judicial reform. It has been suggested, as one facet of judicial reform that certain qualifications as to training and experience be required of all persons nominated for appointment to the Supreme Court.

It would appear to be only commonsense that before becoming a judge upon the highest Federal court one so appointed should possess all of the qualifications necessary to perform the duties of that high office. One of such qualifications should be previous experience upon an appellate court and preferably upon the Federal bench.

Senator DIRKSEN. I think Senator Stennis of Mississippi has been promoting or has introduced a bill.

Mr. SOURWINE. Yes, Mr. Chairman, he has one of several such bills.

Senator DIRKSEN. Mr. Michael, I very reluctantly, but respectfully, suggest if we could hurry just a little; I am afraid they are going to ring those bells for a rollo call on another amendment.

Mr. MICHAEL. Senator, I shall accede to that. I have a statement in here about the clerks to the Supreme Court that I think is very pertinent, and I would like to call the committee's attention to it.

Senator DIRKSEN. That is your addenda?

Mr. MICHAEL. No; that is prior to my addenda, but I would like to make this statement and I will close.

I have referred to the case of *Brown v. Topeka* because the case contains such dramatic interest of the usurpation of power and deviation of constitutional principles, not because of the subject matter of the suit, but we forget completely that it had anything to do with a racial problem or anything to do with local school problems.

The inherent infirmities of that decision still remain, and it could provide the chart and the blueprint by which all our other constitutional freedoms could be taken, as, for instance, those of ownership of private property.

Mr. J. Wise Sanders, an eminent attorney and a son of one of the Governors of the State of Louisiana prepared and published——

Senator DIRKSEN. Didn't he serve once up here?

Mr. MICHAEL. I believe he did.

Senator DIRKSEN. I served in the House with him.

Mr. MICHAEL. Prepared an article in the Louisiana Bar Journal paralleling those possibilities. I considered it so vital and so clearly stated that I wanted, with the permission of the Senator, to file it as a part of my statement, and I have filed copies.

Senator DIRKSEN. Is it very long?

Mr. MICHAEL. No; it is not. The counsel has it. It is not a very long statement.

Senator DIRKSEN. If it, in your judgment, will add to the elucidation of the issue that is before us——

Mr. MICHAEL. I think it very clearly reflects the point, sir.

Mr. SOURWINE. Would the Chair, perhaps, want to order that included in the appendix?

Senator DIRKSEN. Probably so, but I think, since some criticism was made that we had not gone into this too thoroughly before, I would have no objection in putting it in the body. I will leave that to you, whether we put it in the body or in the appendix.

Mr. SOURWINE. Would it make any difference to the witness?

Mr. MICHAEL. None.

Mr. SOURWINE. We are trying to set the hearings up in such a form that they can be readily indexed. We have a little problem doing that in the printing time, and if we put it in the appendix it would be better.¹

Mr. MICHAEL. I appreciate the opportunity to appear here on behalf of this bill, and I hope that it will be reported favorably, and passed.

Senator DIRKSEN. Mr. Michael, I wish we could visit longer; but there are some verities that confront me here. I came out of one committee to come here and I know they are getting ready for another vote on the Senate floor. We thank you, sir, for coming.

Mr. MICHAEL. Thank you, Senator, I shall remember you to your friends in Sweetwater.

Senator DIRKSEN. Thank you very much.

Is Mr. Cadwalader, of Baltimore, here?

That sounds like a good old colonial name to me.

¹ See appendix II.

STATEMENT OF THOMAS F. CADWALADER

Mr. CADWALADER. My people have been here since those times.

Senator DIRKSEN. You are an esquire, I take it. They put it down "Esquire."

Mr. CADWALADER. I am a lawyer.

Senator DIRKSEN. And you are from Baltimore?

Mr. CADWALADER. I practice law in Baltimore. I live in Harford County, Md. My home is Joppa, Md.

Senator DIRKSEN. How long have you been in the practice of law, sir?

Mr. CADWALADER. Fifty-five years.

Senator DIRKSEN. Fifty-five years?

Mr. CADWALADER. Yes, sir.

Senator DIRKSEN. Goodness me; that goes pretty nearly back to the turn of the century.

Mr. CADWALADER. I was admitted to the bar of the Court of Appeals of Maryland in September 1903, not quite 55 years.

Senator DIRKSEN. Well, you are getting awfully close to it, I would say. Have you ever held a judicial post of any kind?

Mr. CADWALADER. No; no official post of any kind. I am a private citizen.

Senator DIRKSEN. You are one of those sterling men of the bar?

Mr. CADWALADER. I hope I am sterling. I am a member of the bar.

Senator DIRKSEN. I am sure you are. You are appearing here individually?

Mr. CADWALADER. Individually; yes, sir.

Senator DIRKSEN. Not for any organization?

Mr. CADWALADER. Not for any organization. I have in the past belonged to organizations that, I am sure, would have been in this battle, but they have ceased to exist. They have folded up, and I am here as an individual.

Senator DIRKSEN. We never try to be offensive, but we like to ask a witness whether he represents an organization, and, if so, how many members do they have; is it diffused over the country; is he authorized to speak for them?

Mr. CADWALADER. No; I am not authorized to speak for any organization. I am coming on my own.

Senator DIRKSEN. You see, I have encountered that so often, where someone will state to the committee, "I represent an organization of 100,000 people," and, unless you read that rather discriminately, you get into difficulties.

Mr. CADWALADER. I understand.

Senator DIRKSEN. Because, you see, maybe they had a little convention.

And maybe only a hundred out of the hundred thousand showed up at the convention, and then they proceed to resolute on a given subject, and it does not properly mirror, I think, what that organization may or may not stand for, and, so, we try to be careful without being squeamish or queasy about it.

Mr. CADWALADER. Like the five tailors of Thule Street. "We people of England."

Senator DIRKSEN. That is right. Well, now Mr. Cadwalader, we will hear from you.

Mr. CADWALADER. I will be very brief.

Senator DIRKSEN. I hope you will not be angry or captious with the temporary chairman of this committee if they ring those bells and I have to get on roller skates and start for the Senate floor.

Mr. CADWALADER. I have a statement that I sent to Mr. Sourwine. I made 1 or 2 slight amendments to it, and I am going to leave it with the committee. I just want to say a few things.

Senator DIRKSEN. First, then, let's put in your whole statement in its entirety so that that, of course, will stand for itself.

Mr. CADWALADER. I will offer this, and I would like to read, in particular, 1 or 2 paragraphs.

(The statement referred to is as follows:)

STATEMENT OF THOMAS F. CADWALADER

Throughout our history, there has been an almost rhythmic alternation between the three great departments of the Federal Government as to which presents the greatest menace to liberty.

The Alien and Sedition Acts of an early date indicated that Congress was then the menace, and the interposition of Virginia and Kentucky aroused the people to teach a needed lesson to the legislative branch.

Again, in reconstruction days, Congress assumed the role of tyrant, and the resistance which finally prevailed was long and painful.

In times of stress, when Congress found itself rudderless, the executive power stepped in, regardless of constitutional limitations, and sought on the whole, successfully to override the paper provisions drawn to prevent arbitrary attack on personal rights. So, the Executive devalued our currency, with only token resistance, and again, with the help of a wholly submissive Congress, deprived the individual citizen of the right to bargain for a job.

During these and other usurpations (in spirit, if not in letter), the Supreme Court has, for the most part, been supine. As a defender of personal right, its record has always been weak, as when, in *Georgia v. Stanton* (6 Wall. 457), it declined to protect the people of the States from arbitrary military rule, or as, in later years, when it held coal mining to be interstate commerce, and that an act of Congress forbidding anyone to engage in it save by consent of irresponsible third parties was a valid regulation.

More recently, the Court has become not a broken reed, but an active agent in trying to remold our institutions in a totalitarian sense, and, incidentally, to protect all individual agents and devotees of totalitarian dogma whether in public employ of the Federal or State Governments, or as schoolteachers, or members of the bar, so as to foster the infiltration of those enemies of our entire system of government and culture.

But, by all odds, the worst instance of the assumption of purely arbitrary power by the Court lies in its decisions of May 14, 1954, on segregated schools. This has been so well stated by others and is so undeniable that it is needless now to dwell on it or document it, except to notice the most utterly illogical and indefensible finding of all; that the due-process clause of the fifth amendment forbids the separation of races in fully equal facilities. If the Court is to be allowed to dream up and impose on our people such fantastic misconstruction of plain and well-understood phraseology, then our liberties are indeed at the mercy of the nine men who call themselves Justices, though the Constitution calls them Judges, of the Supreme Court.

It is questionable, however, whether an appeal even to the Supreme Court should not be allowed to persons threatened with punishment for contempt of Congress. No department of the government of a free people ought to be above the law. The fact that the Supreme Court has assumed to be above it does not justify placing Congress or committees of Congress in a like place.

If the defendant in a contempt case has the right to appeal to the lower Federal courts, that should perhaps be a sufficient curb on the power of Congress to punish a man for merely standing on his rights, and, perhaps, it should be enlarged to afford him a hearing before three judges.

As to security charges against civilian employees and officers, it would seem that defendants should also have their day in court, not because they have any vested right to hold their jobs, but because their unjust discharge for security reasons may impose a lifelong penalty and ruin their prospects of employment. But in such case the lower Federal courts can doubtless serve as well as or better than the Supreme Court, which always acts self-consciously as in the glare of klieg lights.

The other provisions of S. 2640 would work a much-needed check on some of the gratuitous incursions of the Supreme Court into local matters that are none of its business, such as who may be admitted to the bar of any State or what qualifications may be required of teachers in public schools and colleges.

But it is respectfully submitted that another section should be added to this bill, in substance as follows:

"(6) Any law, rule, regulation, or local custom of any State or community by which, without denying to any person the equal protection of the laws and equal use of and enjoyment of facilities and institutions provided by law, the separation of such persons according to age, sex, or race is provided for."

The adoption of the proposed bill with this amendment would put an end to a controversy that is at present dividing the people of the United States into hostile camps when the public danger from without is so great that unity of feeling and purpose is called for as never before.

The advocates of ending segregation are not shut out by such a clause, but are merely remitted to their proper and legitimate field of action; namely the legislative field. The idea that laws in so vital a matter can be arbitrarily enacted by nine lifetime appointees is so repugnant to every principle of free government that everyone, whatever his race or background, who is not a totalitarian, should admit that such questions are to be decided by persuasion of the public and their elected representatives, and in no other way.

Mr. CADWALADER. Before doing so, I would like to mention one thing; that, while I was waiting here for the resumption of the hearings, I fiddled in that bookcase over there and picked out at random two volumes of Wallace's reports, in which I found this question of limiting the appellate jurisdiction of the Supreme Court to have been dealt with, and I thought I would like to put it in the record.

I made a note of it, one case, *Ex parte McCordle*; no doubt you and Mr. Sourwine are familiar with it, sixth Wallace, page 318, and the same case in seventh Wallace, page 506.

Senator DIRKSEN. What was the date of those cases?

Mr. CADWALADER. That was 1867 and 1868. In 1867, Mr. William McCordle, a citizen of Mississippi, applied for a writ of habeas corpus from the Federal court down there against General Ord, and other military authorities who had arrested him as a subversive rebellious citizen and so forth, and the circuit court remanded him after hearing to the military custody. Then he appealed under the provisions of an act of February 5, 1867, which enlarged the appellate jurisdiction of the Supreme Court to include cases where a person sought a writ of habeas corpus because his constitutional rights had been invaded, and, after a very fully argued hearing in the Supreme Court, the motion to dismiss the appeal was denied, and the Supreme Court proceeded then to hear the case on the merits, but, before they could render a decision, have a conference and render a decision, the Congress passed an act over President Johnson's veto repealing the right of appeal in these particular cases, and in the second case, which is reported in seventh Wallace, the Chief Justice simply had to dismiss the case for want of jurisdiction.

So, that apparently settles the question as to the power of Congress to do this very thing that is being proposed to do in S. 2640.

Senator DIRKSEN. Permit me to interrupt for a moment. Are those two cases a part of the hearing now?

Mr. SOURWINE. No, sir; they are not a part of the hearing. They have been frequently and copiously referred to, but the texts of the opinion are not a part of our record.

Mr. CADWALADER. In your judgment would it serve a useful purpose to have them in here?

Mr. SOURWINE. I think it would be a useful purpose, sir.

Senator DIRKSEN. The hearing, itself, finally becomes the textbook, because you cannot expect lawyers who do not have the time running around trying to find reports and get those cases, and I have always been of the opinion if I had to err at all it would be on the side of a little additional expense in getting the text in its entirety in the hearings and then they are there for anyone to read who so desires, so the Chair will ask himself to include those in the hearings, and, since I cannot object to myself, it will go in the hearings.¹

Mr. CADWALADER. I would like to say one thing about the gentleman who testified this morning. I am a little hard of hearing and I did not catch his name, but he represented the American Civil Liberties Union. I caught that much.

I had a little experience with them some years ago. It was the practice in a good many cities, including my own, of property owners getting together and agreeing on covenants restricting the use and occupancy of their dwelling houses to persons of the Caucasian race, and there were a number of similar cases in Detroit, St. Louis, I think, Milwaukee, and other Midwestern cities. I do not know if there were any from Chicago or not, but, at any rate, some of these cases from the Middle West came up to the Supreme Court when Mr. Vinson was Chief Justice, and I represented an improvement association in Baltimore at the time, which was very much interested in this, and we filed a brief as *amicus curiae* in the case. I noticed the American Civil Liberties Union filed a brief on the other side, and I wrote to them. Mr. Arthur Garfield Hayes was then their president. I said, "I understand you are devoted to democratic procedures and you profess devotion to the democratic system of government and you do not like the law under which these covenants are enforced by the courts, which is perfectly your right to have the law changed.

"But why do not you proceed to have it changed by legislation?

"Why do you, as a professed devotee of democratic principles, desire to have it changed by nine lifetime appointees who are responsible to nobody?"

Well, I got a very evasive reply from them, and it did not seem to effect their attitude in the case.

Now, I will briefly run over some of the points in my very brief statement that I prepared a couple of days ago when I first was notified by Mr. Sourwine that I could testify.

Throughout our history there has been an alternation, almost a rhythmic one, between the three great departments of the Federal Government at to which at any given time is supposed to present a menace to liberty.

The Alien and Sedition Acts in the early days indicated that Congress was the menace, and then Virginia and Kentucky aroused

¹ See appendix I.

the people with their interposition resolutions and the Congress was given a lesson which it took to heart.

In 1801, the President took the matter into his hands and threw a great many people into prison, suspending the writ of habeas corpus when the Chief Justice said it was unconstitutional for him alone to do so.

Then, in reconstruction days, Congress overrode the Executive and assumed the role of tyrant in the matter, in the views of a great many people.

Then, in later days, the Executive again took over the dominant job. But, in most of these usurpations, in spirit if not in letter, the Supreme Court has, for the most part, been supine.

As a defender of personal right, its record has been weak as when in *Georgia v. Stanton*, another case in sixth Wallace, it declined to protect the people of the States from arbitrary military rule, or as in later years when it held coal mining to be interstate commerce, and that an act of Congress forbidding anyone to engage in it except by consent of irresponsible third parties was a valid regulation of commerce.

Senator DIRKSEN. Mr. Cadwalader, this is a little digression from where we are at the moment, but I rather like your expression "rhythmic alternation."

Mr. Cadwalader, would you have time, before this record closes, to sit down and prepare say 2 or 3 pages perhaps best in skeleton form, and just show when this applied to the Executive and when to the Congress and when to the judiciary, and then pick up the rhythm again?

I would like to see that expressed.

So if you do have a little time and could just set it down by years, and then probably a short explanatory note which you would not have to document because I presume it would be relating to matters that are quite well-known in the history books, so it would not take too much time.

Mr. CADWALADER. I will try to do that, Senator.

I am pretty busy.

Senator DIRKSEN. I know, but I would like to see it.

Mr. CADWALADER. I will try.

But more recently the Court has been, I think, more of an active agent in trying to remold our institutions in a totalitarian sense, and incidentally protecting all individual agents and devotees of totalitarian dogma, whether in public employ or as school teachers or members of the bar, so as to foster the infiltration of those enemies of our entire system of government and culture.

But by all odds the worst instance of the assumption of purely arbitrary power by the court lies in its decisions of May 14, 1954, on segregated schools.

This has been so well stated by others, and in particular others that have testified here today, and is so undeniable that it is needless now to dwell on it or document it, except to notice one point which has not been much noticed, I consider it the most utterly illogical and indefensible finding of all, and that was in the District of Columbia case where the Chief Justice held that the due process clause of the fifth amendment forbids the separation of races in fully equal facilities.

If the Court is to be allowed to dream up and imposed on our people such fantastic misconstruction of plain and well-understood phraseology, then our liberties are indeed at the mercy of the nine men who call themselves Justices, though the constitution calls them Judges of the Supreme Court.

In analyzing this proposed bill, I thought at first it was questionable whether an appeal, even to the Supreme Court, should not be allowed to persons threatened with punishment for contempt of Congress on the ground that no department of the Government of a free people ought to be above the law.

The fact that the Supreme Court has assumed to be above it does not justify placing Congress or committees of Congress in a like place.

But if the defendant in a contempt case has the right to appeal to the lower Federal courts, as I understand he has, in fact I do not think he can be punished except by a judgment of the district court under a statute that I have not been able in the limited time at my disposal to put my fingers on, that would be, I think, a sufficient curb on the power of Congress to punish a man for merely standing on his rights, in case some committee should undertake to do that.

Perhaps it should be enlarged, if it has not been already, to afford him a hearing before a three-judge court, but I do not see any necessity for letting it go to the Supreme Court.

It is a novel thing, these cases getting up there anyway.

MR. SOURWINE. Mr. Cadwalader, you understand, don't you, that the Supreme Court's jurisdiction in contempt of Congress cases arises because of a statute of the Congress creating a statutory crime of contempt of Congress.

For 90 years or more Congress took care of its own contempts under its own power, and it was only when the amount of work involved became so great that Congress tried to slough it off by putting the trial of such cases on the court through a statute, that the Supreme Court or the courts at all came into the question.

MR. CADAWALADER. Then they could perfectly well limit the appeal to the circuit courts of appeal or to a three-judge court or whatever they want.

MR. SOURWINE. Yes, sir.

MR. CADWALADER. And the same thing in general I should say would apply to security charges against civilian employees.

I think that of course no employee of the Government or of anybody else has a vested right to his job if the employer does not want to keep him, but it is undoubtedly true that if a man is in the Federal employ and he is fired as a security risk, it is a very serious injury to his future prospects in life, and for that reason I think he should have a judicial hearing, but not necessarily in the Supreme Court.

The other provisions of S. 2646 are certainly excellent and supply a much needed check on the gratuitous incursions of the Supreme Court into local matters that are none of its business, such as who may be admitted to the bar of any State, or what qualifications may be required of teachers in public schools and colleges.

But I respectfully submit that another section should be added to this bill, in substance as follows: I would number it No. 6:

The Supreme Court shall have no jurisdiction to review either by appeal, writ of certiorari or otherwise any case where there is gone into question the validity of—

and then I would say:

(6) Any law, rule, regulation, or local custom of any State or community by which, without denying to any person the equal protection of the laws and equal use of and enjoyment of facilities and institutions provided by law, the separation of such persons according to age, sex, or race is provided for.

The adoption of the proposed bill with this amendment would put an end to a controversy that is at present dividing the people of the United States into hostile camps when the public danger from without is so great that unity of feeling and purpose is called for as never before.

The advocates of ending segregation are not shut out by any such a clause but are merely remitted to their proper and legitimate field of action, namely, the legislative field.

The idea that laws in so vital a matter can be arbitrarily enacted by nine life-time appointees is so repugnant to every principle of free government that everyone, whatever his race or background, who is not a totalitarian, should admit that such questions are to be decided by persuasion of the public and their elected representatives and in no other way.

That is all I have to submit.

Senator DIRKSEN. I was going to raise just one question with respect to the sixth proposition which you advance. That could apply only to matters that arise in the future. It has no relation to things adjudicated.

Mr. CADWALADER. Of course I do not think Congress can enact, can actually repeal a decision of the Supreme Court.

Senator DIRKSEN. I just want to be sure that the record is clear on that point.

Mr. CADWALADER. Yes.

Senator DIRKSEN. It is entirely prospective and not retrospective?

Mr. CADWALADER. Yes.

Senator DIRKSEN. Well, Mr. Cadwalader, thank you, sir, very much.

Mr. CADWALADER. I will try to get up that memorandum that you requested.

Senator DIRKSEN. I wish you would. It would be rather interesting if you want to take a little more time and research a little bit.

Mr. CADWALADER. When I used the word "rhythmic" maybe I exaggerated a little because it is not a regular rhythm, but it has happened at times the complaint has been about the executive and at other times about the legislative, and now very distinctly about the Court.

Senator DIRKSEN. Well, we could call them cycles or rhythms or parallels, but whatever they are, I know from my own invasion into our history that those things do recur, and there is a certain regularity about them.

But I have never had the delightful opportunity to spell them out heretofore. I hope as a good history student you may have a chance to do so.

We thank you, sir, for coming.

If there are no other witnesses this hearing will conclude until 10:30 tomorrow.

(Whereupon, at 4:30 p. m. the committee was recessed, to reconvene at 10:30 a. m. Friday, February 28, 1958.)

LIMITATION OF APPELLATE JURISDICTION OF THE SUPREME COURT

FRIDAY, FEBRUARY 28, 1958

**UNITED STATES SENATE,
SUBCOMMITTEE TO INVESTIGATE THE ADMINISTRATION
OF THE INTERNAL SECURITY ACT AND OTHER
INTERNAL SECURITY LAWS, OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.**

The subcommittee met, pursuant to recess, at 10:30 a. m., in room 424, Senate Office Building, Senator William E. Jenner presiding.
Also present: J. G. Sourwine, chief counsel; F. W. Schroeder, chief investigator.

Senator JENNER. The committee will come to order.

The first witness is Mr. Jefferson Fordham, dean of the University of Pennsylvania Law School.

Is he present?

(Not present.)

Mr. SOURWINE. I have two statements of persons who are not here which should be offered for the record at this time. One is the statement of Mr. John U. Barr, chairman of the executive committee of the Federation for Constitutional Government.

Senator JENNER. It will go into the record and become a part of the official record.

(The statement referred to is as follows:)

**FEDERATION FOR CONSTITUTIONAL GOVERNMENT,
New Orleans, La., February 20, 1958.**

**HON. WILLIAM E. JENNER,
Member, United States Senate,
Senate Office Building, Washington, D. C.**

(Attention: Miss Wilma Wood.)

DEAR SENATOR: Attached is statement which I would appreciate your having included in the record, with reference to Senate bill 2646.

I wish it were possible for me to attend the hearings and present this in person, but, since this is not possible, would appreciate your good offices in having it submitted to the proper authority for inclusion in the hearings.

Sincerely,

**JOHN U. BARR,
Chairman, Executive Committee.**

**STATEMENT SUBMITTED BY JOHN U. BARR, CHAIRMAN, EXECUTIVE COMMITTEE,
FEDERATION FOR CONSTITUTIONAL GOVERNMENT, NEW ORLEANS, LA.**

It is inconceivable to us of the Federation for Constitutional Government that there could be any opposition to any of the provisions or intent of S. 2646.

That the United States Supreme Court should have made this legislation so necessary remains an unsolved puzzle, not only to the lay supporters of the Federation for Constitutional Government, but even a greater puzzle to our friends of the legal profession, both in and outside the federation circle.

That the Congress of the United States should have had to act to help the several States to protect their sovereignty against subversion will be difficult for future historians to explain.

That either the Congress or the Supreme Court should be involved in any matters relating to the administration of the public schools of the several States, is perhaps the greatest insult ever visited upon the wisdom and honor of the founders of this Nation.

That this bill is necessary is self-evident, and we fail to see how a single vote could be marshaled against it in either House of the Congress. Our hope is that it is only the first step in the right direction, and that its swift adoption does not intimate or imply that the Federal courts have, or had, any rights in the administration of the safe and orderly conduct, or the safeguarding of such orderly and safe conduct by the sovereign States.

Nor can we forget that in this year, after more than a century and a half, the United States Supreme Court had to be curbed in its zeal to nullify the powers of the bar association of the sovereign States, in their effort to weed out the few subversive shysters who would impede the honor and dignity of the legal processes of such States, and cast a shadow on the wisdom of the entire legal profession of each community in which these few subversive shysters have been able to penetrate, or were preparing to do so.

In the past few years on certain Mondays, all patriotic and devout Americans have had to start the day with the fervent prayer, "God save us this day from our own folly and give us the courage and strength to protect our Nation from the folly of our judicial servants."

Mr. SOURWINE. And the statement of Mr. Arthur Dean.

Senator JENNER. It may go in the record and become a part of the record of this committee.

(The statement referred to is as follows:)

SULLIVAN & CROMWELL,
New York, N. Y., February 20, 1958.

HON. JAMES O. EASTLAND,
*Chairman, Subcommittee on Internal Security,
United States Senate, Washington, D. C.*

MY DEAR SENATOR EASTLAND: At the invitation of Senator Hennings and your counsel, Mr. Sourwine, I am writing your subcommittee to express my views on S. 2646. The purpose of the bill is to abolish the jurisdiction of the Supreme Court of the United States to review the following classes of cases:

- (1) Cases involving the practice or jurisdiction of any committee or subcommittee of Congress and any action or proceeding for contempt of Congress;
- (2) Matters relating to security programs in the executive branch of the Federal Government;
- (3) Legislation or executive orders of any State in relation to subversive activities;
- (4) Action by school boards, boards of education, etc., relating to subversive activities among teachers;
- (5) Laws and regulations of any State relating to the admission of persons to practice law.

Judicial review of the acts of legislatures, governmental bodies, and officials is one of the fundamentals of our American constitutional system. As Judge Learned Hand has recently pointed out in his Holmes lectures, not only is the power of the courts to scrutinize official conduct important in safeguarding the liberties of the individual, but it is equally essential in a Federal system such as ours in maintaining constitutional federalism—the proper allocation of jurisdiction between the Federal Government on the one hand and the several States on the other hand.

S. 2646, it seems to me, seriously infringes the doctrine of judicial review, as we have known it since the days of John Marshall. It does not abolish the jurisdiction of the State courts or the lower Federal courts to determine the class of cases which it deprives the Supreme Court of jurisdiction to review.

The Supreme Court of the United States is the only court in our system which can perform the important task of judicial review in all its aspects, since the Supreme Court alone is empowered to review decisions of both the State and Federal courts. The result of the enactment of the bill might well lead to legal chaos in that the same legal questions could be decided differently, for example,

by two Federal courts of appeal, or by a State supreme court and a Federal district court. This would be particularly unfortunate in cases involving constitutional issues, for the supreme law of the land might be different for persons similarly situated.

No doubt certain Supreme Court decisions have proved a bitter disappointment to litigants and to other persons vitally affected by the decisions of the Court. As a lawyer arguing before the Court, I have had my share of disappointments. However, this is not only inevitable, because the Supreme Court has to decide between party and party, but is also inherent in the issues that come before the Court.

In the light of our long history of judicial review, I seriously doubt, however, whether it is wise to limit the jurisdiction of the Supreme Court by classes of cases such as this bill attempts to do.

Such legislation would tend to equate our system with the English where the Law Lords, the highest court of the land, sit as part of the legislature (the English Parliament) and where the legislature can overrule any particular court decision which it does not like, unbound by any written constitutional limitations.

There isn't any question that the Communist menace is a very real one and that it is a far greater and more pervasive evil than many people suspect.

The question is whether we should change our own historical institutions that have worked well or reasonably well for about 170 years because we are faced with certain evils. I negotiated at Panmunjom for many months with the Communists and know full well their treachery and devious ways.

But my judgment tells me we should move very cautiously about changing our fundamental institutions.

The decision by Chief Justice Marshall in the famous case of *Marbury v. Madison* indicates that the Constitution must be read so as to provide judicial review by the Supreme Court of acts of Congress. Judge Hand's lectures, which I mentioned above, clearly regard the right of the Supreme Court to review legislation by State legislatures and Congress as a necessary constitutional requirement. Hence the proposed legislation might have constitutional implications.

For the reasons set forth above, my view is that your subcommittee should report unfavorably upon S. 2046.

Respectfully,

ARTHUR H. DEAN.

P. S.—I am leaving today for Geneva, Switzerland, to be chairman of the American delegation at the Convention on the Law of the Sea and consequently must decline your invitation to appear in person.

Senator JENNER. Robert G. Chandler is the next witness, Shreveport.

Will you give your full name to the committee?

STATEMENT OF ROBERT G. CHANDLER, CHAIRMAN OF THE STATE COMMITTEE OF THE STATES RIGHTS' PARTY OF LOUISIANA

Mr. CHANDLER. My name is Robert G. Chandler.

Senator JENNER. Where do you reside?

Mr. CHANDLER. In Shreveport, La., where I practiced law for 36 years.

I am a former city attorney at Shreveport and former special assistant attorney general of the State of Louisiana. I am presently chairman of the State committee of the States Rights' Party of Louisiana, which became a legal party in my State at the general election in 1956.

Senator JENNER. Do you have a statement?

Mr. CHANDLER. I have prepared and filed a written statement but I would like to briefly say a few words.

Senator JENNER. All right.

Mr. CHANDLER. I won't take long.

I want to say that I am in favor of the bill now under consideration. My reasons are that the present Supreme Court has rendered not one

decision, but decision after decision, which I think, endangers the welfare of this country.

These decisions fall into two general categories, as I see it.

1. Limiting the power and authority and sovereignty of the several States, which trend, if allowed to continue, will result in the States becoming mere geographical expressions.

I believe that the Founding Fathers know what they were doing when they created 49 compartments of power. There were only 13 at that time but I mean we now have 48 State governments and 1 national Government, which means that any subversive elements would find it practically impossible to take over this country. But if the States are reduced to nought from a governmental standpoint, the country might be endangered.

The second group of decisions to which I refer have the effect of coddling criminals, particularly Communists, to the detriment of the society in general.

The purpose of safeguards around criminal law is that innocent men should not be punished or convicted. But the purpose of the criminal law, the fundamental purpose is to protect society. And these decisions which I have detailed in my written statement, certainly have the effect of making law enforcement extremely difficult, if not impossible, in some areas. And I believe they endanger society.

It seems obvious that the Court as presently constituted is not going to reverse its decisions, these two trends; therefore, the Congress, as the representatives of the people of this Nation, should act, in my judgment. They should adopt either the Jenner bill or some similar bill to protect what I consider the menace arising out of these current decisions.

If the chairman has any further questions, I will attempt to answer, but otherwise I am through.

Senator JENNER. We will let the full statement of Mr. Chandler be incorporated in the record and made a part of the record.

(The prepared statement is as follows:)

STATEMENT OF ROBERT O. CHANDLER

My name is Robert O. Chandler. I was born in Shreveport, La., 58 years ago and have practiced law there for the past 35 years. I am a former Shreveport city attorney and a former special assistant attorney general of the State of Louisiana. I am presently chairman of the State committee of the States Rights' Party of Louisiana, which became a legal party in my State at the general election held in November of 1956. I am in favor of the bill now being considered by this subcommittee.

At the outset I think it should be realized that the States created the Federal Government and not the reverse; that our Government is a republic and not a democracy; that the Government at Washington is one of delegated powers and that each of the 48 States is sovereign (or was until the present climate of opinion in the Supreme Court).

I shall presently discuss the trend of recent Supreme Court decisions particularly in the last 4 or 5 years in an effort to show that they have the effect of curtailing State sovereignty and coddling criminals, particularly Communists, to such an extent that the safety and well-being of society is in danger.

Before citing the decisions I remind this subcommittee that the fundamental purpose of a constitution is to have a supreme law of fixed meaning. To say that our Constitution is whatever 5 judges out of 9 say it is at the moment, is to say that we have no Constitution at all and live under a judicial oligarchy. Parenthetically, Mr. Gunnar Myrdal, who said our Constitution was outmoded has been cited as a sociological authority by the present Supreme Court.

Alexander Hamilton, who certainly favored a strong Central Government, said in article 78 of the Federalist, " * * * liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments * * *," and again, "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them."

James Bryce in his *The American Commonwealth* had the following to say about the judges perverting the Constitution to suit their own political views:

"To construe the law, that is, to elucidate the will of the people as supreme lawgiver, is the beginning and end of their duty, and if it be suggested that they may overstep their duty, and may, seeking to make themselves not the exponents but the masters of the Constitution, twist and pervert it to suit their own political views, the answer is that such an exercise of judicial will would rouse the distrust and displeasure of the Nation, and might, if persisted in, provoke resistance to the law as laid down by the Court, possibly an onslaught upon the Court itself" (third edition, p. 253).

While it may be that the present Supreme Court is not interpreting the Constitution to suit the personal views of the judges, the fact remains that the balance which should exist between the States and the Central Government is being destroyed. To all intents and purposes the tenth amendment has become a dead letter. I will refer to eight decisions of the Supreme Court which illustrates my point.

In *Griffin v. Illinois* ((1956), 351 United States 12), a criminal was freed because the State did not furnish him a free transcript of appeal.

In *Brown v. Board of Education* ((1954), 347 United States 483), the Court struck down the right of the States to maintain separate schools, citing only sociological authority.

In *Holmes v. Atlanta* ((1955), 350 United States 870), separate seating in interstate buses was struck down.

In *Phillips Petroleum Company v. Wisconsin* ((1954), 347 United States 670), it was held that the Federal Government had the right to regulate the price of natural gas at the well, thereby precluding State regulation.

In *Pennsylvania v. Nelson* ((1959), 350 United States 407), the Supreme Court held that a State could not prosecute Communists for sedition under State law.

In *Slochower v. Board of Education of New York City* ((1958), 350 United States 551), the Supreme Court held that the city of New York violated the Constitution by discharging a public employee who had refused to answer questions about his activities, claiming the fifth amendment.

In *Sweezy v. New Hampshire* ((1957), 354 United States), the Court held that a State could not investigate subversive activities under State law.

Mallory v. the United States ((1957), 354 United States 449), involved a Federal statute but it would seem that it would apply equally to State proceedings. A convict rapist was arrested, confessed, and was taken before a magistrate 7½ hours after his arrest. The Court freed the criminal saying that a suspect could not be arrested for the purpose of questioning him.

It seems clear from the foregoing decisions that the present Supreme Court believes that the so-called Sovereign States no longer possess the attributes of sovereignty. If this trend is not checked and reversed the States will soon become merely geographical expressions. Communism can never take over the United States if 49 sovereignties i. e., the General Government and the 48 States remain vigorous and as contemplated by the Founding Fathers. But if all power and authority is to be centered in Washington it is conceivable that communism might ultimately prevail here.

There are also a number of decisions which are, to say the least, overzealous in protecting the rights of criminals, particularly Communists, to the danger and detriment of society in general.

I have already referred to the Mallory case where a rapist was freed. In *Jencks v. United States* ((1957) (353 United States 657)), the Supreme Court held that the FBI must open its files to criminal defendants.

In *Bridges v. Wixon* (1945), the Supreme Court reversed findings of fact by the Attorney General and two lower courts that Bridges was a Communist and allowed him to remain in this country.

The Court held in *Scheiderman v. United States* ((1943) (320 United States 118)), that a Communist could get attached to our Constitution although at the same time attached to the Communist manifesto.

The Seve Nelson case has already been alluded to.

Although the fifth amendment records protection in criminal cases, in *Quinn v. United States*, (1955), the Supreme Court held that congressional committees could not secure information from witnesses where they claimed the fifth amendment.

Reverting to the language quoted above from Alexander Hamilton, I may be permitted to observe that the Supreme Court in these recent decisions has not been "bound down by strict rules and precedents." As a matter of fact, several years ago one of the Supreme Court Judges said in substance that the Court decisions were like a one-way railroad ticket good for this day and trip only. Hamilton feared that the Judiciary and one of the other departments acting together would be dangerous to the liberty of the citizens. This has been proved in the case of Little Rock. The Court having rendered a decision based upon sociological rather than legal grounds, the President says that it is the law of the land and sends Federal troops to an American city. Of course, a decision of the Supreme Court is not the law of the land but only the law of the case adjudicating upon the right of the parties to the litigation.

It seems rather apparent that the Supreme Court is not apt to reverse the trend toward destruction of the sovereignty of the States and that action by the Congress is necessary. The fundamental issue is plain.

Are we to continue as an indestructible Union of indestructible States or are we to adopt the Gunnar Myrdal viewpoint and permit an continued erosion of the Constitution and of the power and authority of the several States? I feel that the Congress representing the people of this constitutional Republic desires to take the necessary step to preserve the form of government under which this country has grown great. That being true, it is my earnest hope that the Jenner bill or one substantially similar to it will be adopted.

Senator JENNER. Do you have any questions?

Mr. SOURWINE. I would like to inquire, if the Chair pleases.

Is there any question in your mind about the authority of the Congress to enact a bill such as S. 2046?

Mr. CHANDLER. My opinion is that it has complete authority. I read in the press this morning that some dean or some law school-teacher questioned it, but as I read the Constitution the Congress has ample and adequate authority to adopt the bill.

Mr. SOURWINE. The argument has been made that the provision of article 3, section 2, paragraph 2, which grants the Congress the power to make exceptions to the regulations, to the Supreme Court's appellate jurisdiction, is an absolute grant of jurisdiction to the court—that the grant to the Congress must be considered as at best ancillary and subordinate to the act, that to give the Congress a discretion to withdraw circumscribed jurisdiction is for the Constitution to give, with one hand, and take away with the other. Would you comment on that theory?

Mr. CHANDLER. As I understand the Constitution, there are certain powers given to the Supreme Court which are there enumerated. Those could not be taken away.

In the other category, those not specifically set forth in the Constitution, it is my opinion that they can be. And in support of my statement I refer to the case of *ex parte McCardle*—I do not have the citation now, but in that case, the Reconstruction acts were up, they were being questioned as to their constitutionality. And the Congress, Stephens et al., passed a law depriving the Supreme Court of jurisdiction and the Supreme Court tacitly accepted it.

Therefore, if *stare decisis* means anything, there is an authority.

Mr. SOURWINE. The *McCardle* case was even stronger than you have outlined it, wasn't it?

MR. CHANDLER. I haven't read it lately.

MR. SOURWINE. The statute that was passed in 1867 did not in terms take any jurisdiction away from the Supreme Court—it simply repealed a previous grant of appellate power to the Supreme Court. And on that basis the Supreme Court said, without an affirmative grant of this power from the Congress we do not have it.

MR. CHANDLER. You are probably correct. I say I haven't read it in a long time. My recollection of it was that they would have taken this thing up except that Congress checkmated them and they accepted it. How they did it is something else.

MR. SOURWINE. Another theory which is advanced in opposition to this bill—advanced as a basis for the declaration that the bill is unconstitutional on its face—is the argument that original jurisdiction always includes an appellate jurisdiction and that the Supreme Court, having been given original jurisdiction over matters of which the States are parties, therefore, cannot be deprived of the appellate jurisdiction over matters which involve decisions of State courts, or in which the States or any of their subdivisions are parties to the act.

MR. CHANDLER. Mr. Sourwine, in the first place, I do not understand that there must be an appeal in every case. You start out with the proposition that to hear a case includes the right to appeal. I know of no general rule to that effect. It is generally followed—I mean, in ordinary cases there is always an appeal. But I do not think that, as a matter of law, that is true.

MR. SOURWINE. Can a grant of original jurisdiction comprehend a grant of appellate jurisdiction?

MR. CHANDLER. I would say it can, if it so states.

MR. SOURWINE. Original jurisdiction is jurisdiction to begin an action, isn't it?

MR. CHANDLER. That is right.

MR. SOURWINE. The same court in which to begin an action cannot sit as an appeals court, can it?

MR. CHANDLER. Not ordinarily under our system of jurisprudence.

MR. SOURWINE. So that if you grant original jurisdiction to court A and the action is commenced, then that court A cannot sit to have appellate jurisdiction over that same subject?

MR. CHANDLER. The appellate jurisdiction may not exist at all. In Louisiana we have certain classes of cases that are not appealable.

MR. SOURWINE. But if there is to be any appeal from that case which is brought in court A, it has to be to some other judicial body, doesn't it?

MR. CHANDLER. I would think so.

MR. SOURWINE. I have no other questions, Mr. Chairman.

Senator JENNER. Thank you.

MR. CHANDLER. One final statement. I brought with me, Mr. Chairman, a statement by Mr. Holloman of Alexandria, who is a very prominent attorney of that city, of Alexandria, La., of the firm of White, Holloman & White, which I have delivered to the counsel already, and I hope it may be incorporated.

MR. SOURWINE. I will cover that in the record at a later date.

Senator JENNER. Is Dean Fordham here?

You may come forward now, then. We called you a moment ago but you were not here.

Would you give the committee your full name for our records?

**STATEMENT OF JEFFERSON B. FORDHAM, DEAN AND PROFESSOR
OF LAW OF THE UNIVERSITY OF PENNSYLVANIA LAW SCHOOL,
PHILADELPHIA, PA.**

Mr. FORDHAM. I am Jefferson B. Fordham.

Senator JENNER. And you are the dean of the University of Pennsylvania Law School?

Mr. FORDHAM. Yes, sir.

Senator JENNER. And you have a prepared statement.

Mr. FORDHAM. I do.

Senator JENNER. You may proceed.

Mr. FORDHAM. Mr. Chairman, I appreciate very much the opportunity to appear to speak with reference to S. 2646. I have a formal statement which I respect fully request be incorporated into the record.

Senator JENNER. It will go into the record as a part of the official record of the committee.

Mr. FORDHAM. My statement is brief and with your indulgence, I should like to extract it fairly closely.

Senator JENNER. Surely.

Mr. FORDHAM. Omitting the part which has to do with the identification of self, let me say first that I have, on an earlier occasion, opposed a proposed constitutional change which would place the appellate jurisdiction of the Supreme Court of the United States, with respect to constitutional questions, beyond the control of the Congress. I have reference to the so-called Butler amendment, Senate Joint Resolution 45, 85th Congress, 1st session (1955).

In delivering the 16th annual Benjamin N. Cardozo lecture in New York City last fall, I had this to say with respect to the appellate jurisdiction feature of the Butler amendment:

In our political and legal system, it is a cardinal proposition that the independence of the judiciary, and especially of the Supreme Court of the United States, must be maintained. This, however, is not simply a fancy abstraction; it is both a principle and a working idea which operates in a government of divided authority involving a complex and delicate system of checks and balances. A statute deliberately aimed at denying the Supreme Court appellate jurisdiction in a case involving the constitutionality of the Reconstruction Acts is one thing on the part of the courts; a broad political restraint upon or counter balance of the judiciary by one or the other or both of the political branches of the Government is quite another. It seems to me that, in the course of our constitutional history, we have achieved a rather extraordinary degree of independence for that arm of the Government which has the final voice as to the meaning of most of the Constitution. Is it not better to rely upon this very genuine traditional independence than to tinker with a well-adjusted system of separation of powers in order to forestall possible future legislative attacks upon the Court?

Just as I believe that we should rely on this tradition of independence rather than cut down the power of Congress, so also it seems to me that the tradition requires that every proposal to cut down the power of the Court be approached with great care and subjected to detailed scrutiny, in a spirit of serious and responsible consideration. I approach S. 2646 in that spirit.

First I want to comment on questions by and questions put to the previous witness with respect to constitutional questions.

In my testimony it is my purpose not to explore the constitutional questions. I do not grant that your bill would be constitutional in

that respect. I pass that question. I will be pleased, certainly, I will be glad to brief that question.

It is my object to approach this on the merits as a matter of legislative policy.

There are, in my judgment, several very telling general objections to proposals such as that to which this hearing relates. The first stems from the proposition that it is self-defeating for the people in a free society to take away the jurisdiction of an arm of government because some members take a critical view of particular actions involving the exercise of that jurisdiction, that the exercise of the jurisdiction of that arm has not well been thought out and well conceived.

This proposition is sound with respect to all three of the great departments of the Government of the United States. It is most clearly applicable to the judicial branch because of the recognized essentiality of independence of judgment. A continuing threat of restriction of appellate jurisdiction is emphatically not the kind of influence under which our highest tribunal should work.

Of particular concern to me here is the thought that if the appellate jurisdiction is to be subject to restriction, that those certain decisions may be subject to criticism that overhang, does not conduce to an atmosphere of independent judgment.

There have been hundreds of instances in which enactments of legislative bodies have been declared unconstitutional by American courts. There have been even more instances of subsequent legislative repeal. This record does not, however, make a case for limiting legislative power. There is no escaping the delegating of appropriate power to perform governmental functions. There are no satisfactory substitutes for restraint and for confidence in our institutions. I think it worth repeating that the essentially negative approach of taking away or denying governmental power because of asserted abuse or injudicious exercise of power is self-defeating.

I suggest, in the second place, that members of the legal profession, above all others, should be sensitive to the need of preserving the integrity of the judicial process at all levels, particularly the highest. Free criticism of the decisions of our courts is a thoroughly wholesome and desirable thing.

This, however, is a far cry from seeking to reduce the jurisdiction of the Court in order to see to it that it cannot do again what some people might regard as highly erroneous or ill-advised. To proceed in this latter manner is, in substance, to impugn the integrity of the judicial process. I find this insupportable. It is obvious that the cases which ultimately come to decision on the merits in the Supreme Court of the United States are likely to involve very controversial issues, not subject to decision with mathematical certainty. Thus, no matter where the Court comes out, there is likely to be a substantial body of adverse opinion with respect to a decision in a case of great moment. I do not need to labor the distinction between the studious and restrained consideration of the proper distribution of judicial business and the subjecting of the courts to political pressures based on disagreement with their decisions.

My third general objection is that the subjects seized on the exclusion from the appellate jurisdiction do not fit into any rational scheme

of limiting jurisdiction. Some relate exclusively to security matters, some do not. Such common strain as they do have seems to be the exclusion of review by the Supreme Court of cases involving reliance by individuals upon the Bill of Rights and other constitutional provisions which are basic safeguards of human rights. I must say that rather than limit judicial review where questions of equality before the law and human freedom are raised, we should bestir ourselves to preserve such review unimpaired.

Coming more directly to the provisions of the bill, let me make one initial point: While the bill is an attack upon certain decisions of the Supreme Court of the United States, it would, if enacted, plainly destroy the authority of those decisions as binding precedents. Instead of destroying that authority, it would have the effect of denying access to the Supreme Court for the purpose of achieving clarification, modification, or even overruling. In other words, insofar as the ground is covered by the decisions under attack, the effect of the enactment of S. 2846 would be to remove any chance of change short of a constitutional amendment.

Mr. SOURWINE. Might I inquire at that point? I take it that you feel all subordinate courts would be absolutely bound by the latest decision of the Supreme Court on the point?

Mr. FORDHAM. If it is a constitutional matter.

Mr. SOURWINE. Although the Supreme Court has not considered itself bound by some of its own prior decisions. Do you still feel that would be true?

Mr. FORDHAM. It think that would be true. That is to say, the Supreme Court is capable of self-correction and it can overrule an earlier case. But I do not perceive that a court in the lower stage in the judicial hierarchy which would be in a position to do the same thing.

Mr. SOURWINE. Do you think that it is misconduct for a judge of a lower court, if he thinks that the Supreme Court is wrong, to diverge from the Supreme Court's decision, in matters before it?

Mr. FORDHAM. No; ordinarily not, but the situation here is a little bit different. Ordinarily, there is an opportunity for that higher Court to correct what is done in that way. In this instance, there would be no opportunity for the appellate court to indicate whether or not the trial judge, or whatever level of court it was, had acted all right consistently with the Constitution or decision of the higher Court.

Mr. SOURWINE. If it does not, what you are saying amounts to the implication, if Congress is going to use its power under article 3, section 2, paragraph 2 of the Constitution, that divests the Supreme Court of jurisdiction in certain areas when it has a decision in the case is what the Congress wants, rather than when the last decision of the case is something that the Congress may not approve.

Mr. FORDHAM. I am not looking at it from that standpoint, Mr. Sourwine. From the standpoint of those who want it that way; yes.

Mr. SOURWINE. You are saying, though, aren't you, the Congress, by doing this, could freeze the law and will freeze the law at exactly the point where it divests the Court of jurisdiction—that is your point?

Mr. FORDHAM. That is the purpose of the point. You may recall the case when Chief Judge Parker was nominated by the President

for membership on the Supreme Court. One of the attacks on him was the decision in the Ray Jacket case involving the endorsement of the "yellow dog" contract, and he had done so on the authority of the Hitchman case of the Supreme Court and he, on that basis had no choice. He was bound by that. He had no choice but to follow it.

Nevertheless, I might say parenthetically, that it operated against him in connection with his appointment.

Mr. SOURWINE. It might be well to point out, I think, that nothing the Congress does by this bill or any other bill can render these decisions of the Supreme Court any less the law of the case which they have decided.

Mr. FORDHAM. Oh, yes; that is clear.

Mr. SOURWINE. That is settled.

Mr. FORDHAM. I was speaking about the thing in a broader sense, related to the idea of precedent, and so forth. Yes, I am sure that no one would disagree on that particular point.

I hardly think that this would advance the objective of the proponents.

With respect to the 5 different classes, with reference to the 5 classes that the bill covers, the first 2 classes of cases to which the bill relates have to do with Federal matters. The jurisdiction of the lower Federal courts with respect to these matters would not be affected. Questions which were not covered by the Supreme Court precedents would be decided by the lower Federal courts, according to their own best lights, and there would surely arise differences in the rulings in the several circuits.

To put the matter a little differently, the Constitution and acts of Congress would not be applied uniformly throughout the country; both would be held to mean one thing in one circuit and something else in another. Surely the Congress would not seek to bring about such an unhappy condition.

Those courts would retain the same jurisdiction that they presently have, to pass on constitutional and statutory questions. However good those courts are, the inevitable effect of this would be differences in decisions in the several circuits, and that to me is a rather unhappy prospect. You would have these differences with no possibility of correction and unifying correction by a single high tribunal.

Mr. SOURWINE. If the lower courts are going to be absolutely bound by the last decision of the Supreme Court how could you have differences?

Mr. FORDHAM. You see, the Supreme Court has not covered all of the ground, Mr. Sourwine. These cases—

Mr. SOURWINE. You are referring there to new points?

Mr. FORDHAM. Exactly. The bill is broader than these cases. I think that is clear. The bill is broader than the cases. In those areas where the cases were not authoritative and were not applicable, then those courts would have to do the best they could. And there would be no Supreme Court with appellate jurisdiction exercised, either by appeal or certiorari to make unifying determinations.

Insofar as the questions which would be covered by the first two classes of cases to which the bill relates were statutory in character, it must be evident that there is an available corrective in the form of legislation. If the Members of Congress are of a common mind that the

Court has arrived at a statutory interpretation which does not effectuate the legislative intent as they would have it, the obvious recourse is further legislation.

You do not always get the legislation that you want, theoretically at least. Insofar as the first two relate to statutory matters, and the second one relates a little bit to executive matters, it would seem that there is room for a change in policy by further congressional enactment.

Mr. SOURWINE. You speak of the first 2, you mean the first of the 5 sections of the bill?

Mr. FORDHAM. Yes, sir.

Mr. SOURWINE. More specifically, first the investigative functions of the Congress and second the security program in the executive branch?

Mr. FORDHAM. Yes.

Mr. SOURWINE. With regard to the investigative functions of the Congress any litigation over that would almost all be within the District of Columbia?

Mr. FORDHAM. That is true.

Mr. SOURWINE. And eventually would come up for decision in the Appellate Court of Appeals of the District of Columbia?

Mr. FORDHAM. It would in a sense supplant the Supreme Court as to final decision in regard to those matters.

Mr. SOURWINE. So that if you concede the desirability of the imposition by another branch of the Government of the uniform rule upon congressional investigations, you could still have it?

Mr. FORDHAM. I grant you that. I grant you that.

Mr. SOURWINE. At that point it is desirable to have a uniform rule with regard to congressional investigations imposed by another branch of the Government?

Mr. FORDHAM. Well only as to some things. For the most part not. But insofar as these things involve constitutional questions under the Bill of Rights, yes.

Mr. SOURWINE. Of course, the Supreme Court in the Watkins case even went so far as to indicate that the Court would decide whether a committee was properly carrying out the directive of the parent body and that would seem to be a greater interference between master and servant than should be.

Mr. FORDHAM. The reasoning in the Watkins case is something that might well undergo further scrutiny, I grant you that. I am a teacher of legislation. I was much interested in this problem. I am not perfectly satisfied with that reasoning, but the Court is left with the appellate jurisdiction, counsel may very well help clarify this in further decisions of the Court.

Mr. SOURWINE. You would not then go so far as to grant the Court the authority to be the arbiter of congressional investigations?

Mr. FORDHAM. Not in the broad sense at all, no. I strongly believe in wide power of inquiry by congressional committees. But what is within the framework of the Bill of Rights, I would look to the Court.

Mr. SOURWINE. Do you think the Court has a greater power to interpret the Constitution than the Congress does?

Mr. FORDHAM. In most cases. There is an area, though, having to do with the political question, the doctrine of the political question, and there the Executive and the Congress have the final say.

Mr. SOURWINE. The area embraced within political questions is constantly narrowing, isn't it?

Mr. FORDHAM. I suggest, sir, that that is not the case; no.

Mr. SOURWINE. That is not the case?

Mr. FORDHAM. Particularly, for example, with respect to international affairs. I think that the responsibility of the President with the tempering power of the Senate as to treaties, do involve particularly decisions in the export cases which were written by a famous Senator.

Mr. SOURWINE. You are speaking of the aggrandizement of Executive power?

Mr. FORDHAM. I do not know whether you want to call it that or not. It is an area where the courts have held their hands off. I generally decide that as a part of the political question.

Mr. SOURWINE. That does not involve any diminution of the court's powers, that is in a sense an accretion—if you do not like the word "aggrandizement"—at the expense of the constitutional treaty-making power which involves both the legislative and the executive, isn't that right?

Mr. FORDHAM. Well, I do not know—I do not know that I would say it just that way. I think it is still fair to say in the broader sense here is an area of action in the international realm by one of the political branches of the government where the court keeps hands off. I think it does indicate there is a large area where the court does not attempt to have the final say as to the meaning of the Constitution.

The last three classes of cases to which the bill relates have to do with State and local matters. In that connection, however, it is obvious that Federal Constitution questions can arise; this is because the 14th amendment is a protection to the individual against the arbitrary and uneven exercise of State and local governmental authorities within its proper sphere. Still it has to deal evenly with persons under the jurisdiction of the States.

The proposal covers Federal constitutional as well as other questions. Thus, the effect of the enactment of such a measure would be to leave the State courts with the final word as to the meaning of Federal statutes and of provisions of the Federal Constitution.

Inevitably, different interpretations would be arrived at over the country. This is an attack upon our constitutional scheme as we have understood it since the days of John Marshall.

I think this is a part of the bill that is most troublesome from the standpoint of the wisdom of such a policy. To me, it involves real serious danger from the standpoint of preserving the integrity of the national union.

Nothing is more self-evident than that the supremacy of the Constitution and laws of the United States, as contemplated by article VI of that instrument, cannot be preserved if there is to be a State instead of a national authoritative interpretation of the organic law.

This feature of the proposal is, in short, an attack upon the Union itself. What makes it doubly bad is that the 14th amendment establishes national citizenship and clearly contemplates national action

to protect the rights of citizens of the United States. There cannot be effective national enforcement if final judicial interpretation is left to the State courts.

What I have said is not to reflect upon the State courts. No matter how able and conscientious a particular State court, there is no hope that the integrity of the Federal Constitution as the charter of national union and the bulwark of human freedom can be preserved if there is no national organ of interpretation.

One final word. I appreciate the concern of Members of Congress with the problem of national security. In my judgment the most vital thing we can do to assure the full realization of the American ideal of human freedom and full equality before the law is to practice what we preach—to put the stress affirmatively upon liberty and fair play and not negatively upon self-limitation and repression.

Mr. SOURWINE. Do you feel that uniformity of the decision imposed from Washington is desirable in such matters as to who shall be admitted to practice law in the individual States?

Mr. FORDHAM. For the most part not, sir. That is not all black and white. From the standpoint of the general standards of admission that is strictly a State concern, but as with respect to admission to some kind of a business activity, there can be a constitutional question, as to whether State governmental authority has been exercised arbitrarily. That is the kind of approach I would take in cases like the *Schwabe* or the *Commonwealth* case. I do not agree with the latter case, because I do not think, as Mr. Justice Frankfurter pointed out, it was clear that the State courts had disposed of the case on Federal constitutional grounds.

I think it would have been better had the Supreme Court sent the case back, as Mr. Justice Frankfurter suggested, in order to have it determined whether this case was decided on Federal constitutional grounds adverse to those grounds or decided upon independent State grounds. I do not agree with the result in that case.

But I do point out that the application of the Bill of Rights to a thing like that, is part of the total sweep of the Bill of Rights which covers it like a tent. And the exercise of the State jurisdiction is subject to that.

My final point may sound a little bit like a preachment I hope you will indulge me in saying it.

I like to look at these things as affirmative things. I appreciate the sense of responsibility of the Members of Congress with respect to problems of national security—I do as a citizen—but I have a firm conviction that we will do more in the long run to preserve our institutions, and preserve the value that we hold dear if we place our preponderant stress upon giving vital effect in practice to the concept of quality before the law, equality of opportunity, and fair play in the practical sense of due process, than we will by any negative approach.

Mr. SOURWINE. Do you mean there should not be any criminal statute against subversion?

Mr. FORDHAM. No, sir; I do not mean that. I mean it should be on the affirmative side. I don't mean there should not be criminal statutes necessarily. It depends on how those statutes are for this purpose, but what I mean is I am preoccupied with the idea of being sure that we act responsibly on the affirmative side of this.

Mr. SOURWINE. You recognize that the State subversive statutes have been overthrown and States' rights even to investigate as to subversives have been taken away from them?

Mr. FORDHAM. No, sir; I do not recognize that.

Mr. SOURWINE. You do not?

Mr. FORDHAM. I think that is subject to qualification. The Nelson case arose in my State, in Pennsylvania; and the Supreme Court affirmed what the Pennsylvania court did. In all intellectual honesty I should say that the Pennsylvania court must have been influenced in its decision by its understanding of the thinking of the Supreme Court as an institution. But it is worth pointing out just the same that the Supreme Court was not overruling the State court there. It affirmed.

Mr. SOURWINE. I did not say they were overruling. I said the effect of the Nelson case was to overthrow the antisubversive statutes of the States; isn't that true?

Mr. FORDHAM. Yes.

Mr. SOURWINE. Then in the Sweezy case, the right of States to investigate subversion was taken away from them.

Mr. FORDHAM. I do not grant that at all. Let us talk about the facts of the case. In the Sweezy case, again, there is a question as to the soundness of the reasoning. I think the case was decided on the reasoning of the opinion by Harlan and Frankfurter. That is my personal opinion.

What the Court did was to deal with the particular situations having to do with a particular inquiry by the Attorney General as the arm for that purpose of the legislature, under joint resolution of the legislature. What the Court did was to deal with that particular situation. And, in that particular situation, arrived at an adverse conclusion as to what was being done. But that does not mean that you can say baldly that the Supreme Court has said, "You cannot inquire through the legislatures into subversion."

Mr. SOURWINE. Dean, the Sweezy case said we cannot conceive that New Hampshire has any interest in this matter—that the State of New Hampshire has any interest in this?

Mr. FORDHAM. I read the opinion.

Mr. SOURWINE. What is that if it is not doing that?

Mr. FORDHAM. It is a pretty broad statement, that is true.

Mr. SOURWINE. I didn't—

Mr. FORDHAM. Let us look at the facts of the case, though.

Mr. SOURWINE. Suppose we leave for the moment the question of investigations, since it is secondary, and go back to the question of the antisubversive statutes of the States which you and I agree have been rendered null and void.

Mr. FORDHAM. On the interpretation of the Federal act?

Mr. SOURWINE. That is right. The various State courts themselves have, in a series of decision, said that the decision in the Nelson case rendered their own State act invalid.

Mr. FORDHAM. That is right.

Mr. SOURWINE. That is done on the theory that the Congress had preempted the field and was dealing with the subversive problem through the Smith Act?

Mr. FORDHAM. That is right.

Mr. SOURWINE. Then would you agree that in the *Schneiderman et al.* decision, the Supreme Court has rendered the Smith Act virtually useless as against the subversives?

Mr. FORDHAM. No; I would not.

Mr. SOURWINE. The organizing section has been made completely useless, has it not?

Mr. FORDHAM. I am not qualified to answer that adequately, Mr. Sourwine.

Mr. SOURWINE. And the other question with regard to the fact that under the present doctrine of the Supreme Court that anything is legal and under that section, even the teaching of the overthrow—the advocacy of the overthrow of the Government of the United States by force and violence, so long as it does not, to use the Court's language, "incite to immediate action."

Mr. FORDHAM. Well the Court made a distinction between the embracing of the theory, as an idea to overthrow the Government by force, and made a distinction between that, on the one hand, and relying upon that theory to influence action. At least, they did make that distinction. But does that render the statute nugatory?

Mr. SOURWINE. You know that Government prosecutors all across the country have been dismissing their cases under the Smith Act, with the statement that under the Supreme Court ruling they could not successfully prosecute a case. At least, that was their judgment that is what that act does. Of course, the enactment of Senator Jenner's bill will not change that fact anyway, will it? If people have been ordered free, they are free—people against whom charges have been dismissed cannot be reindicted because the statute has run. Those things are settled. But what can the Congress do? You and I agree that there should be some legislation against subversion. What can the Congress do about this matter now?

Mr. FORDHAM. I do not really have any mature notion about that. I don't feel quite qualified to advise about that as to what particular change would be made there.

Mr. SOURWINE. All right, sir. I move to one more thing. The committee would like very much to have your opinion as to the constitutionality of Senator Jenner's bill. You said initially that you did not concede that—do you have any doubt about it?

Mr. FORDHAM. I have some doubt about it, on a rather broad theory with respect to its application to the cases coming up from the State courts. It isn't based on any specific provision of the constitution. It is based on a rather broader theory. We do have some broad theories of constitutionalism which are not based on express bases, such as the doctrine of intergovernmental immunity.

It does seem to me that there is a basis for developing a rational theory here to take away from the Supreme Court the jurisdiction to review State court decisions involving the interpretation of the Bill of Rights, carried over in the 14th amendment and so on, does involve, or would involve a kind of limitation upon the application of those provisions of the Constitution, which is out of harmony with the constitutional scheme. In other words, I put this in terms of a basic notion of the constitution scheme.

Mr. SOURWINE. You would then negative the plain language of the Constitution in article III, section 2, paragraph 2, because of this basic scheme that you speak about?

Mr. FORDHAM. Well, let us see about this plain language business. The Constitution says that the judicial power of the Supreme Court shall extend to certain things. Then it says that in certain of those things the Supreme Court will have original jurisdiction. As to all other things the Supreme Court shall have appellate jurisdiction. With such a caption you have it subject to such regulations as the Congress may prescribe.

Senator JENNER. That is right.

Mr. FORDHAM. I grant that Congress can make exceptions—I grant it can.

Senator JENNER. You do not question the constitutionality of this bill?

Mr. FORDHAM. It is a question of how far the exceptions go. Wait a minute. May I ask you a question? Does this business go to the point that you deny all appellate jurisdiction to the Supreme Court?

Mr. SOURWINE. There are two schools of thought about it. I am not attempting to advance my own opinion. I only advance it as a theory. I would like to know if you do agree or if you do not agree. I think you are aware that there are two long lines of cases.

The longer line, by all odds the majority line, is that the Supreme Court has no appellate jurisdiction except as it is granted by the Congress. Certainly, under that line of opinion, Congress could take it all the way—what Congress grants it can take away. That was followed in the *McCardle* case where you recall the 1867 statute did not deny authority. It simply withdrew authority previously granted by repealing the grant. And the Court says, "We do no longer have this grant of authority from the Congress. We do not have the appellate jurisdiction."

The other line, I believe you will agree, is the one which we might say is followed by Story, that the grant of appellate jurisdiction comes from the Constitution itself but is subject to the exceptions and regulations of the Congress, and that when the Congress, in passing the Judiciary Act affirmatively, said the Court shall have thus and thus jurisdiction, that would be simply an inverted way of expressing—

Mr. FORDHAM. Yes.

Mr. SOURWINE. That it was withdrawing jurisdiction, making an exception in all of the areas that it did not expressly include.

Mr. FORDHAM. Yes.

Mr. SOURWINE. Under that second line of cases, however, there is an explicit recognition of the right of the Congress to make exceptions. And it would mean that under that doctrine there is no place to draw the line at the point where Congress may not except, perhaps, at the top; in other words, if Congress should pass an act that says the Supreme Court shall have no appellate jurisdiction whatsoever, then it might be arguable under this secondary line of opinions which are cited that that act was unconstitutional but so long as they leave any appellate jurisdiction to the Supreme Court under that line of cases, it would be a constitutional act?

Mr. FORDHAM. Well, perhaps so, but there is the idea that a scintilla is not much of anything.

Mr. SOURWINE. You base that on the idea Senator Jenner's bill here strips the Court of all but its—

Mr. FORDHAM. I don't say, Senator, that I have any view that this part of the bill is unconstitutional. I am not saying that it is. But I do say that there is a, I think, respectable theory.

Mr. SOURWINE. Is there any case that you can think of?

Mr. FORDHAM. I cannot cite a case but I think that you can develop a respectable theory in line with the Story thinking that this—that to bring about this result with finality of decision in the State courts on matters of interpretation of Federal Constitution, provisions like the 14th amendment which expressly contemplates Federal enforcement, is out of harmony with the Constitutional scheme.

Mr. SOURWINE. Federal enforcement is not available, only through the Supreme Court.

Mr. FORDHAM. I know that is right. As a matter of fact, I frankly point out that the 14th amendment expressly says that the Congress shall have power to pass legislation to enforce the 14th amendment. I have that in mind.

Mr. SOURWINE. We have been unable here to find any case turning on the question or involving the question of Congress' power to regulate or make exceptions in which that power was denied or in which there was any contention by the Supreme Court that it should be. We haven't been able to find a minority opinion of the court which made that contention. And I wondered if you had run across some?

Mr. FORDHAM. I do not have any.

Senator JENNER. If you do, will you let us know about it?

Mr. FORDHAM. I shall, sir,

Senator JENNER. Thank you very much.

Our next witness is Mr. J. Benjamin Simmons.

Give your name, please, for the record.

Mr. SIMMONS. My name is J. Benjamin Simmons.

TESTIMONY OF J. BENJAMIN SIMMONS

Mr. SOURWINE. Do you have a prepared statement?

Mr. SIMMONS. I do not, Mr. Sourwine. But let me say at this point, I was there with Mr. W. E. Michael yesterday, and I have worked with Mr. Michael and I want the record to show that I have approved the written statement which he filed in connection with his testimony before the committee yesterday.

Senator JENNER. All right.

Mr. SIMMONS. I reside at 409 East Melbourne Avenue—

Mr. SOURWINE. What is your business?

Mr. SIMMONS. Silver Spring, Md. I am a member of the bar of the District of Columbia. I am, also a member of the bar of the State of Maryland and the State of Virginia. And I am admitted to practice before the Supreme Court. I am a member of the District Columbia Bar Association, and the American Bar Association. And I have been in private practice here in a Washington law firm for the past 10 years.

And Mr. Chairman, let me say that I will not burden the record unduly. I am somewhat cognizant of the testimony that has preceded me on behalf of the—particularly those witnesses who have approved this bill.

I share the view that this is a good bill. That the provisions of this bill should be enacted into law.

Under the first provision of this bill having to do with the power of Congress to investigate, I must confess that I am not an authority on that. I do not propose to be. But it does seem to me that the Watkins decision has placed Congress in a straitjacket so far as conducting necessary investigative work in order to ascertain the laws that are beneficial to this country are concerned. And I think that Justice Clark in that decision confirms what I think about it, that the Supreme Court action in that case was both unnecessary and that it has set up an unworkable criteria. I do not see how the Congress can legislate in the vital field of subversion and in this crisis that we have now where there are people in this country advocating the overthrow of our Government by force and violence, and they are given the immunity in advocating violent overthrow of this Government by force and violence as Mr. Sourwine pointed out, so long as they do not incite to action.

Aren't we being naive in not knowing the functions and purpose of the Communist conspiracy?

Let me talk about the Jencks case a little more where there were 14 Communists convicted under the Smith Act in California, before a jury. They were convicted, and then the Supreme Court of the United States held that all they did—all they did was advocate the overthrow of this Government by force and violence. And those persons were all members of the Communist Party.

Is there anybody so naive as not to know what the functions and purposes of the Communist Party is?

And if they can go around over this country advocating the overthrow of our Government by force and violence, if they have any overt act in mind they are not going to divulge it, and then they come before a committee of Congress and sit back with impunity and refuse to give the congressional committees information which the committee needs in order to legislate in that important field.

And I say that the Supreme Court has hamstrung the Congress which was never under the Constitution intended.

It is true that the Supreme Court of the United States can declare an act of Congress unconstitutional, but that does not mean that they can come in here and tell Congress how to run its business. And by the same token, the Congress cannot unduly impede the Supreme Court. And I don't think that is the intent of this bill, to spank the Supreme Court and say that "You do not decide right, therefore, we will take away your power."

The question is whether the Supreme Court had that right or should have that right in the first instance.

Let me pinpoint my thought in that by the Konigsberg case and the Schwere case, where the question was whether or not those two persons would be admitted to the bars of the California and New Mexico. And they came before the committee of barristers. In the Konigsberg case he refused to give his political views, refused to divulge whether or not he was a Communist.

MR. SOURWINE. That is not a matter of his political views, is it?

MR. SIMMONS. I do not think so, either.

MR. SOURWINE. You used the phrase "refused to divulge his political views." In asking him if he was a member of the Communist Party is he being asked about his political view or about a conspiracy to overthrow the Government?

Mr. SIMMONS. I think this paragraph right here from the Supreme Court decision will pinpoint my thought on that. It is taken from the *Konigsberg* case (383 U. S. 258), and it reads:

* * * was questioned at great length about his political affiliation and beliefs. Practically all of these questions were directed at finding out whether he was or ever had been a member of the Communist Party.

Mr. SOURWINE. Was there anything about political affiliation and belief as the Court had said?

Mr. SIMMONS. No. Let me read this on—I think it will bring out my point:

Konigsberg declined to respond to this line of questioning, insisting that it was an intrusion into areas protected by the Federal Constitution. He also objected on the ground that the California law did not require him to divulge his political association or opinions in order to qualify for the bar and that questions about these matters were not relevant.

Well now, I think that when the Supreme Court gave him first amendment protection, in his position before the bar I think that by the very fact that *Konigsberg* refused to go forward, we know as lawyers that the test is whether or not you possess good moral character—and when they asked him questions pertaining to or that reflected on whether or not he had good moral character, namely, whether or not he was a Communist—

Mr. SOURWINE. If being a Communist is only a matter of political association and belief, it is no reflection upon you to be one, is it?

Senator JENNER. No.

Mr. SIMMONS. No.

Mr. SOURWINE. The question is whether it is a matter of political belief and affiliation or whether a matter of being associated with a conspiracy against the Government—which is it?

Mr. SIMMONS. I think, Mr. Sourwine, it goes right to the heart of the issue as to whether or not he possesses good moral character, his affiliations and associations—perhaps his church membership and all. I think that the bar examiners of a State should be given wide latitude in a matter of that kind. And the point is that it is only a State question. It is not a Federal question involved in that. Who is going to be affected by a lawyer practicing law in California or any other State? The citizens of that State are. And when he is given protection up through the supreme court of that State, I say then there is no Federal question involved. And I think that the provision of this bill is entirely proper, to leave that within the realm of the State courts.

Mr. SOURWINE. Leaving that for just a moment, that is your conclusion with regard to the bill? I would like to ask for the record your conclusion whether membership in the Communist Party is a matter of political belief and affiliation, or whether a matter of being a part of a conspiracy against the Government?

Mr. SIMMONS. I think it is a conspiracy to overthrow our Government by force and violence. I think anybody is absolutely silly not to face up to that.

Now in the *Nelson* case, there is another usurpation of power where *Nelson* was convicted in Pennsylvania under the Smith Act, and that came before the Supreme Court, and gratuitously, I think, the Supreme Court held that the Federal statutes had preempted that field

that was not even before the Supreme Court. But unquestionably, as Mr. Sourwine pointed out to the other witnesses, the Supreme Court did that because in 350 United States, page 604, this sentence appears:

'Taken as a whole they—

these various acts—

evidence a congressional plan which makes it reasonable to determine that no room has been left for the States to supplement it. Therefore, a State sedition statute is superseded regardless of whether it purports to supplement the Federal law.

The Supreme Court has taken away from the States the right to investigate and prosecute communism; and persons who are advocating and who are actually attempting to overthrow this Government have preempted the States. And, therefore, that again brings it into a Federal realm which is again a usurpation of power or creating a strong central supreme court which we think is wrong.

Mr. SOURWINE. There is another factor in there, that the Supreme Court here in this case, as it has in other cases has presumed to fix a broad policy and to seek to effectuate it outside of the limits of the case then being decided.

Mr. SIMMONS. That is abundantly true.

Mr. SOURWINE. They did not simply refer to the Pennsylvania statute. The Court has deliberately used reasoning and deliberately used language pointed at having the effect of invalidating all State statutes in this case?

Mr. SIMMONS. That is true. The language which I read there clearly does that.

Mr. SOURWINE. That is what I had reference to earlier when I spoke about the narrowing of the political area in which the Court traditionally is supposed to keep its hands off. This is an invasion of that area and a usurpation by the Court of an assumed power to make law for all cases throughout the country; isn't that right?

Mr. SIMMONS. That is right, Mr. Sourwine. You express my views perfectly. And in the Nelson case, the conviction there was under the Federal statute. Nothing was involved in that case regarding the State, being a State prosecution. But the Supreme Court took that occasion to preempt the field, set itself up, take away—

Mr. SOURWINE. Are you saying Nelson was not convicted under the State law?

Mr. SIMMONS. Convicted under the Smith Act.

Mr. SOURWINE. It is the case of the *State of Pennsylvania v. Nelson*. He was tried and convicted under the State act; isn't that right?

Mr. SIMMONS. My notes here indicate it was the Smith Act. But I know the committee has that case in the docket here. So if I am wrong on that, it does not affect my point one way or another; namely, that the Supreme Court has preempted the State. And there are 42 States as well as Alaska and Hawaii that have these sedition statutes. And it preempted those.

That concludes my argument. I thank you.

Senator JENNER. Thank you very much.

The next witness is Mr. Kent Courtney.

You may state your full name for the committee, please.

Mr. COURTNEY. My name is Kent H. Courtney.

Senator JENNER. Where do you reside, Mr. Courtney?

Mr. COURTNEY. 7314 Zimble Street, New Orleans, 18.

Senator JENNER. What is your business?

Mr. COURTNEY. I am in the publishing business.

Senator JENNER. You are appearing here as an individual or do you represent some organization?

Mr. COURTNEY. I am appearing here as an individual, and my testimony as it develops will show that I presume to appear for others, too.

Senator JENNER. You may proceed.

STATEMENT OF KENT H. COURTNEY, PUBLISHER, THE INDEPENDENT AMERICAN, NEW ORLEANS, LA.

Mr. COURTNEY. I thank this committee for the opportunity to appear before it. My name is Kent H. Courtney, and I am the publisher of the Independent American, a national citizen-action newspaper with subscribers in all 48 States.

We have a total circulation of more than 25,000 per month. I made application to testify before this committee after the suggestion had been repeatedly made by our subscribers in various parts of the country. These America-loving citizens are seriously concerned about the need for this legislation as proposed by Senator William E. Jenner, of Indiana.

I am testifying favoring this legislation.

During the past 3 years of 1955, 1956, and 1957 our newspaper was named Free Men Speak. During that time it has been sent to all of the Members of the Congress. These subscriptions were paid for by the grassroots subscriber list of our newspaper. We changed the name this year to the Independent American because we believed that this new name properly described the content and the policy of this experiment in patriotic journalism.

As publisher of this newspaper I am associated with a number of local and national organizations concerned with reducing the size of our Federal Bureaucracy, the reduction of taxes, the preservation of our constitutional States rights. I am a member of the Chamber of Commerce of the New Orleans Area, the Public Affairs Research Council of Louisiana, and the American Association of Small Business.

Last year I was a member of the national Americanism commission of the National American Legion and was deeply perturbed by the continuing pro-Communist decisions of the Supreme Court of our Nation.

I am associated with the American Progress Foundation which seeks to get Government out of competition with private enterprise so that we can all get a reduction in taxes.

But all of these activities will be meaningless and without purpose if this presently constituted Supreme Court continues to set free the enemies of our free-enterprise system; if this Court continues to unleash in the name of freedom the very people who are working for a system of economics and government that will make personal slaves of each of us and will effectively destroy all of the benefits of our free competitive opportunity enterprise system.

Who do I speak for, then?

I speak for myself, an independent American, and I believe all of the readers of our paper. There is one interesting feature of this expression of grassroots opinion, and that is that this battle to preserve this Constitutional Republic is not sectional. Our readers in Oregon, for instance, express the same thoughts as readers in Georgia. Our readers are true "independents." They love this country and they do their own thinking.

The purpose of our paper, the Independent American, is to bring together in one paper, a collection of the very best of the conservative editorial opinion throughout the country.

The testimony which is already in the record of these hearings on S. 2040, limitation of appellate jurisdiction of the United States Supreme Court, should be sufficient for any fairminded, intelligent person who loves his country and who realizes the danger of the international Communist conspiracy, to come to the conclusion that the present members of the United States Supreme Court need to be restricted in what they can rule upon.

In the January 1957 issue of our newspaper, then called Free Men Speak, we wrote an editorial entitled "Congress Has Power to Curb Supreme Court—Constitution Provides Way," and we cited article 3, section 2, clause 2 of the Constitution.

In the past year many hundreds of thousands of words have been printed about the recent decisions of the Supreme Court, and, as a result, there has been a general awakening throughout the country by the American public that not only has this Court continued to hand down decisions favorable to our enemy, the Communists, but that this Court has arrogantly usurped the legislative activities of the people's elected representatives in Congress, until now the Supreme Court has become the "third" House of Congress.

In this era of "pressure politics" and "liberal blocs," one very important "pressure group" should not be overlooked. I refer, of course, to the American voter.

I come before this respected committee to tell you that millions of people throughout the entire United States have already awakened to the constitutional crisis inherent in the recent decisions of our Supreme Court.

I believe that history will prove that America owes a debt of gratitude to the courageous daily newspapers of this country who see it as their patriotic duty to inform their millions of daily readers of the ominous portent of recent High Court decisions.

How does the editorial writer of a daily newspaper arrive at his decisions?

How does he decide what to write about?

I am going into this in order that you can judge for yourself the importance of the nationwide storm of editorial protest that has taken place after each series of decisions, popularly known as Red Monday that this current Supreme Court has announced which freed Communists and their fellow travelers.

An editor listens to his advertisers through the business office of his paper. An editor uses his commonsense based on his education in the law, in journalism, in sociology, in business, in economics. Writers and editors come from every field of training.

Editors read the Congressional Record and the very valuable appendix which gives them an opportunity to study both sides of almost every argument as various elected representatives enter editorials which reflect their own thinking and the thinking of the newspapers in their congressional district or their State.

Editors listen to hometown folks in their clubs, and in their regular social, day-to-day contacts among business friends and family. Editors read those letters to the editor which is the real voice of the people.

Therefore when an editor prints a scathing attack on the Supreme Court, he is representing the views of thousands, perhaps millions of readers, depending on the size of his paper's circulation.

Mr. SOURWINE. Do you think that is always true, Mr. Courtney?

Mr. COURTNEY. Not always true, because of the nature of instruction in some of our journalism schools which has been going on for the past 20 years.

Mr. SOURWINE. Do you think you can take editorials of the newspapers of the country and line them up and compare the circulations of the papers and get any kind of a criterion of the views of the people of the country?

Mr. COURTNEY. I will attempt to prove that as I go on.

Mr. SOURWINE. For instance, when the Chicago Tribune writes an editorial against this bill, do you think that means that the people of Chicago or the majority of the readers of the Chicago Tribune are against this bill?

Mr. COURTNEY. Not entirely, but I will attempt to prove that a large segment of these newspapers throughout the country, including the Chicago Tribune, are aghast at the decisions that have freed the Reds—and they may differ in part with the effect of this bill.

Mr. SOURWINE. How many newspapers in the country write their own editorials and all of their own editorials?

Mr. COURTNEY. I would say that, in the area of weekly papers, a great number of them do. I haven't made a statistical study on this, but from my short experience of the past 3 years I would say that.

Mr. SOURWINE. How many papers use "canned editorials"?

Mr. COURTNEY. It depends on how many columns they buy, and some of the "canned editorials" are good and some are bad.

Mr. SOURWINE. Well, that is true of any editorials—some are good and some are bad.

Mr. COURTNEY. But the editor who selects a series of "canned editorials" will select one that will go over with his group readership, for the most part. I think that answers that question.

Mr. SOURWINE. So if an editorial against this bill is widely printed and sent out by, say, NEA or NANA, do you think that the fact it is widely printed means that the people of the area where it is printed are widely against this bill?

Mr. COURTNEY. No.

Mr. SOURWINE. Or do you think merely that a propaganda device has been used to propagandize the people against this bill?

Mr. COURTNEY. That would involve another congressional investigation, wouldn't it?

Mr. SOURWINE. I am asking you. You are the expert in the newspaper business.

Mr. COURTNEY. I prefer not to be called an expert.

Mr. SOURWINE. You are testifying here on the subject. You brought it up.

Mr. COURTNEY. Yes.

Mr. SOURWINE. I want your opinion on it.

Mr. COURTNEY. I would say that there are some groups of editorial writers of columns for services that attempt to mold opinion.

Mr. SOURWINE. Why, of course, that is true. Everybody knows that.

Mr. COURTNEY. Right; but at the same time, I am claiming that a great number of these editorials reflect the opinion of the people.

Mr. SOURWINE. As a matter of fact, most editors are trying to mold and lead opinion when they write an editorial; aren't they?

Mr. COURTNEY. I thank you for your opinion.

Mr. SOURWINE. They are not simply trying to reflect it; are they?

Mr. COURTNEY. I claim that it is a two-way street—it works on both sides—because I have seen editorial writers having to back and fill after making a step in the wrong direction.

Mr. SOURWINE. I wanted to get your opinion.

Mr. COURTNEY. All right.

Senator JENNER. Proceed.

Mr. COURTNEY. Speaking of circulation and readership, I am informed that approximately 50 percent of the readers of a daily newspaper look at and read some item on the editorial page.

The readers of the Independent American, which has subscribers in all 48 States, constitute a working group of patriotic Americans. They clip editorials from their local newspapers which they believe we would be interested in reprinting. From our mail, therefore, we receive a daily impression of the Nation's editorial reaction to the news.

It is from this collection of editorials sent to us by our readers that I now list the names of the newspapers that have had from 1 to 15 editorials critical of the Supreme Court during the last year. That is prior, in some cases, to this bill being introduced.

[After the name of each newspaper is the circulation of the individual paper, as reported in the Annual Yearbook of Editor and Publisher]

Los Angeles Examiner	352, 883
Santa Ana (Calif.) Register	44, 655
Albuquerque (N. Mex.) Tribune	26, 605
Valley Evening Monitor (McAllen, Tex.)	13, 045
Tulsa (Okla.) Tribune	169, 185
Los Angeles (Calif.) Times	439, 472

Speaking of the California Times and Examiner, look, here's a headline from last June 18, 1957:

Reds boast 14 wins. Supreme Court rulings are greatest victory, say the Communists. Five California leaders set free.

This is the kind of thing that people react to.

Omaha (Nebr.) World Herald.....	250,350
Dallas Morning News.....	208,067
Houston Chronicle.....	202,888
St. Louis Globe Democrat.....	310,243
The Chicago Tribune.....	935,043
The New Orleans Times Picayune.....	184,673
Alexandria (La.) Daily Town Talk.....	24,155
Cincinnati (Ohio) Enquirer.....	212,870
Kingsport (Tenn.) News.....	5,050
Detroit Free Press.....	450,708
Detroit Times.....	306,450
Savannah Morning News.....	53,178
Palm Beach (Fla.) Post.....	20,681
Memphis Commercial Appeal.....	208,264
Charleston (S. C.) News and Courier.....	57,039
Richmond (Va.) News Leader.....	102,010
The New York Journal American.....	703,440
The New York Mirror.....	800,471
The Manchester (N. H.) Union Leader.....	40,517
The Wall Street Journal.....	420,761
Total.....	8,004,510

These are just the ones that were sent to us through the mail from our readers.

Mr. SOURWINE. How many daily newspapers are there in the country?

Mr. COURTNEY. I estimate approximately 900. Don't hold me to that.

Mr. SOURWINE. How many papers have you listed?

Mr. COURTNEY. I haven't claimed that this—

Mr. SOURWINE (interposing). No, no.

Mr. COURTNEY. Twenty-seven.

Mr. SOURWINE. Do you know anything about the policies or attitudes in this regard of the other eight hundred and seventy-odd papers?

Mr. COURTNEY. I don't presume to. Remember that this is just a scattered selection of newspapers. This is by no means complete. Here, therefore, are at least 9 million readers, at least one-half of whom are aware of the danger of the recent decisions of the Supreme Court. It is estimated half the people who read papers read the editorial page.

Public opinion will surely be the final answer to the excesses of this Supreme Court which were so well covered in a recent series published by the Indianapolis Star entitled "The Runaway Court," and many of them in this series were entered in the Congressional Record. This series of brilliant editorials was reprinted in newspapers in every section of the country, thus informing additional millions of American voters concerning this constitutional crisis. And what are these daily newspapers telling their millions of readers throughout the country? Here are a few examples:

The Albuquerque (N. Mex.) Tribune:

Fundamental to the point of view which produced these Supreme Court decisions is the refusal—or legal inability—of the Court to consider communism a criminal conspiracy to advance the interests of an unfriendly foreign power—a "clear and present" threat to national security. The decisions dramatize the need for law which plainly defines and outlaws this conspiracy.

New York Daily News:

In decision after decision, the Warren Supreme Court has befriended the Communists and their Kremlin masters, and has weakened the defenses of the American people against this enemy.

The News and Courier (Charleston, S. C.):

In its concern to make sure that people of Communist sympathies should have fair treatment in the United States, the Supreme Court has ruled that "preaching abstractly" overthrow of the United States Government by violence is no crime so long as the preacher doesn't advocate "action to that end." The point is so fine that we cannot expound it.

Dallas (Tex.) Morning News:

The recent Supreme Court decisions turn the clock back to the heyday of the Institute of Pacific Relations, to the delivery of China to the Communists, to the acceptance of Hiss and Lattimore and White as our advisers in government.

John O'Donnell, national columnist:

The majority of the Bench are strictly second-rate political lawyers, professional incompetents, and the laughingstock of their better educated and better trained colleagues.

George Sokolsky, noted columnist:

When, in a court, the United States is consistently the loser, the subject requires very profound consideration. Maybe the United States needs an American Supreme Court.

New York Mirror:

* * * the law is so loosely interpreted that decisions are handed down by the nine old men of the Supreme Court which give to Communists every opportunity to work for the destruction of the United States as they have destroyed the government of some 15 nations and deprived the peoples of those countries of their liberties and human rights.

All the Communist decisions of the Supreme Court need to be read together to appreciate their enormity.

No law enforcement agency, Federal, State, or local, will now be able to set up any agency to defend this country from Communist infiltration and penetration.

Manchester (N. H.) Union Leader:

Now comes the Supreme Court of the United States to tell Congress that it is none of its business what certain individuals do; that they cannot inquire as to whether a man has been a Communist or not. The Supreme Court in one swoop has practically nullified the investigating powers of Congress.

New York Daily News:

Reversing the conviction of John T. Watkins of contempt of Congress in refusing to answer questions about past Communist associations, the Supreme Court presumed to curtail Congress' power to investigate anything and anybody in the public interest * * * If Congress and the White House continue to take this stuff lying down, they will roll out the red carpet for dictatorship by the Supreme Court, which, judging from its present policies, will then open the country to Communist conquest, from within or from without.

Savannah (Ga.) Morning News:

All of which leads us, inevitably, to agree with Representative Howard W. Smith (Democrat, Virginia), author of the Smith Act by which 14 California Communists had been convicted. Congressman Smith commented: "I am not surprised. I do not recall any case decided by the present Court that the Communists have lost."

Burlington (N. C.) Daily Times-News (quoting from an article by Thurman Sensing, who represents an industrial group):

That the Supreme Court has lost the respect of the public is quite evident to anyone who has his eyes open. Neither is this loss of respect confined to any one region of the country. But the deplorable fact is that this loss of respect is evidenced most vigorously by those who do understand matters of law—by outstanding practitioners of law, by justices of State supreme courts, by Members of Congress. The severe denunciations of the Supreme Court by individuals of this type cannot be passed off lightly.

I have attempted to prove that an ever-increasing number of Americans are aware of the frightening aspects of the recent decisions of the High Court, and that Congress must curb, through this bill, possibly, this "Runaway Court," as provided by the Constitution, article 3, section 2, clause 2.

I wish to add: The laws should reflect the will of the people.

What are we to think concerning the recent action by members of the High Court? Are they ignorant of the ultimate aims of the international Communist conspiracy to destroy this Republic? Have they no knowledge of what communism is? Or—? Well, I prefer to give the august members of the Supreme Court the benefit of the doubt, and believe that their recent decisions are based on their terrifying ignorance of world communism, and also on their ignorance of the United States Constitution, its stated words, and the spirit in which it was written by our forefathers who pledged their "lives, liberty, and sacred honor" in another fight against tyranny.

The "big guns" of the liberals of both political parties are booming the propaganda of the need for Federal aid to education. Although I and my paper firmly oppose Federal aid to education, there is one program of education which I believe that conservatives throughout the country would enthusiastically support. I refer, of course, to Federal aid to educate the Supreme Court.

The cost of such a program would be 1 item in the Federal budget that would have the support of all the "budget-cutters" and conservatives of both parties.

The members of the Supreme Court, and I wish to add, all critics of this law, ought to be required to attend a course of lectures on the threat of the Communist conspiracy to the independence and the sovereignty of the United States of America. They should be required to read that excellent book on Communist infiltration by Louis Budenz, entitled "The Techniques of Communism."

To increase their education, to enlarge their understanding, the members of the Supreme Court should be required to attend the hearings that are conducted by the Senate and House Investigating Committees when said committees are making inquiries regarding the activities of alleged members of the Communist Party.

Members of the Communist international conspiracy are now openly operating throughout the United States and preaching the overthrow of our Government, as a result of recent decisions of the Supreme Court.

They feel that they are now over the hump. In a recent meeting up in New York, they said this was a new Bill of Rights, these recent decisions during 1957. They said, "Now we can go forward."

Both political parties are in favor of billions of dollars for "defense against communism." Why, then, I ask—should we spend billions of the taxpayers dollars to defend America from communism abroad—and, at the same time, befriend Communists at home via Supreme Court decisions?

The Communist Party members and their fellow travelers are not worried about the fact that this committee may rewrite the law as to the appellate jurisdiction of the Supreme Court. These Communists are counting on their "friends in high places." (The Communist-befriending decisions of the Supreme Court in the past years

are tragically ample proof of this!) But, I sincerely believe that both the Communists and the Supreme Court, in their mutual arrogance, have overlooked the ultimate controlling factor.

I refer, of course, to the American voter.

The domestic Communists and their liberal associates have been depending on the narcotic of apathy to anesthetize the American people to the dangers on our very doorstep. But—the American people are not asleep, as I have attempted to point out.

The American voter is looking for a defender. Conservatives of both parties who believe in the United States Constitution as it was written—not as it is presently interpreted—are looking to this committee to provide the defense against Communist infiltration of this Republic.

It will be a simple matter to measure the fear of the leftwing, pro-Communist element in this country today. All you have to do is measure the vehemence and concentration of their attack on this bill to curb the Supreme Court.

What are they afraid of?

Are they afraid that true Americans will find out that they—those who wish to circumvent and emasculate our Constitution, are merely a minority?

Therefore, it is imperative that this question of curbing the "Third House of Congress," the Court, be openly debated on the floor of the Congress. It is imperative that the people of these United States be given a chance to see who defends the pro-Communist decisions of the Supreme Court, and who are the brave men who will attack the pro-Communist decisions of the Supreme Court.

Doubtless, attempts will be made to pigeonhole this bill in committee. But, let any who would be so unwise, be mindful of the nationwide public resentment against these recent decisions of the Supreme Court. Righteous indignation, when it sweeps a nation, can be as overwhelming as a hurricane.

Gentlemen, the future survival of America is in your hands.

I was talking yesterday to Richard Arens, of the House Un-American Activities Committee, and he stated when he makes talks and visits with groups across the country, that those people are alert to the danger of the Communist conspiracy, and I believe that the honorable Senator presiding this morning over this committee, Senator Jenner, will agree with that.

Senator JENNER. Thank you, Mr. Courtney. Do you have any questions, Mr. Sourwine?

Mr. SOURWINE. No, sir.

Senator JENNER. There being no further questions, the committee will stand in recess until 2 o'clock this afternoon.

(Whereupon, at 12 noon the committee was recessed, to reconvene at 2 p. m., Friday, February 28, 1958.)

AFTERNOON SESSION

Senator HRUSKA. The meeting will come to order. This is a continuation of the hearings on S. 2646. Mr. Sourwine, I understand that you have some material that you would like to incorporate in the record at this time.

Mr. SOURWINE. Yes, Mr. Chairman. Here is a letter addressed to Senator Holland from Mr. Earl G. Nicholson, of Palatka, Fla. It is transmitted with a referral slip from the Senator who asks that it go on our record.

Senator HRUSKA. It should become a part of our record.
(The material referred to is as follows:)

PALATKA, FLA., February 10, 1958.

HON. SENATOR SPRESSARD L. HOLLAND,
Senate Office Building, Washington, D. C.

DEAR HON. SENATOR HOLLAND: In regard to the United States Senate subcommittee hearing on S. 2040, as introduced by Senator Jenner, of Indiana, after having read this report, I am most happy to see that some action is contemplated in heading off the usurpation of the legislative powers of the United States Senate under the guise of sociological, philosophistic philanthropic system of government by well-meaning members of the Supreme Court of the United States of America, who delve more into the very fibers of our American way of life, breaking a strand at a time, until in a real time of crisis or need, we cannot withstand the tension and stress.

It is my sincere hope that this committee will prevail upon the Members of Congress to accept the action undertaken in S. 2040.

Would you please file the statement made in this letter in the records of the Internal Security Subcommittee.

Thanking you, I am

Respectfully yours,

EARL G. NICHOLSON.

Mr. SOURWINE. On Tuesday, Mr. Frank B. Ober of the Maryland bar will testify before us. In connection with his testimony it will be desirable to offer for the appendix of the record an oral statement which he wrote which appeared in the journal of the American Bar Association. As the chairman knows, we are up against the problem of getting our record printed by a deadline. It would facilitate the printing if this could be offered for the appendix now, and since it will appear in a different part of the record, it can do no harm and will help us in getting it in print.

Senator HRUSKA. It will be accepted for the record and will be printed in the appendix.¹

Mr. SOURWINE. This, Mr. Chairman, is a portion of the testimony before the subcommittee by a witness under oath with regard to the jubilation of the Communist Party over certain decisions of the Court. I would ask that this might be printed in the appendix of the record.¹

Senator HRUSKA. Very well. It will be accepted for that purpose.

Mr. SOURWINE. Mr. Chairman, this is along the same line. It is an issue of the publication of the American Legion entitled the "Firing Line," dealing with the reaction of subversive elements to certain Supreme Court decisions.

Senator HRUSKA. That will be accepted for the record for inclusion in the appendix.¹

Mr. SOURWINE. This, Mr. Chairman, is a communication received from Mr. Samuel B. Pettengill of Grafton, Vt. He was asked to appear to testify. His letter indicates that he could not do so, but he suggested that there be included in the record an essay he had written on this subject, and I offer his brief note and that essay for the record.

Senator HRUSKA. Very well.

¹ See appendix II.

(The document referred to is as follows:)

GRATON, Vr., February 17, 1958.

Mr. J. G. SOURWINE,
Committee on the Judiciary,
United States Senate, Washington, D. C.

DEAR MR. SOURWINE: I appreciate Bill Jenner's suggestion that I be asked to testify in favor of S. 2040.

I could not make any statement of value without much previous study and I regret that I am already so committed on other matters that I simply do not have the time.

I am really sorry that I must decline.

Sincerely yours,

SAM PATTENGILL,
Former Member of Congress.

P. S.--Possibly the enclosed Human Events letter has enough bearing on the need for S. 2040, as to be included in the record.

[From Human Events, vol. XIV, No. 40, October 5, 1957]

WHAT IS "THE LAW OF THE LAND"?

By Samuel B. Pettengill

The idea that whatever a Judge says is law is actually "the law of the land" and must be obeyed by everyone as a matter of conscience and good citizenship is spreading like seeds in a whirlwind.

There are degrees of intensity of conviction with respect to this idea, depending on whether the Judge is a State Judge, a lower Federal court Judge, or a United States Supreme Court Judge.

Decrees of the Supreme Court of the United States on constitutional questions are given the highest priority as "the law of the land." No such presumption of impeccability is given the acts of constitutional lawbreakers—State legislatures and Congress.

The Constitution, it is said, is "what the Supreme Court says it is." This quote is attributed to Charles Evans Hughes, but because he was a great lawyer I have always supposed he said it with something of a chuckle beneath his beard.

If the idea that "the Constitution is what the Supreme Court says it is," no matter what, becomes uncritically accepted, it can lead to more harm than segregation or integration or any other issue likely to arise. It can lead to the final destruction of what is left of the boundary lines between the States and the Federal Government. That would, of course, practically destroy the Constitution.

I somewhat doubt that this nostrum will be permanently swallowed by the American people without regurgitation. Perfumed as it is now with political incense, the horsensense of the people will nevertheless remind them that, of those who now bow the knee to our judicial priesthood, few paid much attention a few years back to its decrees that the Volstead Act and the 18th amendment were also constitutional and the supreme law of the land—binding on one and all.

Nevertheless, the doctrine is now epidemic and needs to be examined before a new generation is completely brainwashed by long exposure to it.

We begin with a recent case. Two Army wives murdered their husbands while stationed abroad. The women were convicted by court-martial and sentenced to life imprisonment. On June 11, 1950, the United States Supreme Court held their trial was constitutional. It became so it is said, "the law of the land" that Army courts could try Army wives.

On June 10, 1957, on rehearing, the Supreme Court held that the act of Congress which authorized their trial by court-martial was unconstitutional and the murderers went free. What was the "law of the land" in 1950 ceased to be the law of the land 1 year, less 1 day, later. It was the same case, same wives, same facts, same dead husbands. Nothing new had been added or changed.

Nothing had been written into or erased from the Constitution in the meantime, to my knowledge, but the Constitution had changed. It commanded one thing one day, and the opposite on a following day. A majority of nine men said so.

Now Judges have the right to change their minds, but who changed the Constitution? Not Congress, nor the people by amendment. The Court had changed

it. If the Constitution is "what the Court says it is," then the Supreme Court is a supreme legislative body, or a superconstitutional convention.

Told of this murder mystery, even a schoolboy will see that there is a flaw somewhere in this notion that what a Judge, or several Judges, say is the law of the Constitution is necessarily so.

If in this case, some State governor or Jailer had been required to enforce the Court's first decision that the women had been given a constitutional trial and must be held in prison for life, but had challenged the correctness of the decision and refused to carry it out, would he be held in contempt of court by the American people a year later when the Court admitted that its decision was wrong and not the law of the land?

No. The fact is, of course, that the Supreme Court has reversed itself many times on constitutional questions. It attaches no such sanctity to its own previous judgments as the people are now told they must render. The Court has specifically held that Judges, as well as executive or legislative officers of government, State or Federal, sometimes act unconstitutionally.

During the time since the 14th amendment was ratified on July 21, 1868, down to May 17, 1934, a period of 86 years, the Supreme Court had held (although not in a public-school case) that the furnishing by public authority of equal but separate facilities to persons of different races or colors was not forbidden by the 14th amendment. During that long period neither Congress nor the people, by amendment, had seen fit to change the amendment to give it the meaning which the Court has now given it.

If ever court decisions and long usage and acceptance of them by the sovereign people during three generations of time had given a fixed meaning to words, this would seem to be a settled thing.

On the day the Court ruled in the school case, segregation was required by law or State constitution in 17 States, and in the District of Columbia (under the jurisdiction of Congress itself), and was permitted by law in 4 other States, a total of 22 jurisdictions, whose legislative bodies, including Congress, had acted in the belief that segregation in the schools was constitutional, if facilities were equal. At least seven of these States were outside the South.

In 1837, a year after Congress had proposed the 14th amendment, it established Howard University in the city of Washington as a separate coeducational institution of higher learning for colored men and women, as was, of course, common justice to them.

In 1862, while the war was on, Congress set up land-grant colleges for agriculture and the mechanical arts. In 1890, Congress authorized separate such colleges for white and colored students provided public funds for their support were equitably apportioned to them.

The school cases of 1954 reached the Supreme Court on appeal from four States—Kansas, South Carolina, Delaware, and Virginia—and the District of Columbia, where Congress itself had enforced or permitted segregation for over 80 years. On the way up, 3 United States district courts, each consisting of 3 Federal judges, as well as the Supreme Court of Delaware, relied on this long-accepted interpretation of the 14th amendment as "the law of the land" to the effect that equal but separate schools and schooling were constitutional. In the District of Columbia case, another United States district court had ruled to the same effect. All of these judges, State legislatures, and Congress were reversed by the Supreme Court, which also reversed its own previous ruling that had been "the law of the land" for 86 years. The Court held that everybody had acted unconstitutionally for 86 years.

In the light of these facts, the decision amounts to judicial legislation, or judicial constitutional amendment by a body of men who have no constitutional power to enact law, or to amend the Constitution as the Court itself has many times said it has no power or right to do.

Strangely enough, the Supreme Court in the same term of court, had before it the question whether organized professional baseball was in violation of the Sherman Antitrust Act, passed in 1890. In 1922, it had held that it was not in violation. The Court in 1953 said that "The business has thus been left for 30 years to develop on the understanding that it was not subject to antitrust legislation," and as Congress, the lawmaking body, had not seen fit to change the antitrust law to apply to baseball, the Court would not attempt to do so by interpretation.

As stated above, Congress, which proposed the 14th amendment for ratification by the States in 1868, at about the same time required or permitted segregation in the public schools of the District of Columbia. Succeeding sessions of Congress never changed this practice in the district.

Can it be supposed that Congress would have required or permitted segregation in the District of Columbia back in the 1860's, where it had and still has exclusive jurisdiction, if the members of the House and Senate thought the 14th amendment, which they then were proposing to the States, forbade segregation?

It is an ancient maxim that "the intention of the lawgiver is the law." This contemporaneous action of Congress with respect to segregation in the District of Columbia is conclusive evidence that the 14th amendment was not intended by Congress to make segregation in the schools unconstitutional. The action of the State legislatures which ratified the 14th amendment, and at the same time, or shortly thereafter enacted statutes requiring or permitting segregation in their own States, also shows that the intention of the lawgiver in ratifying the 14th amendment was not what the Supreme Court now says it was.

The Constitution, of course, says that only the people, through their Congress and State legislatures (or conventions) have the power to amend the Constitution.

But now the Supreme Court has done so in a case which concerns, directly and intimately, more families than any other decision it has ever rendered.

The Constitution says that all legislative powers granted the Federal Government are vested in Congress. Congress has never acted on this matter. It has not acted now. The public schools of the Nation are now being ordered what to do, and when to do it, by the Judicial branch of the Government. And this despite the fact that the 14th amendment itself states that Congress shall have the power to enforce its provisions.

The Constitution does not say that Supreme Court decisions are the supreme law of the land. That high rank is given only to the Constitution itself, laws passed by Congress in pursuance thereof, and treaties made by the United States. The judges in every State are bound thereby. But judges are constitutionally bound only to support the Constitution, constitutional acts of Congress, and treaties.

They are not constitutionally bound to support what the Supreme Court says the Constitution is. Nevertheless, as a practical matter, it is important that the Constitution, acts of Congress, and treaties be given uniform application throughout the Union. Hence, lower Federal judges and State judges, as well as public officials, generally and properly follow the Supreme Court's rulings, even if they think they are wrong. And surely lower judges who are overruled by the Supreme Court must think the Supreme Court is wrong in overruling them, many of whom had longer experience on the bench than the average Supreme Court judge.

But the yielding of their judgment to the judgments of the Supreme Court is done for practical reasons, not because it is their constitutional duty to do so.

A Supreme Court ruling is not the law of the land. It is only the law of the case before it. Its judgment is final as to the parties to the case for the simple reason that there being no higher court, they are stuck with it, right or wrong.

Abraham Lincoln made this perfectly plain in his opposition to the Dred Scott decision. He admitted that as to Dred Scott, the decision must control. But it would not control A. Lincoln. He said that if he were a Member of Congress and a similar question arose, he would not be bound by the Dred Scott decision. (See Abraham Lincoln, His Speeches and Writings, Basler, p. 396.)

Thomas Jefferson's views on this point were equally clear. "It is a very dangerous doctrine to consider the judges the ultimate arbiters of all constitutional questions * * *. The Constitution has erected no such single tribunal * * *. There are two measures which, if not taken, we are undone. First, to check these unconstitutional invasions of State rights by the Federal Judiciary * * *. The Government was divided into three branches in order that each should watch over the others and oppose their usurpations." (See the Jefferson Encyclopedia, Foley, pp. 845-846.)

Thus spoke the founders of our two once great parties, to the same effect.

The dilemma confronting us is not constitutional: it is a practical one. It is similar to that confronting the authors of the Declaration of Independence, when they said:

"Prudence, indeed, will dictate that governments long established should not be changed for light or transient causes; accordingly all experience hath shown that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed."

But when a long train of abuses and usurpations are so great as to outweigh the values of uniformity and stability in the law, a different question presents itself.

A majority of the Supreme Court has been upsetting long established law and creating chaos—the very thing citizens are being told not to do by refusing to accept its decisions.

It may be said that this discussion is water over the dam. Politics being what it is, it is not likely that the school case will be undone.

Nevertheless, if the nonsense that the Constitution is what the Supreme Court says it is is dissipated by honest discussion of this or any other case of judicial usurpation, it may help preserve the Constitution and American liberties from further erosion.

One of the greatest of Supreme Court judges, Justice Story, said: "The Constitution was reared for immortality, if the work of man may justly aspire to such a title. It may, nevertheless, perish in an hour by the folly or corruption or negligence of its only keepers, the people."

This quotation appears in a book he wrote "to promote and encourage the study of the Constitution of the United States by her ingenious youth." Would that his, or some other splendid treatise on the Constitution had been, and still was, a required text in every high school in the land.

If this had been done, it would be clear to all that ours is a government of law and not of men; that the Constitution does not permit any court to rewrite it to suit its notions of what it ought to say, and that judgemade law, enforced by injunction, is as intolerable to all Americans as it proved to be to our millions of members of organized labor when they felt that they were being governed by courts and not by legislative bodies.

Meantime, let us have patience and good will toward each other.

Mr. SOURWINE. This is a staff study, Mr. Chairman on the Supreme Court Instrument of the Communist Global Conquest which has been submitted to the committee by an outside organization. It appears to be a work of some scholarship, and I offer it for the appendix.

Senator HRUSKA. For inclusion in the appendix?

Mr. SOURWINE. I would respectfully suggest that the Chair rule that this may be printed as a separate item of the appendix or in the appendix as the Government Printing Office may find most feasible.

Senator HRUSKA. So ordered.¹

Mr. SOURWINE. Mr. Chairman, that is all I have in the way of statement to offer for the record.

Senator HRUSKA. Very well, we will come then to the witnesses. The first witness is Mr. B. M. Miller of Arlington, Va.

Mr. Miller, have you any preliminary statement?

Mr. SOURWINE. We always like to know whether the witness is here as an individual or representing an organization.

STATEMENT OF B. M. MILLER, ARLINGTON, VA., NATIONAL COMMITTEEMAN, CONSTITUTION PARTY OF VIRGINIA

Mr. MILLER. I am here not by direct order of the Constitution Party, but our philosophy and our feelings throughout the State of Virginia, which I represent, is that something must be done to preserve this Nation.

Mr. SOURWINE. You are an official of the Constitution Party?

Mr. MILLER. Yes, sir, I am the national committeeman for the State of Virginia.

Senator HRUSKA. How long have you held that office?

Mr. MILLER. About 8 months since we organized in the State.

Senator HRUSKA. How long have you been active in that organization?

¹ See appendix IV.

Mr. MILLER. I was elector on the States Rights Party for Andrews last year for the 10th District and the Constitution Party is the outgrowth or the continuation of the States Rights Party of last year.

Senator HRUSKA. Let's get this straight. Are you speaking for the organization or in your own behalf?

Mr. MILLER. I am speaking on my own behalf, but expressing the opinions of the people in the Constitution Party.

Mr. SOURWINE. Has that party held a convention?

Mr. MILLER. No, sir, not yet.

Mr. SOURWINE. It has had no way of expressing its opinion as such, then, has it?

Mr. MILLER. Only within our platform.

Senator HRUSKA. Who adopted the platform?

Mr. MILLER. The executive committee and various members from the various States. They have had several conventions but not a national convention.

Senator HRUSKA. Very well. Proceed, Mr. Miller.

Mr. MILLER. I will give to you the platform. There is the national platform.

I am B. M. Miller. I am an Arlington businessman. I live at 4907 North 28th Street, Arlington, Va., and my business is at 1109 Jefferson Davis Highway, Arlington, Va.

Mr. Chairman and members of the committee, I am grateful to have the privilege and opportunity to appear before this committee and to speak in favor of Senate bill 2646 and urge its immediate passage.

It is not only vital that this bill be enacted into law so as to curb and restrain future members of the Supreme Court from abusing and overstepping their authority but I urge you gentlemen to use your impeachment proceedings against the present members of the Supreme Court for violating their oath of office and for giving aid and comfort to the enemy in time of war.

Mr. SOURWINE. Mr. Miller, you understand that under the Constitution the Senate of the United States sits as a court to try an impeachment case.

Mr. MILLER. Yes, sir.

Mr. SOURWINE. After the House has impeached.

Mr. MILLER. That is correct.

Mr. SOURWINE. You don't mean to suggest that the body must sit as a court in such a case, should interest itself in the case in advance, and attempt to procure impeachment proceedings in the other body?

Mr. MILLER. Personally, yes.

Mr. SOURWINE. That is what you are suggesting?

Mr. MILLER. Yes, sir.

Mr. SOURWINE. All right, sir.

Mr. MILLER. There has not been any open or official declaration of war but anyone with common sense knows that a state of war exists between the United States and the Communists.

I do not see how any law will affect, influence, or persuade the present power-hungry members of the Supreme Court. I am of the opinion that they are fully convinced in their own minds that they are above all laws both present and future. I doubt if a law is sufficient to restrain the Supreme Court from making personal decisions and then using Federal courts and Federal troops to enforce their illegal

decisions. Since they have refused to adhere and comply with the present laws, how can you expect them to recognize and abide by future laws?

When the destiny of a Nation and the lives of 170 million people rest within the hands of nine men who disregard all legal precedences and ignore the tenants of our Constitution then it becomes the duty of the Congress to take whatever drastic measures are necessary to preserve the peace and tranquillity of the citizens and protect this Nation from its foreign and domestic enemies.

Despots and dictators have no place in our Republic and we must have judges on the Supreme Court bench which have a decent respect for and abide by their oath of office and the Constitution of the United States.

The God-given freedom and the bequests of our forefathers must not be destroyed or imperiled by those who may assume alleged inherent powers for the sole purpose of establishing themselves as dictators.

During the past 15 years, according to my records, there have been 8 highly important Communist cases come up before the Supreme Court and in each of these 8 cases, the Supreme Court has ruled in favor of the Communists and against our country and the security of the people. These rulings were in reality informing and encouraging these enemies of free men to go forth and continue their program of overthrowing this Government by whatever means, were necessary.

In many other cases they have ruled in favor of the enemies of society. Many of these enemies were confessed and convicted rapists and murderers, yet the Supreme Court turns them loose with their blessings so as to prey upon the innocent and unprotected.

Then there is this uncontrollable crime wave right here in the Nation's Capital where it isn't safe for a white woman to go out upon the streets even in daylight and it is suicide to go out after dark or answer your doorbell.

These unbelievable decisions are undermining our Government, breeds lawlessness and crime, encourages the Communists and criminals to increase their operations while thumbing their noses at our investigating and law enforcement officers, because they know from former court cases that they will be protected by members of the Supreme Court.

It has been the American family custom and tradition to teach children to respect our laws, our courts, the offices of the three branches of the Federal Government but in the past few years some of these offices have been disgraced by individuals which have brought shame upon our Nation by their evil acts and their fantastic interpretation and conception of law by decree rather than law under the Constitution.

The rulings and decisions which the Supreme Court has made are so fantastic and preposterous that I often wonder if I am dreaming. It doesn't seem possible that nine men born and raised in a free society and with average intelligence could hand down the decisions which are so destructive to our security and our way of life.

Again may I urge the Congress to take whatever steps are necessary to preserve and defend the security of this Nation and its people. It is your responsibility to establish the necessary safeguards to insure the preservation and continuation of the human race.

May you with the help of God provide all free people with an opportunity to remain free.

Senator Hruska. Have you any questions, Mr. Sourwine?

Mr. SOURWINE. I have none, Mr. Chairman.

Senator Hruska. If not, thank you very much, Mr. Miller, for coming in and testifying before this committee.

Mr. MILLER. There was one other thing I failed to mention. I was mentioned here yesterday by one of the witnesses, by Mrs. Lane from over in Arlington and where she mentioned I attempted to get some pamphlets into the schools over there rather than junk, as I call it, and various other things which is anti-American. Yet the school board over there couldn't see fit to put in any pro-American materials in the schools, sir.

Thank you very much.

Senator Hruska. Our next witness will be Mrs. Margaret Hopkins Worrell.

STATEMENT OF MRS. MARGARET HOPKINS WORRELL, NATIONAL LEGISLATIVE CHAIRMAN OF THE LADIES OF THE GRAND ARMY OF THE REPUBLIC

Mrs. WORRELL. Mr. Chairman, and members of this committee, as national legislative chairman of the Ladies of the Grand Army of the Republic, I am pleased to speak for this bill now under consideration. I notice that the press has scheduled me as speaking for the Daughters of the American Revolution. I would be very proud indeed to speak for that organization, but I speak for the Ladies of the Grand Army of the Republic, the organization that saved this Union.

My name is Mrs. Margaret Hopkins Worrell and my address is apartment 515 East Clifton Terrace NW., Washington, D. C.

Our organization is backing the Jenner bill for the limitation of the jurisdiction of the Supreme Court for the reason Congress has full power to vest and divest the jurisdiction of that Court. May I say, also, that our organization is one of the 132 national organization members of the Women's Patriotic Conference on National Defense, with thousands of women throughout the United States, that adopted a resolution at the national conference this month supporting the Jenner bill, S. 2610.

Our organization is backing the Jenner bill for the limitation of the appellate jurisdiction of the Supreme Court, for the reason that Congress has full power to vest and divest the jurisdiction of the Supreme Court.

The provisions of the Constitution, as to the appellate jurisdiction of the Supreme Court, provide a special provision namely, the power to create the Federal tribunals and of investing them with jurisdiction, either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degree and character which the Congress may deem proper for the public good.

The Constitution of the United States, article III, section 2, in part provides:

* * * In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The appellate jurisdiction of the Supreme Court is not derived directly from the Constitution, but from acts of Congress which must bestow it. (Constitution, U. S. Sen. Doc. 1953, p. 614, note 1 and 2.) Congress has plenary power to bestow, withhold, and withdraw, appellate jurisdiction even to the point of its abolition. In the case of *Turner v. Bank of North America*, (4 Wall., 8, 1709) included the following statement by Justice Chaso:

The notion has been frequently entertained, that the Federal Courts derive their power immediately from the Constitution; but the political truth is, that the judicial power (except in a few specified instances) belongs to Congress (Sen. Doc. 1953, p. 618, notes 1, 2, 3, 4, 5).

In the *McCardle* case (*Exparte, McCardle*, 7 Wall., 506 (1869), 6 Wall., 318 (1908)), which has been affirmed and approved—see *Exparte Yeager* (8 Wall., 85 (1909)), the Court took occasion to reiterate the rule that an affirmation of appellate jurisdiction is a negative of all others and stated that as a result—

acts of Congress providing for the exercise of jurisdiction had come to be spoken of as acts of granting jurisdiction and not as acts making exceptions to it.

The Supreme Court, as now constituted, has arrogated unto itself the usurpation of the power of Congress, therefore, Mr. Chairman, it becomes the duty of Congress to limit its power.

Consequently, since Congress has full power to vest and divest the appellate jurisdiction of the Supreme Court, it is the duty of Congress to exercise its power and enact the Jenner bill (S. 2040) and we so recommend.

And may I say personally that you will note that most of the opposition to this legislation is by leftwingers, fellow travelers, or probably good brainwashed people. Our real American citizens are in favor of this legislation and are hoping that Congress will take heed thereof.

Senator HRUSKA. Thank you, Mrs. Worrell. Have you any questions, Mr. Sourwine.

Mr. SOURWINE. No, sir.

Senator HRUSKA. Then the committee will stand in recess for a few minutes.

(A short recess.)

Senator HRUSKA. We will resume our hearings. The next witness will be Mr. Andrew Green, of Harrisburg, Pa.

Mr. SOURWINE. While the witness is coming to the witness stand, sir, may I resume with the information to the Chair and for the record that Mr. Herbert D. Donovan, Ph. D., delegate of the Diocesan Union of Holy Name Societies of the Diocese of Rockville Center, Long Island, N. Y., who had been scheduled to appear as a witness, has indicated his inability to get here, and offered for the record his statement, and I hand that to the reporter now with the suggestion that the Chair might want to order it into the record.

Senator HRUSKA. It will be accepted for the record and will be made a part thereof.

(The document referred to is as follows:)

STATEMENT OF HERBERT D. A. DONOVAN, DELPRIATE, BEFORE THE INTERNAL SECURITY SUBCOMMITTEE IN HEARINGS ON BILL S. 2040, FEBRUARY 28, 1958

My name is Herbert D. A. Donovan. I am chairman of the public affairs committee of the Diocesan Union of Holy Name Societies of the diocese of Rockville, Centre, N. Y. The union consists of 105 societies of Catholic men, having an average membership of 100 men each. While we include a good proportion of professional men, our membership is composed chiefly of businessmen and industrial workers. We are not skilled in technicalities of law nor greatly interested in the points of court procedure. We are very much interested in the preservation of our accustomed rights and of the American way of life. We resent attempts to alter it under the supposed necessity of accommodating ourselves to world welfare or exaggerated concern for possible violations of individual rights, based on what might happen rather than what has happened.

We consider that the United States Supreme Court has, by many recent decisions, reversed the trend of judicial interpretation followed by the same Court in earlier times, and is trying to alter our historic system of government under the pretext that times have changed. If such alteration is needed, this certainly should not be done through the decision of 9 men of 1 profession, but only through the decision of the whole electorate, expressed in a national referendum.

Furthermore, we hold that, unless the Supreme Court is promptly checked in its present course, it will reach the position of dominating the other two coordinate branches of the Government, resulting in a government dominated by whims of theorists rather than by the will of the people.

Specifically, we believe that education is an activity properly reserved to the management of the States. The States should zealously safeguard pupils against indoctrination of communistic ideas into their minds by discharging teachers guilty of that. The schools have no more important function than that of teaching respect for our history, our ideals and our past achievements. To assume that any teacher has a personal right to teach his theories is to open the door to subversion; and the personal belief and record of the teacher is a pertinent subject for investigation to decide on his retention.

We believe that interference by the Court with legislative committees of the Congress is a flagrant violation of the carefully worded method of ensuring the independence of the Congress. The election at frequent intervals of the Members of Congress makes them more observant of the wishes of the people than is a Court serving life terms. Most of the effective work of Congress results from committee procedure; this should be unhampered by judicial interference.

We feel that the Court has no authority to alter or to add to the Constitution by including in its decisions the suggestion that alleged rights exist that are not guaranteed in the Constitution. This was attempted in the Watkins case decision, wherein Chief Justice Warren held that the first amendment insures freedom of political belief or association.

We feel that the repeated freeing of persons who had been judged guilty of subversive conduct by lower courts is a serious embarrassment to the stamping out of the Communist conspiracy in this country. The glee with which the Communists and their sympathizers received these decisions, and their loud characterization of Government witnesses as stool-pigeons, and their renewed campaign to have all investigating committees discontinued, indicate that such decisions give aid and comfort to enemies of our country.

We think that the executive department has the full right, and should zealously exercise it, to discharge from its employ any and all subordinates whose conduct or attitude it judges to be prejudicial to national security. We are sure that the department can be trusted to find fair as well as efficient methods of getting rid of such persons, without being hampered by minute Court regulations on how to do so.

For these reasons, I and my fellow-citizens urge that the pending bill S. 2040 be favorably reported and we hope that it will be enacted into law.

Senator HRUSKA. Mr. Green, are you speaking here as an individual before the committee or do you represent an organization of some kind?

STATEMENT OF ANDREW WILSON GREEN, HARRISBURG, PA.

Mr. GREEN. I am speaking here as an individual. However, I do give something of my background in my statement.

Senator HRUSKA. Very well.

Mr. GREEN. Before I begin, I was going to add as an appendix to my statement volume VI, No. 13, of the American Firing Line for July 1, 1957. I see no reason to have it printed in the appendix if it is already in the record. Does Mr. Sourwine know whether it is in the record?

Mr. SOURWINE. I believe it is.

Mr. GREEN. I submit it subject to the qualification that if it is already printed it need not be included.¹

Senator HRUSKA. It is received on that condition.

Mr. GREEN. Likewise an article by Marion Stephenson, from the National Review of February 15, 1958, page 159, with the same qualifications.¹

Senator HRUSKA. Very well.

Mr. SOURWINE. That is not printed in the record, Mr. Chairman.

Senator HRUSKA. Then it will be received for inclusion in the appendix.

Mr. GREEN. I appreciate greatly the honor of testifying on this vital question.

I. MY QUALIFICATIONS AS A WITNESS

Before I begin my testimony, I should like to say a word about why I believe I am qualified to testify on this subject.

First, I am a lawyer. I am a graduate of the Dickinson School of Law and a member of the bar of Pennsylvania, the District of Columbia, and the Supreme Court of the United States. I believe that I am a better than average lawyer, though it would be vanity to characterize myself as an exceptionable lawyer, nevertheless I am given confidence in my ability to understand such issues as are before this subcommittee by the fact that I passed both the Pennsylvania and the District of Columbia bar examinations on my first examination, and by the fact that on constitutional questions, I suppose myself to be one of the few lawyers of my generation who has actually read Madison's Notes of the Federal Constitutional Convention.

Secondly, I am a veteran. Having served in the past war as a weather officer in the Air Force, and thus borne arms in support of the Constitution, I think I have a moral right to speak up when I see our Constitution threatened by judicial lawlessness. I am a member of the American Legion, and have served as a commander of my post, Camp Hill Post No. 43, Pennsylvania. At the present time I am active in the American Legion in countersubversive work, and I am chairman of the countersubversive activities committee of the 10th district of Pennsylvania of the American Legion, and a member of the national countersubversive activities committee of the American Legion.

¹ See appendix II.

In addition to this I am active in other patriotic societies. I am secretary of the Harris Ferry Chapter, Sons of the American Revolution, and a member of the board of management of the Pennsylvania Society, Sons of the American Revolution. I do not consider that the fact that I am of Revolutionary War descent makes me any better than any other citizen, but I do consider that it places upon me a greater obligation to preserve the heritage which my forefathers fought for almost two centuries ago.

Thirdly, I am interested in politics. Politics has been a consuming interest of mine ever since I was a member of the American Whig Closophic Society at Princeton University, and I might say, my classmate, and your former assistant counsel, Bill (William A.) Rusher, and I share many pleasant memories of college debates on political matters in our activities in this society.

I have been in Young Republican activities. In 1950 I was chairman of the Dauphin County (Harrisburg) Pennsylvania Young Republicans at a time when it had over 400 paid-up members, which I am sure you can appreciate, is a large active membership for a junior political organization in a city the size of Harrisburg. I am now a Republican, for reasons which may be clear to you when I conclude my testimony.

Concerning my past political activities, I might say that in 1948 I supported Harold Stassen for President, whom I shall this year oppose for Governor of my State, because at that time he was the only candidate who was in favor of outlawing the Communist Party, and I am thankful that a merciful providence has spared those efforts from success, particularly in view of the fact that far from being anti-Communist today, Stassen seems to be the foremost supporter of a summit conference which is so greatly desired by the Kremlin today. In 1952 I supported Taft or MacArthur for President. In 1956, I supported Knowland for the Republican nomination, and was instrumental in placing his name on the Pennsylvania preferential primary ballot. But in the fall of 1956, I supported T. Coleman Andrews for President, since neither of the two parties in my opinion took a forthright stand in opposition to the Communist world conspiracy.

I am hoping that in view of this background, what I have to say on the proposed legislation will be of some interest to the committee.

II. THE NEED FOR THE PROPOSED LEGISLATION

Three essential conceptions of Constitution being destroyed by Supreme Court: It is apparent that the Supreme Court of the United States has gone hog wild on a few of the most vital conceptions of our form of constitutional government. Unless the ravages of their destruction are stopped, we shall be faced with but an empty shell of a Constitution, and we shall be left defenseless before the most insidious and diabolical enemy which this country, or any other, or civilization has ever face—I mean the enemy communism.

The vital conceptions essential to our Constitution which our present Supreme Court is destroying are three: (1) The right of our country to self defense; (2) the rights of the States; and (3) the independence of the legislative powers, the Congress. It is, may I remind you, gentlemen, your independence and your ability to exercise freely the powers given to you under the Constitution which are being destroyed.

If the thinking which prevails on the present Supreme Court, goes unchallenged, these conceptions, these rights, will be utterly destroyed, and as they are essential to our continuance of constitutional government, our Constitution will also be destroyed with them.

Our present historical situation: I shall speak in a minute of each of these three dangers separately, but before I do, I should like to generalize a minute on the historical situation in which we find ourselves. Republics have historically, without exception, proved unable to preserve themselves. It appears that our own Republic will be no exception. Our Founding Fathers harbored no false hope that we would be able to preserve our form of government forever, which they founded. The strength of our infant republic under the Constitution surprised Benjamin Franklin and Thomas Jefferson, one of whom, as I recall, did not think it would last 25 years. But while all the founders of our Constitution conceived, nay, knew, that the end of our Republic would come some day, its end has always been until now so remote as to be a mere possibility in some indefinite and unforeseeable future. I fear the demise of our Republic may come, if not within your lifetime, then within mine.

Rome and the United States: There was recently published a popular book by the French author, Aimeur de Reincourt called the Coming American Cæsars. One thing about caesarism is that it wears a republican dress, so that its advent can never be heralded. Was the Republic of Rome lost with Marius, with Sulla, with Pompey, with Julius Caesar, or with Augustus? Or must we go to the post-Julian emperors, in order to mark the demise of the Roman Republic? No one knows; it is a matter of opinion. But it did perish. Republican offices and titles continued until the sack of Rome.

Our own country will not be different. We will have a dictatorship, but it will be called constitutional government. We will have provinces but they will be called states. We will have a House of Lords, but they will be called a Congress. We will have royal judges, but they will call themselves justices under the Constitution. We will have imperial decrees, but they will be called congressional acts. Even now I am told that the merit of a Republican Congressman depends upon how nearly his views coincide with those of the leader of his party, rather than their merit according to the excellence of his conscience and reason.

The analogy, it is true, between Rome and the United States, is admittedly imperfect. But the drift, the decay, the rot is there. To deny the drift of our times is as futile, as stubborn as the man who stands in the water on the beach, and feels the riptide churn at his feet, and deny that the current is there. It is true that from a distance the current is not seen, but it is felt everywhere by all who can feel, who have put their feet into the water of our time and place.

I do not know how long this draft can be held back, or how long we can maintain our position upright on the beach with this current dragging us down and tending to topple us. I hope for my lifetime, and I hope that if we can but stand firm upon the beach of constitutional government for another generation, perhaps the direction of the current will change and our children will be in a position to restore constitutional government to its full glory. But it is a hope as I am already persuaded that the direction is irreversable. But still

it is in hope and faith that I am doing what little I can and that in this same spirit I must urge you also to do the same.

Our efforts here, even if we are able to pass the proposed legislation of Senator Jenner, may be utterly inadequate to stem the tide. But we must make the effort. We must take the challenge of faith—and trust in God that somehow our efforts—and sacrifices—for it may well be a political and personal sacrifice on the part of each and every one of you who supports this proposed legislation, so little is the popular understanding of its importance, that you may lose your seat in the Senate because of it. But still, even if this is the probable result I must still urge you to support it, for as I have said, it is with faith that we are compelled to act, if at all, in our present situation, and trust that God will somehow make our sacrifices significant beyond any of our visions.

A. THE RIGHT OF NATIONAL SELF DEFENSE

I was as I said going to discuss separately the three great vital conceptions to our Constitution which our Supreme Court is destroying in its decisions. The first of these is the right of self-defense.

The trouble with the present state of our law is that it is based upon a Victorian romanticism about liberty which supposes that it is the duty of liberty to die rather than to defend itself. That liberty is a woman who must die rather than ever surrender her chastity. I am reminded in this regard of a certain famous camp follower, who became the mistress of an emperor and is now known to history as the Empress Catherine I of Russia. I do not propose to condemn the lady. I suppose she did in the circumstances which she must. And as I understand my history, unlike the second Empress Catherine, preserved her chastity when she was able. I will admit that her practicality in the circumstances is a great disappointment to the emotional perturbations of sheltered and genteel ladies who in reading her life have been deprived of the satisfaction of seeing her nobly resist the thing worse than death unto death itself.

But, gentlemen, the chastity of a dead woman is dead, not living, and gentlemen, the liberty of a conquered republic is dead, not living.

Supreme Court is Victorian; has a false gentility toward the law: The thing I object to about the present Supreme Court on the right of self-defense is that like many a genteel lady, they would impose their standard of conduct on others against their will. The old maids may prefer death to disgrace, but I suspect that they are in the minority. The Supreme Court may prefer death to liberty—conquest to independence, though an independence without liberty. Gentlemen, if our Republic cannot survive without liberty—then I propose it survive. I do not see that we have any obligation to accept death, and surrender and conquest to life, independence, and victory. If the liberties of the enemies of our Republic must be sacrificed to the life of our Republic, then so be it. The Supreme Court has no right to impose suicide on me, or you, or on our Republic. It is time I think someone said so.

Examples of Rome: Nor has it ever been different in the life of any vital republic. The Romans were under no illusions in the days of the glory of their republic. When the life of their republic was critically threatened, they suspended the usual civil liberties, and put the

public safety, the health of the republic, above the rights of any individual among them—and named a dictator—so that liberty might live.

Committees of public safety in American Revolution: Nor was the American Republic in its most glorious days, in the days of its birth, different. It is perhaps worth recalling how the fathers of our country who wrote our Constitution—which the present Supreme Court uses to justify its leniency to our traitors—dealt with subversives in their time. I have been, this past year, on Sundays, reading the Archives of the American Revolution, which was published by this Congress about 100 years ago. In them I read that they protected the Republic against subversives with the deadly instrument of committees of public safety. These committees respected none of the guarantees which our present Supreme Court insist must presently be followed in regard to our subversives. These committees of public safety in the Revolution met in secret. They issued their summonses to suspect traitors to appear before them. The identity of the accusers was secret. There was no right of confrontation. There was no bail. There was no public hearing. These committees were, in every sense of the word, star-chamber proceedings. The orders of the committee of public safety gave no reasons or opinions for their actions. Sometimes their orders were that a suspect should not leave his community. Sometimes their orders were confiscation of property without compensation. And sometimes, I fear, their decrees were more harsh. Liberty cannot be born without blood. It will not be preserved without blood. The story of how our liberty and independence was obtained may not be a pretty one in some of its chapters, but those who erected it did not flinch at the means which were necessary to its establishment.

The Victorians across the street, who suppose that liberty can be born and maintained without blood, as as naive as the old maids who suppose that life can be born and continued without sex.

Numerous objectionable opinions of Supreme Court: I could speak in detail of the specific opinions of the Supreme Court which have been coming down like a deluge against the right of our Republic to preserve itself. I shall not burden you with the recital of these dreary tirades called opinions. I shall content myself with including as part of my statement here, a copy of the Firing Line of the American Legion for July 1, 1957, which sets forth in detail the most notorious of them prior to the present term of the Supreme Court.

Supreme Court opinions untruthful: These opinions are all badly reasoned. In some cases they make statements that are palpably false, as in the case of *Commonwealth of Pennsylvania v. Steve Nelson* (April 2, 1956), in which the Court held that the Smith Act intended to abrogate the State sedition acts. We know that this is not so, from the statement of Congressman Howard Smith who wrote the act, and there is not a shred of evidence in the hearing which led to the passage of the act to support the conclusion that the Congress either intended such abrogation, or was fearful that the Smith Act might abrogate these acts. The Supreme Court, out of whole cloth, applied the doctrine of occupation of the field—with bad reason, as I have said—even if it had not been clear that Congress had no such intention. These legal fictions which the Supreme Court uses in arriving at its results are patent falsehoods. We have the degrading spectacle of seeing the highest Court in the land strike down a

conviction and a State law by the most patent falsehoods in order to further its own political conceptions and opinions on current events on the dangers of communism. Clearly, the situation is intolerable, and it has got to stop.

Since these decisions last term, there have been this term, the John Stewart Service case, as clear a case of treason as was ever made out in the courts, and the FBI files cases, the congressional contempt cases. These decisions are all, as I have said, badly reasoned, and even in many of them go so far as to use the most despicable means to justify their conclusions—I mean patent falsehoods in the opinions.

Two basic errors in Supreme Court opinions on internal security: But why take and dissect each opinion to illustrate these vices, when with but a simple analysis we can get to the root of all their errors. And the root has but two stems:

(1) The Communist, or subversive, has the same moral right to liberty as a non-Communist or nonsubversive.

(2) Communism does not constitute a clear and present danger to the United States and our Constitution.

Communist does not have moral right to freedom: Does the Communist have the same moral right to freedom as the non-Communist? Of course not. I say that the man who will not grant freedom to his political opponents has no moral right to claim it from them. Further I say that the man who would grant his political opponents freedom has no duty to give freedom to a man who would deny freedom. I will go even further—I will say it is the duty of a man who believes in freedom to deny it to the man who does not believe in it. I say it is his duty because this is by historical experience the only terms on which any people can have freedom for any extended period of time. If you and I would have freedom, then it is our duty to suppress the political effectiveness of the Communist, if necessary by denying his freedom. When there is no danger of the tyrants' oppression, we may neglect our duty, but this in no way attenuates our right to do our duty.

Do these ideas seem shocking? They should not be. This gives every man the right to liberty on mutual terms. He has a right to get as good as he will give. Does any one suppose that he is entitled to more? Every one here in this room, I trust, believes in liberty? Do these ideas threaten the liberty of any one here in this room? They do not. There is not a single person in this room to my knowledge who would lose a single iota of liberty under these doctrines. Is there under our law or under the law of God's heaven any reason why the brotherhood of our Republic should admit its enemies into fellowship?

Clear and present danger doctrine unsound and without reason: I come now to the second basic error of the Supreme Court decisions. The doctrine of clear and present danger. This doctrine formulated by a man of overrepute, a materialist whose vaunted liberalism is really but the reflection of wan pity of a decadent aristocrat for the less favored masses—I speak of Mr. Justice Holmes—is utterly without rational support. It is true the crying of fire is wrong because of the crowd. It is the circumstance which makes the cry of fire wrong, the crowd which permits us to impute an evil or wicked intent

to the cry—Fire. But the cry of rebellion, or tyranny would be wrong and wicked even if it were shouted in an empty theater or from an empty rostrum. Shall we concede that a man—any man—has a moral right to hate us, to plot our death, or our slavery, which the Communist does every minute of his life, that these things are not wicked in and of themselves—at least from the point of view of our Republic and our lives and those of our children. Why then the concern over the Communists chance of success? His chance of success has nothing whatsoever to do with criminality of his act; it is morally punishable even if futile.

Liberty not required to tolerate abuse: Ah yes, I know, but it is said as freemen we have the right to contemplate, to consider the desirability and beauty of tyranny, and that therefore we must hear would-be tyrants advocate it. Perhaps, let us admit this, for the sake of argument, although I do not know why we need to, any more than we need to admit that the preacher is obliged to permit the whore use his pulpit to expound the delights of sin. But when the Communist becomes ravishing and provocatively stimulating in his description of the delights of tyranny, when his catalog of them becomes pornography and not anatomy, are we to characterize this as free speech rather than an act of revolution, particularly if his description is delivered with the intent of seduction, or pederasty.

Must we wait until our daughters are maimed by dorranged persons before we can punish them, or do we have the right to remove the pornographic literature from the newsstand which stimulated their perverse desires beyond control.

Must we wait until our atomic and space secrets are betrayed, and our diplomacy frustrated by Communist agents before we can enforce a security program or allow Congress the power to investigate subversion.

Our Supreme Court liberals do not believe in liberty: The truth of the matter is that the so-called defenders of our liberty, the so-called liberals, do not believe in liberty. What they believe in is license, the absence of discipline, and the governance of the laws of chance. They are uncertain in their own mind that liberty is better than tyranny. They want someone else, preferably some impersonal social or historical process, to decide for them whether the future should be free or not. They are not quite certain whether communism is, or is not, the wave of the future. They are fearful or apprehensive lest they should commit a sin against history by using their own preferences to frustrate its processes.

Mr. SOURWINE. Who do you mean by "they"?

Mr. GREEN. I mean the members of the present Supreme Court as I understand their philosophy.

Liberty is an act of will—not a matter of tolerance: But gentlemen, I do not regard the liberty of your children and mine as but a creature of the chances of history. I regard it as the result of an act of our will—a will which declares that there shall be as was proclaimed with such decision, will, and resolution at Philadelphia in 1776—Liberty throughout the land.

Gentlemen, there is no uncertainty in my mind. As many other Americans, I have drunk the waters of liberty, and they are sweet, sweet. For myself, I have made my decision—there will be liberty.

All except one of the Supreme Court Judges usually votes against internal security. Before I pass on I want to illustrate the seriousness of the problem by including as an appendix to my statement the article of Marion Stephenson in the National Review for February 15, 1958, on page 159. In particular, I want to call your attention to the table in this article as follows:

The rollcall—Votes on internal-security measures

	<i>Against</i>	<i>For</i>
Earl Warren.....	10	0
Hugh L. Black.....	10	0
William O. Douglas.....	10	0
Felix Frankfurter.....	9	1
John M. Harlan.....	8	2
Wm. J. Brennan, Jr.....	5	0
Harold H. Burton.....	6	3
Tom Clark.....	2	7
Charles Evans Whitaker.....	1	0

In this table you will note that there is only one Justice who voted for the self-defense of our Republic—Tom Clark—and I rather gather from that that he is the only real American on the High Bench, and even his record is not perfect. You will note that three Justices—I do not believe you need to be told who they are—in every 1 of 10 cases voted against our right in self-defense, and Justice Brennan so voted in the 5 cases he heard. I submit to you that Mr. Justice Brennan's testimony before this committee that he felt a Communist was unfit to teach, was somewhat less than candid, in view of his record since then.

Is everybody out of step except the Supreme Court? And it is not without significance that in the past 2 years the High Court has failed to uphold the lower court in a single case in which the security of the United States was involved. It would seem then that everybody is out of step except the Supreme Court of the United States.

Gentlemen, I submit that the lower courts of the United States cannot have been so uniformly wrong concerning the constitutionality of various internal-security measures as the Supreme Court would hold them to be. They too are learned in the law, and in the meaning of the Constitution, and if the Supreme Court finds itself so consistently in conflict with the lower courts of the United States, it seems to me to raise a rather strong presumption that it is the Supreme Court which is wrong, and not our inferior Federal judiciary.

B. STATES RIGHTS

States rights a vital defense against communism: I come now to the threat on States rights. The importance of the States to our Federal system cannot be overemphasized. I believe it was Vishinsky who told a group of American Communists that it would be impossible to achieve a revolution in the United States due to the fact that the police power of the United States was divided among 48 States, and that it would not be until the powers of the States were substantially destroyed that it would be possible to achieve a Communist revolution in the United States by internal forces.

Supreme Court follows Communist plan of legal strategy: Many of the recent decisions of the Supreme Court attacking the rights of the States also concern internal security—I mean the power of State

legislative committees (the Sweezy case), the power of the States to protect themselves from sedition (the Nelson case), the power of States to keep Communists out of the bar, and thus the administration of justice (the Konigsburg and Schwabe cases), the right of the States to keep Communists out of its school faculties (the Slochower case). It would seem that in this field, the Supreme Court could not have been following the strategy laid down by Communist planners any better than if they had been on the general staff of the Red army, or on the planning committee of the Soviet Foreign Ministry. Having through recent decisions destroyed the power of the Federal Government to take effective security measures, the Supreme Court is not content until they have rendered the States impotent to do the same thing.

It is well known that the Communist Party has for years very carefully laid a strategy as to what legal doctrines are to be promoted or destroyed in the United States; the organization which does this—I forget its name—it is not the National Lawyers Guild, and was and may still be headed by the brilliant Communist lawyer, Carol Weisking. We see the spectacle of our Supreme Court assenting to the capture of one legal stronghold after another; the legal strongholds are attacked and captured in logical sequence, so that a case is not prepared for appeal for the Supreme Court until the ground has been laid for it by the previous decision. For example, the recent case—I forget its name—which held that the House Un-American Activities Committee had asked questions beyond the scope of its authority; could not have been so decided without the less shocking Sweezy case. The Konigsburg and Schwabe cases involving the fifth amendment, etc., were forecast by the less shocking Slochower case. In brief, the outer defenses are attacked before the inner defenses are attacked. To put this in logical terms, the defense of an internal security measure may depend on two propositions—and the Government has argued—well, if we cannot rely on defense No. 1, then we rely on defense No. 2. It is very curious how cooperative the Supreme Court is with the Communist Party, always attacking defense No. 1, and the Supreme Court concurring in this order of attack, before attacking defense No. 2, which cannot be logically reached as long as defense No. 1 stands.

Loyalty of several Supreme Court Justices suspected: Can the logical and orderly sequence of these cases be but an accident? There are not a few—and I want to add for the record I think it is perhaps not discreet that I should commit myself as to whether or not I am one of those few at this time—who suspect one member of the United States Supreme Court as being under Communist discipline, and another as being subject to their blackmail, and another as knowingly following their desires out of political ambition, and another as being sympathetic with communism because of his association with so many of them as personal friends, and including members of his family, and a fifth as being motivated by a resentment of a religious nature.

Mr. SOURWINE. I take it by virtue of the phrasing that you have used that you are not prepared to name any names, and you are not making any charges today?

Mr. GREEN. I am not making any charges and I am not naming any names.

Mr. SOURWINE. You are not associating yourself with these views?

Mr. GREEN. I don't wish to express an opinion at this time as to whether I associate myself with these views.

Mr. SOURWINE. You are not bringing them here as the views of anyone else?

Mr. GREEN. No, but—

Mr. SOURWINE. And they are not your own views?

Mr. GREEN. I don't want to say that they aren't my own views.

Mr. SOURWINE. By what virtue are they here?

Mr. GREEN. They are here because these are current suspicions which are current in the thinking of the public which are justified by facts which the public knows.

Now if I may, I would like to illustrate that by a little story. My mother's family comes from Indiana County, Pa., and it seems as if out there they raise some sheep, and when you raise sheep there is always the possibility of sheep stealing, and so Jim Weaver was sitting around a fire one day with some of his friends, and they asked him if he had lost any sheep, and he said, "Yes, I lost a few sheep."

"They said, 'Well, Jim, do you know who stole them.'"

And he said, "Well, this is a free country and I understand a man can think anything he wants to, but I understand that maybe it isn't always correct to say them."

He said, "I suppose it is all right if I think Bill Clark stole them."

And so that would be my position in this regard, that these are thoughts which occur to people.

As I have said in my statement that is 5 out of 9—a majority. It is perhaps not fitting that I mention their names here, though I will do so if examined in this regard. If you would like to ask me who these individuals are, I would be glad to state for the record who these individuals are.

Senator HRUSKA. It was the Chair's recollection that you just got through saying these are not views of your own. Now you say they are. Which of those statements is right, Mr. Green?

Mr. GREEN. I would like to report that these are views and suspicions currently in the American mind.

Senator HRUSKA. And yet you don't advance them as opinions of your own?

Mr. GREEN. I don't say that. I merely say that I don't want to commit myself on whether they are my own opinions.

Mr. SOURWINE. Do you have any knowledge, sir, of any facts which would lead a reasonable person to believe that any member of the United States Supreme Court is under Communist discipline?

Mr. GREEN. I do.

Mr. SOURWINE. You do have knowledge of such facts?

Mr. GREEN. Yes.

Mr. SOURWINE. I can assure you will be subpoenaed to appear before this committee to testify.

Mr. GREEN. But those facts are not facts which are accepted general knowledge. They are facts that anybody can go to the public library and form their own conclusions. If you would like me to state the basis of my conclusions, I would be glad to do that, but they aren't facts of which I have any peculiar or special knowledge.

Mr. SOURWINE. Perhaps you and I have a different concept of facts. I am asking you if you have any knowledge as a matter of fact concerning any Communist connection of any Justice of the Supreme Court of the United States?

Mr. GREEN. The answer to that is, I don't know that any member of the Supreme Court of the United States is a Communist, or is under discipline.

What I am saying is that in view of their opinions, their political actions, it is reasonable to infer that they are under Communist discipline. In other words, I rely on what we might call circumstantial evidence for the opinion which I have expressed.

Mr. SOURWINE. You have no facts?

Mr. GREEN. I have no personal direct knowledge. I mean I have only the same circumstantial evidence which is available to any member of the public through the library.

But this suspicion of so many of us will not dissipate in view of the relentless efficiency with which the legal engine of the Supreme Court, with such perfect timing and organized plan, is leveling the internal security defenses of our Nation. As has been said of our State Department a number of years ago—it could not have consistently made so many mistakes accidentally—surely if they were Americans—they would have occasionally made a mistake in our favor.

Supreme Court rewrites Constitution for its framers: Thomas Rafterburn White, one of the most distinguished members of the Pennsylvania bar, and a great expert on constitutional law, wrote recently in the American Bar Association Journal with characteristic, and to me lamentable, understatement, that the present Supreme Court seems to be following an unwavering canon of construction of the Constitution, that it should be interpreted not according to what it says, or what the framers of it meant, but according to what the framers of it, in the minds of the judges, would have done, had they been present today, and faced with our problems. For the Supreme Court to assume the power to interpret the Constitution in this fashion, would make it a continuing constitutional convention, to make it a legislature rather than a judiciary.

Supreme Court does not avow canon of constitutional interpretation it uses: Perhaps the reason why the Supreme Court dares not to avow the canon by which they construe the Constitution today is because the recognition of such a canon must destroy all confidence in the integrity of the law.

Unfortunately, we are stuck with a Supreme Court because the Constitution says we must have one. But, where it is evident that in certain fields of the law the Supreme Court is construing the Constitution according to a canon of construction which will destroy the integrity of the law, it is obvious that Congress would do less than its duty if it did not withdraw this field of the law from the Supreme Court's appellate jurisdiction, and hope that the Supreme Court will not extend this destructive canon to other fields.

C. POWER OF CONGRESS

I want to touch now on the powers of Congress. I forget where it was that I saw that of forty-some persons cited by the Congress—one House of it or the other, for contempt—only some half a dozen or so had actually served time, the remainder had been freed by the courts;

I am sure somebody has put these figures in the record, and the havoc had been brought about in large part by the recent decisions of the Supreme Court, including the most recent one that the witness was questioned by the House Un-American Activities Committee on matters outside of the scope of inquiry granted to it in the resolution establishing the committee.

It is very apparent that the power of Congress to investigate--and therefore to legislate--must be utterly destroyed if these decisions are to be permitted to stand.

Congress should try own cases of contempt: Personally, if I may so at this time, I have never fully understood the willingness of the Congress to turn over to the courts the punishment of recalcitrant witnesses--unless the object is to give them time to reflect on the error of their obstinacy--which is not very useful in the case of a Communist--though it may get him out of espionage work or something like that for a short while.

Mr. SOURWINE. May I interrupt for just a moment, sir? It didn't strike me at the moment I heard you say it, but on reflection it appears you may have inadvertently been in error in referring, as I think I heard you refer, to a recent decision of the Supreme Court that a witness questioned by the House Un-American Activities Committee on matters outside the scope of the inquiry granted to it in the resolution establishing the committee.

Mr. GREEN. That is right.

Mr. SOURWINE. Do you remember that case you were referring to there?

Mr. GREEN. I haven't read the opinion. I am relying on my recollection of the case involving the House un-American Activities which was recently handed down by the Court.

Mr. SOURWINE. You mean the Watkins case which has been greatly discussed here?

Mr. GREEN. I suppose so, as I recall it has been in the last couple of months.

Mr. SOURWINE. I wonder if that is what you are referring to. Isn't it true that in the Watkins case the Supreme Court did not decide that the committee had gone outside the scope of its inquiry? It intimidated that it might in some future time make such a decision, but it bottomed the Watkins decision on the question of pertinency, as our circuit court here has quite recently held, isn't that true?

Mr. GREEN. Now that you refresh my recollection on that, you are correct.

Mr. SOURWINE. I just didn't want this record to show that there was any Supreme Court holding that the House Un-American Activities Committee had exceeded its jurisdiction in the questioning of a witness.

Mr. GREEN. Perhaps the confusion arose in my own mind because I can't quite possibly see the difference, which is to say that it would seem to me that if Congress is a coequal power of the Government, Congress ought to be the judge of pertinency rather than the Court.

Mr. SOURWINE. The question of whether a thing is pertinent and whether the witness is informed with respect to the pertinency are two different matters of course.

Mr. GREEN. I appreciate that.

Mr. SOURWINE. Without attempting to defend or argue the Watkins decision, I simply wanted the record to speak accurately as to what the Court decided in that case.

Mr. GREEN. I appreciate that, but again as I said, to me it seems all of the same thing, because it would seem to me that Congress ought to be the judge of the pertinency and not the Court.

Mr. SOURWINE. It seems to be the same thing to you.

Mr. GREEN. That's right.

I think that recalcitrant witnesses should be arrested by the Sergeant of Arms of the House or the Senate, as the case may be--and kept in prison until he purges himself of contempt, or until Congress wearies of his futile imprisonment. And if the Marshal of the Supreme Court came across the street waving some sort of a document called a habeas corpus, or some such animal, I would simply throw the Marshal of the Supreme Court out on the street.

Mr. SOURWINE. You mean you personally?

Mr. GREEN. I mean if I were a Member of the Congress I would. That would be the action I would vote for.

I know the objection to the procedure that I am suggesting is that Congress doesn't have the time to try for contempt, but I do not see why the mechanics of it should be any more difficult than the mechanics of confirming the promotions of some 60 or 100,000 military officers each year. If the committee recommends a contempt citation, it goes on the calendar for the next day, and as a matter of courtesy the committee's recommendation should always be granted and within 24 hours the recalcitrant witness is in the "pokey." And he stays there until Congress is good and ready to let him out. Of course, there is a problem where the witness is a member of the judicial or executive branches, and I do not propose to discuss that here.

Mr. SOURWINE. You are familiar with all the precedents in the congressional handling of contempt cases?

Mr. GREEN. Generally familiar, although I haven't made any detailed study of the particular opinions.

Mr. SOURWINE. Do you know of any contempt case which the Congress itself tried in either the House or the Senate, in which the person accused of contempt was, as you say, in the "pokey" 24 hours after the committee had recommended his contempt citation?

Mr. GREEN. Let me follow up on my views because I think I see what you mean?

Mr. SOURWINE. Will you answer that question, sir. You made a general statement here. Do you know of any case in which it was done?

Mr. GREEN. I don't recall of any case in which it was done. I know that Congress has directly tried witnesses for contempt.

Mr. SOURWINE. It is your familiarity with the procedure then in general which leads you to say that this can be done this speedily?

Mr. GREEN. Well, as a matter of fact I am not sure that it can be, and I think that there are certain views that a quorum of the entire House has to try the witness for contempt.

Now I don't think I follow that opinion, but I think there are some opinions in that regard.

The reason I say that is there is some question about due process, that Congress, if it is going to try cases of a judicial nature, must do so by a quorum.

But my only feeling is that since Congress is a coequal body, it has the power to determine its own procedures, and the Supreme Court has no power to interfere with those procedures, and so could do so by simple resolution. Those would be my views.

Mr. SOURWINE. Don't you know, sir, that neither House of the Congress ever acts without a quorum?

Mr. GREEN. The resolution, in other words, would be all that would be required. It wouldn't be necessary that a quorum sit at a trial on the witness, that is what I am distinguishing between. Do you follow my distinction there, sir?

Mr. SOURWINE. No, sir, but let's go on.

Mr. GREEN. In other words, what I am driving at is I don't think a quorum of Congress must sit and hear evidence and weigh the evidence. I think all they have to do is pass—

Mr. SOURWINE. You are recommending here that the Congress take action without considering the evidence, just pass a resolution on the basis of the recommendation of its committee?

Mr. GREEN. That is correct, sir.

Mr. SOURWINE. That is your recommendation?

Mr. GREEN. That is my recommendation.

Senator HRUSKA. And what are your ideas as to the length of time that such a person would be kept in prison?

Mr. GREEN. Until he has had a reasonable opportunity to purge himself of contempt.

Senator HRUSKA. Is that days, weeks, years?

Mr. GREEN. Going by analogy in the courts, it is usually about 3 or 4 weeks, and by that time the witness usually comes across and purges himself. If he doesn't do that in about a month, the courts get tired and it is on his record of having been in the pokey. That is about what it amounts to.

I am not guaranteeing that this will necessarily correct the recalcitrant witness. I am only saying that it will probably do it in most instances after about 3 or 4 weeks in prison.

But except when a member of the judiciary and the executive branches are involved, I think that what Congress does with a recalcitrant witness is none of the court's business—any courts. And so, if we have to pass a law to make sure of this, then let us hurry up and pass it. The courts have no more power to determine what is contempt of Congress before its face, than the Congress has to determine what is contempt of court before its face.

III. THE PROPOSED LEGISLATION IS CONSTITUTIONAL

Two objections to proposed legislation: As I understand it, there are two objections to the proposed legislation—(1) it is unconstitutional, and (2) it will destroy uniformity of decision of the law.

I shall now deal with the first of these objections.

Constitutionality really irrelevant; if we don't pass this bill, there will be no Constitution. Of course, this broad answer to the objection of unconstitutionality is that if we don't pass this legislation, there won't be a United States Constitution—so if we have to destroy the Constitution to preserve it—it is all the same thing.

I don't see why anyone should carp about Congress claiming the privilege to destroy the Constitution, now that the Supreme Court has done so.

Mr. SOURWINE. Do you really mean that? You mean that the Congress would be justified in doing anything that it thought was desirable and necessary to save the Constitution, whether or not what it did was authorized by the Constitution?

Mr. GREEN. I have said in reviewing my earlier testimony I think that may be about the situation which as a matter of fact we are faced with.

Mr. SOURWINE. Do you think this bill is an instance of doing something that is not authorized by the Constitution?

Mr. GREEN. No. I feel very strongly this bill is authorized by the Constitution, but my argument is that even if it weren't, the necessity is so grave that we will not have to be too timid about the objections to constitutionality.

National preservation transcends Constitution: But gentlemen—there is something which transcends the Constitution. It is the United States. If in order to preserve the United States, it were necessary to destroy the Constitution, then let us preserve the United States, and destroy the Constitution. We must put first things first. If a government of civil liberties, of constitutional rights, of democracy and a republic is a luxury that our enemies do not permit us in this day and age, then let us yield to necessity and survive.

Proposed legislation authorized by Constitution: But happily, however, we are not faced with the choice of violating the Constitution to make effective this vital legislation.

The proposed legislation is constitutional.

Clause 2, section 2, article III of the Constitution provides in part:

In all other cases, before mentioned, the Supreme Court shall have appellate Jurisdiction, both as Law and Facts, *with such Exceptions and under such Regulations as the Congress shall make.*

If I may add for the reporter, in these quotations I have certain indications of italics and capitalizations, and I should like the printed record to give the same emphasis that I have given in my statement to the committee.

Mr. SOURWINE. I will say to the witness that the editor will follow the style of the Constitution itself, if that will be satisfactory to the witness.

Mr. GREEN. I would prefer that the underlining emphasis I have in my statement be used, but if the editor has certain rules to follow, I won't quarrel with that. I am making a request that I hope the committee may be able to follow.

Mr. SOURWINE. You want to emphasize or italicize the words "with such Exceptions and under such Regulations"?

Mr. GREEN. That is correct.

Senator HRUSKA. Yes, that can be done, with indication that it has been done.

Mr. GREEN. And there are other indications in here following in other quotations, and if the Chair would please, I would like to have the same ruling.

Senator HRUSKA. Very well. The same ruling.

Mr. GREEN. It would seem that the meaning of this clause was clear enough.

Unlike the present Supreme Court, we shall not attempt to construe this clause to mean what we think the framers of the Constitution would have written today if they were familiar with our situation. I am pretty sure they would have written the same thing, but I shall not attempt to prove it.

Debates of clause in Constitutional Convention: The papers concerning the debates of the Constitutional Convention throw little light on the part of the above clause in the Constitution which we have emphasized by italics. I have gotten out my Farrand's Records of the Federal Convention, and have checked carefully Madison's notes on the judicial power, and it gives little elucidation as to the meaning of this clause.

What the convention did debate in connection with this section was the permission of the Constitution to make the Supreme Court judges of the facts as well as the law. Luther Miller, attorney general of Maryland, gave this as one of his reasons for opposing the ratification of the Constitution.

The memorandum among Mason's papers: The only document in Farrand's collection of documents relating to the Constitutional Convention which sheds any light upon this particular clause is a paper found among Mason's papers. The date of this memorandum and its author are unknown, so it is difficult to determine how far it represents the thinking of any of the framers of the Constitution. Concerning this paper, the editor of Farrand says (vol. II, p. 432):

This document, not in Mason's handwriting, was found among the Mason papers. It seems to represent a plan for the organization and jurisdiction of the judiciary, which must have been prepared about this time by someone familiar with the work of the Convention. There is no evidence that it was presented to the convention. It is reprinted here from K. M. Rowland, *Life of George Mason*, vol. II, pp. 385-380).

Even though we cannot identify the author of this memorandum, it is sufficiently interesting to analyze the plan for the judiciary set forth therein under the assumption that it does represent the intentions at some time during the Constitutional Convention, of the delegates to the Convention, or at least some of them.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, and suits between persons claiming lands under grants of different States, the Supreme Court shall have original jurisdiction, and in all other cases before mentioned the Supreme Court shall have appellate jurisdiction as to law only, except in cases of equity and admiralty and maritime jurisdiction in which last-mentioned cases the Supreme Court shall have appellate jurisdiction, both as to law and fact.

In all cases of admiralty and maritime jurisdiction, the admiralty courts appointed by Congress shall have original jurisdiction and an appeal may be made to the Supreme Court of Congress for any sum and in such manner as Congress may by law direct.

In all other cases not otherwise provided for, the *superior* State courts shall have original jurisdiction, and an appeal may be made to the Supreme Federal Court in all cases where the subject in controversy of the decree or judgment of the State court shall be of a value of \$1,000 and in cases of less value the appeal shall be to the high court of appeals, court of errors, or other supreme court of the State where the suit shall be tried (*italic in original*) pp. 432, 433, Farrand, vol. II).

In the first paragraph quoted, we see that the plan for the Federal judiciary was the jurisdiction of the Supreme Court over the judicial power of the United States was divided into two classes, original and appellate, into which presumably every case would fall. But of the

class of cases where the power of the Supreme Court was appellate, it was seen that certain of them under this appellate power were excepted altogether. We can therefore see that under this proposed plan, there were certain cases in which the Supreme Court was to have no jurisdiction, either original or appellate.

What is more logical then to suppose that if this document represents the thinking of the framers of the Constitution, in which certain cases under the Federal judicial power are to be exempted from both the original and appellate jurisdiction of the Supreme Court than to suppose the framers rather than to specify which cases should be exempted from both the original and appellate jurisdiction of the Supreme Court, to leave the matter to Congress to determine by legislation.

Mr. SOURWINE. We don't have to suppose that, do we? The Constitution provides it.

Mr. GREEN. Like in all cases where you get complicated sentences with several modifying clauses, the question is, What did the modifying clauses modify? I will discuss that in a minute, if I may.

Mr. SOURWINE. This sentence in the Constitution which you say has several modifying clauses?

Mr. GREEN. Let me continue with my testimony. I think I will answer the question which you are asking, because I go into the construction or the analysis of the particular phrasing of this clause.

Then I think if my views aren't clear, then I would like to have you renew your question, if I may.

Is that agreeable, sir?

ANALYSIS OF TEXT ON RATIONAL BASIS

But let us see if from a construction of the text it is possible that the words "exceptions" and "regulations" in clause 2, section 2, article III, of the Constitution could mean that the original jurisdiction of the Supreme Court should extend beyond those enumerated in this clause by "exceptions and regulations" to the appellate jurisdiction of the Supreme Court. The language of the clause clearly forbids such a construction. It says:

In all other cases (i. e., other than those having original jurisdiction), * * * the Supreme Court shall have appellate jurisdiction * * * with such exceptions—and so forth. Clearly if the case is not within the original jurisdiction of the Supreme Court, it falls within the appellate jurisdiction, unless Congress excepts it, in which case it falls within no jurisdiction of the Supreme Court at all, although it may still be within the Federal judicial power.

Mr. SOURWINE. I don't follow that at all. Can the Court have original and appellate jurisdiction over the same case?

Mr. GREEN. No, but, like in the Supreme Court, it may have either one or the other.

Mr. SOURWINE. But is it necessary if a Court does not have original jurisdiction over a particular case, that it shall have appellate jurisdiction over the case?

Mr. GREEN. Let's get into the phrasing of this thing again.

Mr. SOURWINE. We are in it right now. You say here:

Clearly if the case is not within the original jurisdiction of the Supreme Court, it falls within the appellate jurisdiction.

Why does that follow? Why doesn't it lie outside of the jurisdiction of the Court completely?

Mr. GREEN. I would say unless Congress excepts it. That is also to be read into that. I suppose it could be, but that is not as I would construe the meaning of this particular clause in the Constitution.

Mr. SOURWINE. How has the Court construed this clause in the Constitution? Do you know?

Mr. GREEN. I haven't checked into that. I have been getting into the sources of the Convention in the Federalist papers, and my testimony will be limited to that. I haven't gotten into the construction of this clause by the Court. I very much doubt if it has been substantially construed at all.

Mr. SOURWINE. You doubt that it has?

Mr. GREEN. I say substantially. There may be a handful of cases on it.

Mr. SOURWINE. All right. Go ahead. I will have no more questions, Mr. Chairman.

Mr. GREEN. I agree that I should have checked my United States Code Annotated, possibly, before my testimony, but time being limited, I was able only to get into the meaning as it were from the original sources and not from the commentary on it.

The debates of the Convention disclose a distinction between the meaning of judicial power and the Supreme Court since by amendment "Supreme Court" was substituted in one instance for "judicial power" at the Convention in order to clarify the meaning of the article.

Furthermore, the debates of the Constitutional Convention disclose that there was concern by the Convention that the judicial power be not broader than necessary to assure the respect for Federal power, and that in particular the original jurisdiction of the Supreme Court was to be given only in those cases where it was considered absolutely essential, namely—

in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party—

and it is not to be supposed that having thus with great deliberation defined the original jurisdiction of the Supreme Court narrowly, they would have permitted it to be broadened at will by Congress through "exceptions and regulations."

Hamilton and Federalist papers indicate legislation constitutional: The framers of the Constitution seem generally to have been silent on the Supreme Court in their writings after the Constitution, except for Madison, who did not like it, and Hamilton. Madison's comments are not apropos here. Hamilton's comments are contained in the Federalist Papers.

In No. 81, Hamilton writes (p. 530, Modern Library edition):

Let us resume the train of our observations. We have seen that the original jurisdiction of the Supreme Court would be confined to two classes of causes, and those of a nature rarely to occur. IN ALL OTHER CASES OF FEDERAL COGNIZANCE, the original jurisdiction would appertain to the inferior tribunals; and the Supreme Court would have nothing more than an appellate jurisdiction "with such *exceptions* and under such *regulations* as the Congress shall make." [*Italics Hamilton's; capitals mine.*]

In regard to the meaning of exceptions and regulations, I should like to point out that between tribunals and the word "and" there is

a semicolon, so that I do not feel that these words "exceptions and regulations" can refer back to the idea of throwing this back into the original jurisdiction of the Supreme Court.

That the exceptions and regulations do not enable Congress to remove certain cases from the appellate jurisdiction to the original jurisdiction of the Supreme Court, apart from the clear language of this paragraph, we have in addition, the previous comment of Hamilton in Federalist No. 81, as follows:

The Supreme Court is to be invested with original Jurisdiction *only* "In cases affecting ambassadors, other public ministers, and consuls, and those in which A STATE shall be a party." [Italic mine; capitals Hamilton's.] (P. 529, modern library edition.)

I would like to add for the record, I think that the word "only" is very significant in interpreting the meaning of this sentence.

It is therefore apparent that the word "exceptions" in the clause of the Constitution, must mean to give Congress the power to except certain cases from both the appellate and the original jurisdiction of the Supreme Court, under Hamilton's interpretation of this clause. That this is Hamilton's interpretation, is further confirmed by the following quotations from Federalist No. 81.

To avoid all inconveniences, it will be safest to declare generally, that the Supreme Court shall possess appellate Jurisdiction, both as to law and fact, and that this Jurisdiction shall be subject to such *exceptions and regulations* as the National Legislature may prescribe. This will enable the Government to modify it in such a manner as will best answer the ends of public justice and SECURITY. [Italics Hamilton's; capitals mine.] (Modern library edition, p. 532, 533.)

If I may make a comment on that, I think the word "security" is of particular interest in this regard.

To continue:

The amount of the observations hitherto made on the authority of the judicial department is this: that it has been carefully RESTRICTED to those causes which are manifestly proper for the cognizance of the national Judicature; THAT IN THE PARTITION OF THIS AUTHORITY A VERY SMALL PORTION OF ORIGINAL JURISDICTION HAS BEEN PRESERVED TO THE SUPREME COURT, AND THE REST CONSIGNED TO SUBORDINATE TRIBUNALS; that the Supreme Court will possess an appellate Jurisdiction, both as to law and fact, IN ALL CASES REFERRED TO THEM, both subject to any *exceptions and regulations* WHICH MAY BE THOUGHT ADVISABLE." [Italics Hamilton's Capitals mine.] (P. 533, modern library edition.)

Hamilton on impeachment: While we are on Hamilton, and the Federalist, it is perhaps not inappropriate to refer to what Hamilton thinks Congress should do with judges who do not respect the Constitution:

There never can be danger that the Judges, by a series of deliberate usurpation on the authority of the legislature, would hazard the united resentment of the body intrusted with it, while this body was possessed of the means of punishing their presumption, by degrading them from their stations (modern library edition, p. 527).

Which prompts me to ask you gentlemen, now that we are faced with usurpations of legislative power by the Supreme Court: Where is your self-respect and your just pride in the prerogatives of your office?

Mr. SOURWINE. As has been previously called to your attention, the House impeaches, which is the initiation of any case, and the Senate tries.

Do you recognize that?

Mr. GREEN. I recognize that.

Mr. SOURWINE. Go ahead.

Mr. GREEN. I might say on that, if I may, that I am not urging these views with the idea that the Senate should take any initiative in the impeachment of any of the present Supreme Court Justices, but that if in the event the House should pass an impeachment, that these views will be kept in mind by the Senate.

Mr. SOURWINE. You just want the Senate to make up its mind now that when it tries them, it will find them guilty?

Mr. GREEN. No, I don't say that. I say they should be aware of the significance of the impeachment proceedings.

IV. OBJECTIONS TO PROPOSED LEGISLATION THAT IT WILL CREATE A LACK OF UNIFORMITY OF JUDICIAL DECISION ARE NOT SOUND

A. Uniformity of decision in matters involving internal security will be promoted by proposed legislation.

There was, as we understand it, no substantial lack of uniformity among the lower Federal and State courts concerning cases involving the internal security of the United States. In matters involving internal security the Supreme Court seems to have taken the position that everybody is out of step except them.

B. Uniformity of decision in matters involving contempt of Congress not affected.

Since all criminal proceedings for contempt of Congress are tried in the District of Columbia, no lack of uniformity of decision will be involved in this class of cases.

C. Uniformity of decision in matters involving dismissal of disloyal persons or security risks from the Federal Government is not involved.

As we understand it, all appeals in this class of cases involving dismissal from Federal employment on grounds of disloyalty or security risk are to be taken to the District of Columbia Court of Appeals, and so no lack of uniformity of decision will be involved in this class of cases.

D. Uniformity of decision in regard to State action for sedition or control of subversive activity is not desirable.

We must not forget that in framing the Constitution, its authors did not destroy the sovereignty of the States. The sovereignty of the States is maintained in as full force as it was when the Constitution was written, less whatever sovereignty was delegated to the Federal Government by the Constitution. The Nelson case which denies the State the inherent power as a sovereign to defend its own sovereignty under the theory that the Constitutional Convention delegated to Congress the power to defend the States from sedition and internal subversion cannot be justified by logic or by an analysis of either the Constitution, or by the proceedings of the Constitutional Convention. The repository of general sovereignty not specifically delegated in the Constitution to the Federal Government or to the States, is the States. This was so prior to the 10th amendment as well as afterward. The right of self-defense from subversive activities against the sovereignty of the several States is clearly not one of those Federal powers

where the States get authority to act from the nonexercise of Federal authority.

But, apart from the logic of the matter as to why the States have the power to deal with the problem of sedition and subversive activity against the several States individually in a nonuniform way, there is the additional reason why the States should be permitted to do so in the variety of local conditions.

The example of Hawaii: For example, I am sure that Hawaii, if it becomes a State, will have a problem of dealing with Communist influence in labor which, to my knowledge, no other State in the Union faces. As we all know, the power of the Communist Harry Bridges in Hawaiian labor is so great that he is able to frustrate, if he wishes, all economic activity in the Hawaiian Islands, including the operation of our military facilities there. I am quite sure that the emergency will arise in the not-too-distant future when the problem posed by Harry Bridges will have to be dealt with in the most strenuous way in order to maintain commercial and military activity and civil authority in Hawaii. I am sure that conditions in the other 48 States will, in the near future, neither require nor justify such harsh repression as will be required in Hawaii. There is no reason, therefore, why measures required in Hawaii should be enforced in the other States, or why the measures adequate in other States should be all that Hawaii is permitted to use when an emergency confronts it. Furthermore, it seems to me that loyal Americans in Hawaii will be in a better position to know how to cope with the grave security problem confronting them than the United States Congress, almost 6,000 miles away. Hawaii should be free to take whatever measures, in its own judgment, are felt required by the problem of its internal subversion.

While I do not foresee that other States, in the near future, face a local problem as grave as that of Hawaii, the same logic is applicable, and we cannot tell when such situations might arise in other States of the Union.

Mr. SOURWINE. You say other States. You don't mean Hawaii is a State.

Mr. GREEN. No. I mean in the States of the Union.

E. Uniformity of decision in regard to subversive activity among teachers and among lawyers, particularly in admission to the bar of the States, is neither required nor desirable. Such matters are primarily matters of State concern.

Education primarily a matter of State concern; States' interest in schools is proprietary, not governmental: Education is a matter of State power and concern. Except for the taxing and spending power of the Federal Government, the Federal Government could not, constitutionally, touch the matter of general education at all. Since I know of no constitutional right to be a teacher, I am at a loss to understand how due process is involved at all in the Slochower case. Prior to that decision, I had supposed that a State school board could fire a teacher (unless State law was to the contrary) because it didn't like the way a teacher parted his hair. I had supposed that the States operated their public schools in a proprietary rather than a governmental capacity, and were as free to hire and fire teachers as private institutions.

Will private schools be required to keep fifth-amendment teachers? Since I believe the States are in a proprietary capacity in relation

to their schools rather than a governmental capacity, I wonder whether the Slochower decision foreshadows a decision at some near future time that a private school cannot hire and fire teachers as it pleases; that it cannot fire a fifth-amendment Communist. I do know that certain academic bodies like the American Association of Law Schools, which thus disgraced the profession to which I belong, criticized Rutgers University for forcing the resignation of a fifth-amendment law professor, and so, I suppose, soon we shall have these academic bodies clamoring that even teachers in private schools are under the State due-process clause of the Constitution.

However, since, basically, as I have said, the States are proprietors in the operation of their schools, it seems to me that the rules they make for the hiring and firing of teachers need not be uniform; that no overriding national purpose requires that they be uniform; and that, in fact, much good will be gained by placing the public schools of the several States in competition with each other.

Admission to the State bars: We come, then, to admission to the bars of the several States. Admission to the bar of the several States has been a matter of great diversity in the past, and, to my knowledge, this diversity has never been seriously criticized.

Admission to the bar is a privilege, not a right: The Supreme Court, in the *Konigsberg* and *Schwartz* cases, have assumed that an individual has some basic right to be admitted to the bar of a court if of good character and of the required learning. This view of membership in the bar is somewhat surprising to me. I had supposed, heretofore, that admission to the bar was a privilege and not a right, and that admission to the bar implied a determination by the court that it felt the particular lawyer was competent and willing to assist the court in the administration of its business. I had supposed, therefore, that a court has a constitutional power as an inherent part of its judicial power or, at least, that, if the courts had not inherently such a power, the various States of the Union have a right to confer this portion of the States' sovereign power upon its courts, that is, to admit or not admit an individual to the practice of law at the pleasure of the courts.

Of course, once an individual has been admitted, and begun practice, this privilege may become a right, for, having relied upon his admission and held himself out to the public as a lawyer, the lawyer ought not to be disbarred without cause. But, in the *Konigsberg* and *Schwartz* cases, we are talking not of disbarment, but of admission.

How the American Revolution dealt with the problem: It is, perhaps, significant to note in this regard that, in the American Revolution, not only were Tory lawyers proscribed, but even those otherwise patriotic lawyers who took pity on the Tories and represented them in the law courts were also proscribed. If Wendell Willkie had represented Schneiderman at the time of the American Revolution, he would have been disbarred and his property confiscated.

Sovereign judicial power of States destroyed: The disturbing thing to me in the *Konigsberg* and *Schwartz* cases is not alone the reversal of the idea that admission to the bar is a privilege and not a right, a privilege conferred at the pleasure of the courts, but the fact that Federal interference with admission to the bar of the several States destroys the sovereign judicial power of the several States.

The States cannot be sovereign or maintain any of the attributes of the quality of sovereignty if they are compelled to permit the Federal Government to choose those who are entitled to practice before its courts and, as lawyers, to exercise a part of the sovereign judicial power of the States. While the total sovereignty of our Nation is dual, that is, divided between the States and the Federal Government, it still implies that a quality--the same quality as in the Federal Government--of sovereignty resides in the States.

These rules create the danger of Communist-state judges: I have heretofore discussed the importance of the independence of the States to our internal security from communism, and I shall not repeat what I have said previously. I may say, however, that since being learned in the law is usually a requirement in the States for holding the office of judge, and learned in the law is construed to mean--admitted to the bar, this means, if Communists must be admitted to the States' bars, that we increase greatly the possibility of having some of them become judges.

Diversity of State rules prevents spread of Communist contamination of the bar: I have discussed heretofore likewise that it is well in internal-security measures to permit the States to make rules which are applicable to their peculiar situation. The same is true of admission to the bar. By permitting the States to control individually the admissions to their bar, we enable them to take appropriate measures to prevent the spread of Communist contamination from the bar of one State to another State, and thus to isolate this malign influence to a single State.

The Supreme Court ruling in effect requires admission of Communists to the bar: In opposition to the views which I have expressed here it will be said that the recent Supreme Court opinions do not require the admission of Communists. This is naive--for in my opinion the Supreme Court opinions in effect require precisely that. Communism is a conspiracy, and its members do not go around leaving fingerprints at the scene of their crimes. The only way to catch this sort of criminal is through circumstantial evidence, the power of inquiry under oath, and asking him about his too numerous associations with Communist-front organizations.

Furthermore, a truly repentant ex-Communist will not seek to hide his connections with this criminal conspiracy, nor will he be unwilling to convey the knowledge he has gained of it to the proper authorities, I mean names, dates, and places, and what happened. It is true that psychologically the ex-Communist, the repentant ex-Communist takes, according to the numerous autobiographies of numerous ex-Communists which we have, about 2 to 3 years for him to complete the passage from his formal break with the Communist organization to an actual opposition to Communism. And when the repentant ex-Communist has completed this passage from communism to anticommunism, he usually recognizes his duty to warn the rest of us of the dangers of this conspiracy. If, 5 or more years after an individual's formal break with the Communist organization, he is not willing to warn us by giving us his knowledge of this conspiracy, then I conclude that such an individual is not truly repentant of his Communist past, and still retains a sympathy for communism.

Now when such an individual more than 10 years after his formal break with the Communist Party, or 10 years after at least such membership can be proved, the individual is unwilling to come clean about it, I conclude that such individuals are still under the discipline of the Communist Party. In brief, to put it in concrete terms, I am of the considered opinion that both Schwab and Konigsberg are today Communists. As the Supreme Court of New Mexico said, it was not alone the fact of Schwab's association with the Communist Party 15 years ago, but "his present attitude toward those matters" which justifies the denial of his admission. Likewise where past membership in the Communist Party has been proven, it seems that the individual ought to have the burden of proving that he is no longer a member. The inference that a Communist continues to be a Communist becomes particularly strong as in the Konigsberg case where he neither answers or is willing to answer interrogatories concerning his present membership.

Supreme Court decisions have reflected adversely on the bar: If the Supreme Court wants Communists as members of its bar, I suppose that may be its constitutional prerogative. However, as a member of the bar of the Supreme Court, I feel demeaned, degraded, sullied, and soiled by these decisions of the Supreme Court which mean in effect that I must now be associated with Communists as members of the bar of the Supreme Court and other States. If it were not for the practical matter that I must continue my membership in the bar of the Supreme Court in order to earn a living, I would resign in protest to these decisions which reflect adversely on my reputation as a lawyer. I feel these decisions lower my esteem in the public eye, have injured my reputation and that of my profession for honesty, patriotism, and integrity, and have brought down upon me the contempt of a large part of the American public.

In regard to the repentant ex-Communist, the Supreme Court exhibits the honor of the underworld. The problem of the repentant ex-Communist is one in which the Supreme Court shows neither sympathy nor understanding. Only the unrepentant ex(?)-Communist receives sympathy. There is the case of the repentant ex-Communist who wanted to get admitted to the bar of the State of Illinois, and was denied admission, it was set forth in the National Review about a year ago. He had disavowed the Communist Party about 10 years before he sought admission. As I recall a petition for certiorari was taken to the Supreme Court, but certiorari was not granted to him.

It seems under the views of the Supreme Court and other fashionable liberals that a Communist loses no honor by taking the fifth amendment and concealing his past crimes—but only loses his honor by telling of his errors, and helping his country know about the mortal danger of internal subversion. The repentant ex-Communist under these views only becomes dishonorable if he tells of his past associates with communism—if he becomes a stool pigeon. But that type of honor, gentlemen, is the honor of the underworld.

Is the honor of the underworld the type of honor which our Supreme Courts holds up to the public and the legal profession as worthy of emulation? I think the answer to that in view of what I have said is obvious.

No, gentlemen, uniformity of decision in regard to admission to the bar of our sovereign State, is neither required nor desirable. The

policies of admission to the bar prevailing in Illinois which are helpful to communism are now required to prevail in New Mexico and California where the courts of those States had rejected them.

CONCLUSION

In conclusion, let me say, this bill must pass; the future security and existence of our country depends upon it. If after the provocation which the Congress has suffered from our present Supreme Court, this bill were to fail of adoption, it seems to me that an early extinction of our Republic is almost certain.

While harsh times require harsh measures, the remedy proposed by this bill is not so harsh as its critics claim; it is permitted clearly by the Constitution, article III, section 2, clause 2; but when faced with the urgency of our present situation, this is merely our good fortune, for I do not see how we could avoid the remedy proposed even if it were unconstitutional, if it were our firm purpose to preserve our Republic and our liberties.

I would like to thank the committee very much for having the opportunity to appear before them, and in regard to any comments I may have upon the association of any of the members of the Supreme Court with communism, I might say that I shall be very glad to state in my opinion why certain people have come to the suspicion that there is a connection with certain particular Justices at a future time, not to say that I adopt these suspicions, but indicate that there is a rational ground for such suspicions.

But I have not at this time prepared to support that view with particular instances and facts, but I would be willing to come forward at a future time, if the committee should desire me to do so.

Mr. SOURWINE. When did you last try a case before the Supreme Court?

Mr. GREEN. I was admitted to the Supreme Court last February, and I have filed one petition for certiorari with another lawyer, and I am at the present time preparing in a case a petition before them.

I have a one-man law office, and to say that I am a Supreme Court practitioner would be bragging. I am just sort of a one-horse lawyer in a small town, and that is the type of practice I have.

(Discussion off the record.)

Senator HRUSKA. Mr. Green, the Chair wishes to thank you for your appearance here. I want to apologize for the necessity of getting away from the committee room. It is only because of things which we cannot very well avoid, as I hope you appreciate.

Mr. GREEN. If the Chair pleases, I would like to express to the Chair my appreciation of this courtesy.

Senator HRUSKA. Thank you, sir.

The next witness is George Stallings of Jacksonville, Fla.

STATEMENT OF GEORGE B. STALLINGS, JR., JACKSONVILLE, FLA.

Mr. STALLINGS. Mr. Chairman, by way of identity, my name is George B. Stallings, Jr. I am a resident of Duval County, Fla., living in the suburbs of Jacksonville, actively engaged in the practice of law in Jacksonville, Fla., licensed to practice law before the courts

of Florida and the United States District Court for the Southern District of Florida.

I am a member of the Jacksonville Bar Association, the Florida Bar Association, and the American Bar Association.

I am appearing before this subcommittee on behalf of the Duval County Federation for Constitutional Government, which is affiliated with the Florida Federation for Constitutional Government.

If it please the Chair, for the sake of brevity I won't repeat this long name. I will merely refer to it as a federation or use the pronoun "we."

The Duval County Federation is composed of approximately 4,000 members who represent a substantial portion of the leading business and professional men and women of one of the largest metropolitan areas in the State of Florida. All of its members are loyal patriotic citizens of the United States and the State of Florida, who are fully aware of the serious national and international problems facing the Nation as well as the world. For this reason the federation has seen fit to send a personal representative to Washington, D. C., to present its views and position to the honorable members of this subcommittee regarding bill S. 2646.

At the outset I wish to make it plain that we are heartily in favor of the passage of Senator Jenner's bill, S. 2646, to limit the appellate jurisdiction of the Supreme Court in certain cases as provided for in the bill itself. We are persuaded that the Constitution of the United States makes adequate provision for the passage of such legislation under the provisions of article III, section 2, paragraph 2.

We desire the passage of this bill because we are deeply concerned about the internal security of the Nation. Our primary foundation for desiring the passage of such legislation is the fact that we believe that the Congress, who represents the people, should protect the people from any and all abuses dealt to the people by the Supreme Court, which Court is not elected by the people nor directly accountable to the people. The Congress is the one body to which we look for the preservation of our American way of life as epitomized in the United States Constitution.

And I might add here that it is not the only body to which we look. We naturally look to the Supreme Court and the executive branch of the Government as well to preserve our American way of life.

However, we cannot ignore the overpowering evidence of the world-wide Communist conspiracy aimed at the overthrow and destruction of the great American Republic. The first law of nature, being that of self-preservation, demands that we take positive action to defend ourselves from the monstrous Communist giant who seeks our complete overthrow and destruction. Our love for God and country compels us with unabated force to rise to the challenge of the forces of darkness that would forever engulf us as slaves to a totalitarian tyranny.

The events of our day certainly alarm us. The encroachments upon our constitutional guaranties and upon the Constitution itself, cause us grave concern. But, when we see the Supreme Court of the United States in a veritable parade of decisions handed down over the past 5 years in particular, pave the way for foreign ideologies that militate against us, then we cannot hold back our protest.

And I might add here that this statement is certainly not directed as a play against any personalities. The protest is merely one of results rather than directed to any persons.

We can see but one great enemy upon the world scene. That enemy is the Communist conspiracy aimed at the complete domination of our Nation. Compared with the so-called doctrine of socialism, we can hardly detect a marked difference. Both of these foreign ideologies are to us equally evil. Left along to run their chosen course, they would quickly destroy and erase our American way of life.

We honestly believe that the first line of defense against the Communist conspiracy is the Congress of the United States. In that body the will of the people is manifested. Through its committees and subcommittees it originates the policies that express the will and spirit of the citizens of the United States. To accomplish its task, the Congress must be held in the highest respect by all. Contempt for its authority is but contempt for the sovereignty of the Nation. Yes; it has become commonplace for the members of the Communist Party and its willing dupes to show their contempt for the Congress, and the sad part of it is to us is that such contempt in effect is being made possible without fear of punishment, by the decision of the Supreme Court.

This condition to us is deplorable and needs immediate and positive legislation enacted for its abolition. Bill S. 2646, in our opinion, will remove the restrictive shackles from congressional committees and subcommittees in conducting their investigations. When the Supreme Court hinders and hampers the investigative efforts of Congress to delve into the Communist conspiracy, which has for its purpose the overthrow of the Government of which that Congress forms a part, it becomes timely for the Congress to enact legislation to obviate the hindrance of the Court.

Our next grave concern is for the Government's security program. To us it is self-evident that any sound form of government must provide measures that will guarantee its own security. Any continued practice by any branch of the Government that hinders and hampers Government from maintaining such security is a fit and proper subject for corrective and remedial legislation. Our contention remains unchanged regarding the function of the Supreme Court. Its province is strictly judicial; not legislative. It has no authority to legislate or to execute laws enacted by the Congress, nor to hinder their execution. In the execution of the laws enacted by Congress, the executive branch of the Government necessarily is composed of many employees. Most of these are faithful servants of the people. But, unfortunately, some present serious threats to the security of the Government. We sincerely believe that the executive branch of the Government must be free to determine who those employees are that are jeopardizing the security of the Nation and must be free to summarily dismiss them from public service. Hindrance by the Supreme Court in this respect can prove fatal to the Nation's security.

Our federation is composed of persons with strong beliefs in States rights as the same have been reserved unto the several States in the United States Constitution. We stand firmly and positively upon the 10th amendment in particular. We have never lost sight of the constitutional truism that—

the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.

We hold to the conviction that there are inherent rights of the people in the respective States to protect themselves, through their duly elected State governments, from subversive activities at the State level. We are obliged to utter our protest against all the recent decisions of the Supreme Court that have blocked all State action in this field. We feel strongly that the appellate jurisdiction of the Court over State laws for the purpose of controlling subversive activities should be withdrawn. Protection of its internal security should be the first and prime motive of each State. The people of a State are naturally the best judges as to which persons within its bounds are dangerous to the security of that State. Subversive activities against the duly created government of a State can certainly be most effectively combated and defeated by the people of that State. The only reliable way to obviate such subversive activities within a State is by way of statutory enactments by its duly elected legislature. To remove this inalienable power reserved to the States and the people by judicial usurpation will eventually lead to the collapse of State governments. This field of local government has no place in the hands of the Federal judiciary.

Looking further to the Constitution and the 10th amendment in particular, we are certain that education in all its phases is a power inherent to the respective States and reserved to them under the Constitution. We are definitely in favor of preserving home rule over our schools. To us this principle is basic. We are persuaded that the Supreme Court has done great violence to it—namely, the principle just stated of home rule for schools—in its recent decision. Home rule over our schools means to us that we have the absolute right to discharge any teacher or member of our school system who willfully refuses to answer questions about his or her participation in subversive activity. Each State has its own particular heritage and a sovereign right to preserve such for the best interests of its people.

The people of each respective State are the best judges of what is best for them. Those in disagreement with the will of the majority in any particular State have the privilege of moving elsewhere until they find one that best reflects their own personal ideals. No person is compelled to reside in or to accept citizenship in any one particular State of the Union. The youth of a State are the natural heirs of the way of life characteristic of that State. Their elders have every right to create an educational system that best preserves that way of life most desirable to the majority of its citizens. Such a system must necessarily have a teaching body to impart learning to the youth. The people have the sacred right to carry out their educational program by duly created school boards. These boards, representing their electors, must of necessity determine a given standard of ethics and morality for the members of the teaching body in this educational system. When and if the members of the teaching body indulge in activities, the purpose of which is undermine and overthrow the chosen educational system of the people of the State, these respective boards of education must be in a position to promote valid rules, bylaws, and regulations concerning such subversive activities of the teaching body. Without such right, education would fall to perilous levels of totalitarianism. Modern history has taught us the painful

lesson that our enemies have gained their strong holds upon the people by capturing the minds of the youth of the country. Therefore, our stand is that education is a paramount power of the States—one which they have never released or relinquished to any branch of the Federal Government. The Federal judiciary has no rightful province to interfere with State education. The power has never been given to them and it has only been exercised by usurpation and encroachment. We are convinced that the local level is the proper point at which to keep control over our schools. Each community has the right to determine the kind of teachers it wants to instruct the children of that community, and the terms and conditions under which those teachers may continue to teach. We resent the Supreme Court's denial of that right, and feel that it is time to take away from the Court the appellate jurisdiction of cases in this field.

Our federation is composed of many lawyers who are held in high esteem by their fellows at the bar. Most of them are members of the Jacksonville, Fla., and American Bar Associations. Their patriotism and loyalty to State and country are beyond criticism. Most have served actively in either World War I or II, and many in the Korean conflict.

And I might add that some of them have their sons buried on foreign battlefields.

These lawyers, together with the majority of the lawyers of the State of Florida--and I should add a personal qualification here: The majority of them that I have had personal contact with; I wouldn't want to make the categorical statement of the entire State bar--but it is my opinion that the majority of the lawyers in Florida feel that the practice of law in the State of Florida is a sacred privilege granted to them by the people as a body politic. The lawyers in our federation hold the belief that each State should be free to determine the qualifications for admission to the practice of law. This matter should be left to each State to decide for itself. The subject is essentially and particularly a local one. Our legal members recognize the fact that the citizens of Florida are the best judges concerning who should practice law in Florida. The people alone should create and enforce the canons of professional ethics and the qualifications for all Florida judges and lawyers.

And I would apply this to each State respectively in its own domain.

The practice of law in Florida is regarded as sacred ground by the members of our federation. They do not welcome an invasion of this domain by Federal intervention or usurpation in any form.

For these reasons we strongly endorse bill S. 2646 and will earnestly contend for its enactment into law.

MR. SOUTHWINE. I see you have confined yourself to arguing the desirability of the legislation. Is that because you have no question in your own mind about its constitutionality?

MR. STALLINGS. We have no question at all about its constitutionality. In fact, I believe I cited the provision, article III, section 2, paragraph 2, as the authority.

MR. SOUTHWINE. We have been unable here to find any case decided by the Supreme Court which involved a holding shedding any doubt on the authority of the Congress to regulate and make exceptions to the appellate jurisdiction of the Supreme Court.

Have you ever found such a case?

Mr. STALLINGS. No; I have not, sir.

I take this stand: I proudly say that I am a simple-minded person, and to me the language of that third article of the Constitution is so simple that, as someone said, even a boy behind a plow should be able to understand it.

I don't think it leaves any room for doubt or hesitation or equivocation in any shape or form. It is crystal clear.

As far as the constitutionality of this legislation is concerned, it doesn't cross our minds.

Mr. SOURWINE. I have no other questions.

Mr. STALLINGS. Senator, I wish to thank you for the opportunity.

Senator HRUSKA. Thank you very much for coming.

Our next witness will be Mr. Harris. All right, Mr. Harris.

Mr. HARRIS. Shall I go ahead, Senator?

Senator HRUSKA. Yes; you may go ahead.

Does your statement indicate in what capacity you appear before the committee and who you represent?

STATEMENT OF THOMAS E. HARRIS, ASSOCIATE GENERAL COUNSEL OF THE AFL-CIO

Mr. HARRIS. Yes, Senator.

My name is Thomas A. Harris. I am associate general counsel of the AFL-CIO. I appear here on its behalf.

We have a prepared statement which has been supplied to the committee.

I would like, if I may, to submit that statement for inclusion in the record and orally in order to try to avoid boring us both.

I will simply endeavor to summarize it, if I may.

Senator HRUSKA. The statement will be received and placed in the record at this point and you may proceed in your own fashion.

(The statement is as follows:)

STATEMENT OF THE AFL-CIO ON S. 2646

Mr. name is Thomas E. Harris. I am associate general counsel of the AFL-CIO and appear here on its behalf. We appreciate this opportunity to appear before the subcommittee.

The AFL-CIO is opposed to the enactment of S. 2646.

This bill curtails the jurisdiction of the United States Supreme Court to review five categories of cases; that is—

"Any case where there is drawn into question the validity of—

"(1) Any function or practice of, or the jurisdiction of, any committee or subcommittee of the United States Congress, or any action or proceeding against a witness charged with contempt of Congress;

"(2) Any action, function, or practice of, or the jurisdiction of, any officer or agency of the executive branch of the Federal Government in the administration of any program established pursuant to an act of Congress or otherwise for the elimination from service as employees in the executive branch of individuals whose retention may impair the security of the United States Government;

"(3) Any statute or executive regulation of any State the general purpose of which is to control subversive activities within such State;

"(4) Any rule, bylaw, or regulation adopted by a school board, board of education, board of trustees, or similar body, concerning subversive activities in its teaching body; and

"(5) Any law, rule, or regulation of any State, or of any board of bar examiners, or similar body, or of any action or proceeding taken pursuant

to any such law, rule, or regulation pertaining to the admission of persons to the practice of law within such State."

The bill evidently proceeds upon the assumptions (1) that recent decisions of the Supreme Court dealing with these five subjects are deplorable, or mostly so, and that it is to be expected that the Court will, in these fields, continue to fall into error; and (2) that a proper remedy is to restrict the appellate jurisdiction of the Supreme Court with respect to suits involving these subjects.

In the view we take it is not necessary to examine the first of these propositions. The AFL-CIO has never taken any position with respect to many of the Supreme Court decisions of which the bill's author evidently disapproves; and we do not do so now. We take the position, rather, that even if it be assumed that the Supreme Court's decisions in the five fields enumerated in the bill have been and will continue to be unsatisfactory, that the remedy the bill proposes, of reducing the Supreme Court's jurisdiction to review cases of these sorts, is inappropriate and unworkable.

The Supreme Court decisions at which the bill is evidently aimed have rested in a few cases on the Supreme Court's interpretation of the Constitution of the United States and in other cases on its interpretation of Federal statutes. Any or all of the principles laid down by the Supreme Court in these decisions could, of course, be overturned. Many of them could be overturned by a simple act of Congress, though amendment of the United States Constitution would be necessary to reverse some rulings. The bill, however, does not attempt to reverse any of the constitutional principles or statutory constructions enunciated by the Supreme Court in these cases, but simply restricts the Supreme Court's jurisdiction to hear cases of the same general sorts in the future. We think the bill's main product would be confusion.

Let us consider, for example, State sedition laws, which is one of the subjects dealt with by the bill. In *Pennsylvania v. Nelson* (350 U. S. 407 (1956)) the Supreme Court held (by a vote of 6 to 3) that by enacting the various Federal statutes dealing with sedition against the United States (407 at 604) "Congress had intended to occupy the field of sedition. * * * Therefore, a State sedition statute is superseded regardless of whether it purports to supplement the Federal law."

Dissatisfaction with this decision was evidently one of the stimuli producing the present bill, since one of the categories of cases which it bars the Supreme Court from reviewing is any case where there is drawn into question the validity of "any statute or executive regulation of any State the general purpose of which is to control subversive activities within such State."

Let us consider, however, what effects the bill would actually have on future State sedition prosecutions. The bill does not express any congressional determination that the Supreme Court was wrong in concluding that the Congress had intended by various enactments to occupy the field of sedition against the United States, to the exclusion of State legislation. Thus, if S. 2046 were enacted it would still be up to the State courts to determine in the first instance whether or not the Federal legislation occupies the field. A State court might view the enactment of S. 2046 as an invitation to it to disregard the Supreme Court decision in the *Nelson* case, but it is by no means clear that it would. In the *Nelson* case the Supreme Court of Pennsylvania itself held that the State sedition act was superseded by the Federal legislation, and the United States Supreme Court simply affirmed the State court's holding in that regard. Thus, in the *Nelson* case itself the end result would have been the same even if S. 2046 had been on the lawbooks.

Let us suppose, however, that in a future State prosecution for sedition the State courts do accept S. 2046 as an invitation to ignore the Supreme Court's *Nelson* decision. Undoubtedly the convicted defendant would then seek a writ of habeas corpus from a Federal district court. Since the likelihood that a Federal district court would ignore the Supreme Court's decision in the *Nelson* case is very small indeed, at that point the defendant would, in all probability, be released. Thus, as respects this category of cases—State sedition cases—S. 2046 would be productive only of litigation, confusion, possible conflict between State and Federal courts, and contempt for the administration of the law.

We respectfully suggest that if Congress wishes to reverse the result of the *Nelson* case, taking it again as an example, S. 2046 is a very poor way to go about it. The proper way, we believe, would be by the enactment of one of the various bills that were introduced at the 84th Congress, such as S. 3617 or S. 3603, which specifically give the States concurrent power to legislate with respect to sedition against the Government of the United States.

We do not mean to take the position that Congress necessarily should enact such a measure. As to that, our position, as stated before a special subcommittee of the Senate Judiciary Committee in 1939, is as follows:

"We think there can be no difference of opinion as to the end objective: protection of the national security. The issue raised by the Nelson case is simply whether that end will or will not be promoted by permitting State prosecutions for sedition against the United States. It is whether, as the Supreme Court majority thought, State prosecutions would conflict and interfere with the Federal enforcement program, or whether, as the minority thought, State prosecutions would supplement and strengthen Federal enforcement.

"We do not feel that we possess any special competence for answering these questions. We suggest that the committee secure the views of the Attorney General, of the Director of the Federal Bureau of Investigation, and of representative State law-enforcement officials. For our part, we are quite willing to abide by the judgment of the committee and the Congress as to whether concurrent prosecutions by State authorities for sedition against the Federal Government would promote or embarrass national security."

The point we are making now is simply that if Congress is dissatisfied with the result of the Nelson decision, the cure is to enact a statute in effect overturning it. That remedy would preserve the orderly processes of the law while likewise achieving the result presumably sought by Congress; viz, clearing the way for State sedition prosecutions. S. 2040, in contrast, would disrupt the orderly administration of justice, yet would not clear the way for State sedition prosecutions.

Let us look at another example of how S. 2040 would work in practice. The first class of cases which S. 2040 excludes from the Supreme Court's appellate jurisdiction is those involving any action or proceeding against a witness charged with contempt of Congress.

These contempt proceedings are of necessity usually brought in the District of Columbia, and perhaps it is the intention of S. 2040 to make the United States Court of Appeals for the District of Columbia Circuit the final arbiter in these cases. Since the Court of Appeals for the District of Columbia has nine judges, and follows the practice of sitting en banc on important cases on which the court is divided, it may well be that that court could supply the desired consistency of decision as respects contempt of Congress cases arising in the District of Columbia.

However, contempt of Congress cases must be prosecuted wherever the contempt occurs, and, since congressional committees sometimes sit outside the District of Columbia, contempt of Congress cases do sometimes arise in other jurisdictions. Thus, if the Supreme Court were deprived of authority to review contempt cases there would be no way of resolving conflicts among the circuit courts of appeal and of securing consistency of decision.

Further, a person convicted of contempt of Congress in the District of Columbia and sent to a Federal prison elsewhere would be free to seek habeas corpus in the Federal district court having jurisdiction over the area in which the prison is located. Here again, any conflicts of decisions among the Federal courts could not, under S. 2040, be resolved by the Supreme Court.

These examples of the unworkability of the approach embodied in S. 2040 could be multiplied indefinitely.

We respectfully urge the subcommittee that it reject entirely the device of curtailing the jurisdiction of the Supreme Court, and that if it is dissatisfied with the substance of particular court decisions it seek a more appropriate means of altering them.

We are firmly convinced that S. 2040 would accomplish nothing worthwhile and would, on the contrary, be productive of much mischief.

Mr. SOURWINE. Might I ask if you were asked to appear to testify by Mr. Meany or was it by a vote of the board of directors or how did it come about?

Mr. HARRIS. It was by Mr. Meany, who is the president of the organization.

The AFL-CIO is opposed to the enactment of this bill for reasons which I will endeavor to state briefly.

Mr. SOURWINE. Do you mean, sir, that the AFL-CIO membership has taken some kind of a vote on this or that as a matter of policy the national leadership is against it?

Mr. HARRIS. I would say that is the situation.

Obviously we have not polled the membership and we have not had a convention either.

Dissatisfaction with the decisions of the United States Supreme Court is not something new, and attempts to alleviate that dissatisfaction by curtailing its jurisdiction are not entirely new either.

The first case ever decided by the Supreme Court—a case called *Chisholm*—was the occasion of such intense dissatisfaction that it was followed by the 11th amendment to the Constitution which was the first change in the Constitution after the original Constitution and the Bill of Rights.

Chisholm case held in the words of the headnote that—

A State may be sued in the Supreme Court by an individual citizen of another State.

Actually it was a suit on a debt owing to British creditors, and this decision was followed fairly promptly, as constitutional amendments go, by the 11th amendment, which provides that—

the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of a foreign state.

As far as I know, this is the only amendment to article III of the Constitution, the judiciary article, that has ever been put through. But on at least one other occasion the Congress did restrict the jurisdiction of the Supreme Court out of fear as to how it might decide a particular case.

That is the *McCardle* case in the reconstruction period with which I am sure you are familiar.

Much more often, dissatisfaction with particular Supreme Court decisions has resulted in the decision being overruled, not by tampering with the Court's jurisdiction, but by overruling the substantive principle behind the decision.

That has been done in some instances by constitutional amendment such as the 16th amendment permitting a Federal income tax, which overruled a Supreme Court decision to the contrary, I think 1 or 2 other constitutional provisions, and quite often by statute.

Now here the proposal is to deprive the Supreme Court of jurisdiction in some situations or to some extent to review five classes of cases. We assume that this proposal arises from dissatisfaction with the recent decisions of the Court dealing with these subjects. We think that the proper remedy, rather than changing the Court's jurisdiction, is if the Congress is dissatisfied with these decisions, that it reverse the principles underlying them.

Mr. HRUSKA. Could that be done in the *Watkins* case by statute, Mr. Harris?

Mr. HARRIS. In the *Watkins* case, Senator, I do not think it would take even a statute. As I read the *Watkins* case, it says a person before a congressional committee is entitled to be informed with reasonable precision of the legislative purpose to which the questions asked him are pertinent, and I think the decision indicates that the legislative purpose could be spelled out in any of three ways, either

by the resolution setting up the committee, or if that is vague, perhaps by the statement of the chairman of the committee at the start of the hearing, or perhaps when the point is raised by the witness, by spelling it out to him then.

There have not been any followup decisions on the Watkins case, so it is not entirely clear yet, I think, how much needs to be done to meet the Supreme Court's point.

Mr. SOURWINE. It is clear, isn't it, however, that the Supreme Court felt that the Watkins case had a force and effect beyond the decision which was involved in that case, because the Supreme Court in that case had before it the case of a witness who had been before a committee of the House of Representatives, and yet the committee remanded to the United States Circuit Court of Appeals for the District of Columbia a case involving an appearance of a witness before a committee of the Senate of the United States, so it must have felt that what the court laid down in that decision in Watkins had a broader effect and applicability than to the particular facts of that case.

Mr. HARRIS. Oh, yes, I think so, but I do not see any reason to think that the decision cannot be met by some alterations in the procedures of the committees.

In fact, I am sure they are trying to meet it. The issue has of course come up before committees several times since. I think that the chairman of the committees are trying to meet it by reading, at the outset, a statement referring to the various purposes and then, when the witnesses raise the point, I think the committee chairmen try to spell that out for them.

Mr. SOURWINE. I think you recognize it is not the point with regard to pertinency which does appear to be the only holding in the case, but rather a great deal of the dicta and some of the intimations in the case that (1) the Court was going to move in and decide for itself what was pertinent, (2) that pertinency would be a subject for review by the Court in each case rather than a decision by the body that the Court was going to decide whether the committee, (3) was carrying out properly the work assigned to it by the parent body, and some of the other implications in the case which have been most disturbing to the Congress.

Senator HRUSKA. And if they are what counsel indicates, they would completely remove from any practicality at all any possibility of a congressional committee interrogating any contumacious witness.

Mr. HARRIS. I would think, sir, that there is as yet no basis for saying that the congressional committees cannot meet this point.

Certainly they are endeavoring to do so.

Mr. SOURWINE. They met the point of pertinency.

Mr. HARRIS. Of pertinency.

Senator HRUSKA. But not the judgment, not that portion of the opinion which indicates that it is for the Supreme Court to determine whether or not in the original instance the committee is proceeding pursuant to the authorizing authority of the resolution itself.

Mr. HARRIS. I would not think, sir, that that point would be too troublesome. Actually the particular committee that was involved in the Watkins case has a much more general grant of authority than is usually, I think, the case with congressional committees, and that

particular committee apparently feels that it can meet the requirements of the Watkins case without a new resolution more specifically defining its functions as it is proceeding without seeking that and is trying to take care of the pertinency point simply by statements at the outset of hearing or when the point is raised.

Now let's consider a little what would happen in that particular class of cases, Senator, since you have raised the contempt of Congress cases.

If Senator Jenner's bill became law, the Supreme Court would not be able to review this category of cases.

Most of those cases come up initially in the District of Columbia, and I suppose the court of appeals here would then become the final arbiter on those cases arising in the District.

They do not all come up in the District though.

Mr. Green, I believe, is his name, testifying earlier stated that they did, but that is not the case.

A contempt case is brought in whatever Federal district the contempt takes place in.

Some of these cases, for instance, have come up in the Southern District of New York.

I am sure committee counsel is more familiar with where they have come up than I am, but I think the Josephson case came up there, and they will come up in whatever district the committee happens to be sitting when the contempt occurs.

It might be Hawaii. Again if the people are convicted and are put in Federal prison somewhere, I take it that they can try to sue out a writ of habeas corpus in whatever jurisdiction they find themselves; in the Federal court, whether it be in Atlanta, Leavenworth, Alcatraz or wherever else, so that the possibility of conflict among the lower courts does exist even in this category of cases if the possibility of Supreme Court review is removed.

Mr. SOURWINE. Of course the writ of habeas corpus would be properly answered, would it not, by a return held by virtue of conviction and mandate of the circuit court of appeals.

Mr. HARRIS. I think the question of to what extent a conviction can be collaterally attacked on habeas corpus is a fairly difficult one.

Mr. SOURWINE. Do you think it is still open in an area in which there is no appellate jurisdiction?

Mr. HARRIS. Yes, I think it is. And I think the decisions in recent years have tended to broaden the right to attack a conviction collaterally by habeas corpus.

Mr. SOURWINE. Do you think the Congress can control habeas corpus by statute?

Mr. HARRIS. That was the McCordle case itself, sir.

Mr. SOURWINE. I mean other than the McCordle case, which dealt solely with the matter of the Supreme Court's appellate jurisdiction in a habeas corpus case, my question was intended to be much broader.

Do you think the Congress can by statute make revisions with respect to where habeas corpus will lie and will not lie?

Mr. HARRIS. I think there is a provision in the Constitution about suspending the writ of habeas corpus in time of peace.

Isn't there a provision that it may not be suspended in time of peace? That would raise a question.

Mr. SOURWINE. Does that mean that Congress could not for instance, pass a statute providing that repeated writs of habeas corpus might not be entertained without new evidence, that after a writ had been issued and returned, another one would not be issued on the same plea in the same cause without new evidence?

You mean Congress could not enact anything like that?

Mr. HARRIS. I am sure that Congress can to some extent regulate that subject, but whether a particular statute would be valid would I think require rather careful study.

Mr. SOURWINE. Yes.

Mr. HARRIS. Let's look at another type of case at which the statute appears to be aimed, the matter of State statutes dealing with sedition against the United States.

The States have, of course, had these statutes for many years and the States enforce these statutes, and their validity was in general upheld by the Supreme Court up until the enactment of extensive Federal sedition legislation.

During World War I there were a considerable number of prosecutions under State sedition laws. Those were upheld against attack. The attack actually was mostly on due process grounds.

A year or two ago, however, after the enactment of the Smith Act in 1940 I believe, the Internal Security Act of 1950, the Communist Control Act in 1954, all of this being Federal legislation dealing with sedition against the United States, the Supreme Court held that, by these enactments, Congress had intended to occupy the field: the entire field of sedition against the United States to the exclusion of State prosecutions for that offense.

Now this decision seems to rest simply on the inference which the majority of the Supreme Court drew, I think a six-three decision, as to the intention of Congress.

It is therefore, I take it, open to being overruled by a congressional declaration of intention that they wish the States to have concurrent power to enforce or to punish sedition against the United States.

Mr. SOURWINE. You are aware, are you not, of the provision in the section of the code which includes the Smith Act that nothing therein shall be deemed, shall be construed—I am not attempting to quote the section verbatim—to take away from any of the States any of their powers under their own laws.

Would you suggest to the committee how it might more strongly phrase an expression of intent which would negative the Supreme Court's finding, made notwithstanding that other provision that the Smith Act did in fact invade and preempt the field?

Mr. HARRIS. Well, as I recall, the Supreme Court decision rested not merely on the Smith Act but the two other more recent acts which I mentioned, the Internal Security and the Communist control acts.

It seemed to me that the bills that were before the Judiciary Committee about 2 years ago, I think that the 84th Congress, 3617 and 3603 would have sufficed to overrule the Nelson case.

Now at that time we were not testifying on this particular measure, one which is generally known as H. R. 3. I forget what its current Senate counterpart is, a bill dealing with the subject of preemption generally, and we there urged that if there was dissatisfaction with the Nelson case, the proper remedy was to pass a statute specifically on the subject of sedition.

The House Judiciary committee did report out such a statute. I do not know what happened to the statute after that.

Now if, instead of authorizing the States to prosecute for sedition, you enact this bill, what will be the situation?

Well, first each State court will decide for itself whether the States have power to handle sedition cases.

Mr. SOURWINE. Excuse me. Can Congress authorize the States or any State to prosecute for sedition?

Mr. HARRIS. I take it that it clearly can.

Mr. SOURWINE. Don't you think perhaps all that Congress could do would be to declare unequivocally its own intent not to preempt the field?

The authority of the States does not flow from the Congress, could not flow from the Congress. The authority of the States is residual under the Constitution.

Mr. HARRIS. Yes; I would accept that formulation.

I think what the Congress would do would be to remove any barrier to State action which might arise from an inference that Congress had intended to occupy the field or to preclude State action.

Suppose instead of doing that, this bill were enacted.

Then it would be up to each State to decide for itself whether the Federal Congress had preempted the field of sedition against the United States or whether it had not.

Now maybe they would take the enactment of a bill like this as a suggestion that they disregarded the Nelson case, but maybe they would not, and in the Nelson case itself the Supreme Court of Pennsylvania held that the Federal enactments had preempted the field.

The Supreme Court there was not reversing—its decision did not reverse the State court's assertion of jurisdiction.

It affirmed, rather, the Supreme Court of Pennsylvania that the States had no authority.

I think the Supreme Court of Kentucky has since ruled the same way.

Now suppose some other State supreme court was more assertive of State jurisdiction and said "Yes; we can prosecute for sedition."

Then you would have the situation that the defendant, after conviction, could go into a Federal district court and make his try for habeas corpus, and whatever may be true of the State courts, the Federal courts are usually quite conscientious about following the decisions of the United States Supreme Court, so that they would probably let the people out.

All you would have done was provide for confusion, litigation. You would not have cleared the way for the States to prosecute for sedition.

Mr. SOURWINE. I note, Mr. Harris, in your prepared statement that you said at one point that the Nelson decision was originally in the Supreme Court of Pennsylvania and you added:

Thus, in the Nelson case itself, the end result would have been the same even if this 2846 had been on the law books.

It is correct, is it not, that if there had been no appeal from the Pennsylvania court decision, that decision would have been stare decisis in Pennsylvania but the antisubversive laws in 41 other States

would have been affected as they were by the United States Supreme Court's decision.

Mr. HARRIS. Yes; Nelson would still have been acquitted but it would have been up to the other States to decide the issue as the issue came up.

Mr. SOURWINE. Whereas in the Nelson case the United States Supreme Court used language which has been intended to mean and accepted in various State supreme courts as meaning that no State antisubversive law may stand, that the Congress has completely preempted the field.

Mr. HARRIS. I take it that that is what it means, but I think it could be overruled by a congressional declaration to the contrary.

Now if that is the decision of Congress, I do not think there would be anything shocking or novel about having the States handle cases of this type.

They did after World War I of course, and there was no constitutional impediment found at that time.

I take it there is not a constitutional impediment now but only a statutory one.

I would like to make a comment if I may on the question of the constitutionality of S. 2646.

I do this with some trepidation because I have not studied it with the care that should always be used before reaching a conclusion on such a matter.

Article III, in dealing with the appellate jurisdiction of the Supreme Court, does of course state, with such exceptions, that it shall have appellate jurisdiction in appellate categories of cases "with such exceptions as the Congress shall make."

I would suppose that the power of the Congress under that provision is, however, limited by the Bill of Rights just as all other powers of the Federal Government are limited by the Bill of Rights.

Specifically I would suppose that just like the commerce clause and the treaty power or any other Federal power, that they must be exercised in accordance with due process and other provisions of the Bill of Rights.

If, for instance, the Congress should enact a law stating that a particular litigant, a particular named litigant, could not appeal a case, or that a court could not have jurisdiction to entertain an appeal of a particular named litigant, I would think that that would be unconstitutional, that that law would itself violate the due process clause.

Now this is, of course, not the same sort of thing.

It seems to me that the question on a statute like this would be whether there was any reasonable basis on which it could presume that Congress could segregate out these types of cases.

Mr. SOURWINE. Does it have to be reasonable?

Mr. HARRIS. Yes, I think that the test of due process is reasonableness.

There is of course a presumption of reasonableness I think.

Mr. SOURWINE. No, I mean does the exercise by the Congress of its authority under article II, section 2, paragraph 2, have to be reasonable?

Isn't that a discretion given to the Congress?

Mr. HARRIS. No, I do not think it is absolute any more than any other power of Congress. That is, I think it is subject to the limitations of the due process clause.

Mr. SOURWINE. You think that the due process clause gives anyone a right of appeal to the Supreme Court of the United States? Aren't you confusing the right to have your cause reviewed with the right to have it appealed to the Supreme Court?

Mr. HARRIS. I think it gives a person the right that his right of appeal shall not be taken from him, except under due process of law.

Mr. SOURWINE. Is there any right of appeal except by statute?

Mr. HARRIS. No, I do not think there is, and I do not think that due process requires that a right of appeal be given.

Mr. SOURWINE. No, I would agree.

Mr. HARRIS. And if all of the Supreme Court's appellate jurisdiction were taken from it, it seems to me that that would probably be permissible.

Mr. SOURWINE. There are a lot of cases under which you can argue that you cannot take it at all.

Mr. HARRIS. It is a problem of classification that it seems to me raises the problem.

Mr. SOURWINE. If the Supreme Court's jurisdiction is taken away within a particular area affecting equally all persons within that area, there is no due process problem that arises, is there?

Mr. HARRIS. I think that would depend on whether the definition of the area itself violated the due process clause. I have given one example that I think would be a violation if you named a particular person.

Mr. SOURWINE. I am talking about what is in this bill.

Mr. HARRIS. I would think a provision that the Supreme Court shall not have jurisdiction to hear appeals by Negroes would violate the Constitution.

Mr. SOURWINE. There is nothing like that in this bill.

Mr. HARRIS. No, but I point that out simply in answer to your suggestion or what I took to be your suggestion, that there are no limitations on the power of the Congress under article 3, section 2, paragraph (2). It seems to me that there are some due process limitations. The question then is what?

Mr. SOURWINE. What I said might certainly be accepted as an intimation that that was a view.

However, what I was trying to do was to get at your view on the constitutionality of the provisions of this bill.

You have previously raised the due process question.

Mr. HARRIS. Yes.

Mr. SOURWINE. And I was wondering if you see any due process question, actual or possible, under this bill.

Mr. HARRIS. I do see a possible question.

Mr. SOURWINE. What is it?

Mr. HARRIS. And I am not clear on what the answer to it would be. It does not seem to me an open or shut question either way as to whether the bill would be constitutional.

Mr. SOURWINE. Which of the provisions there do you have in mind as raising a due process question?

Mr. HARRIS. I would think that they all raise some question.

Mr. SOURWINE. In what way?

Mr. HARRIS. But I am not sure that the answer would be the same case in all of them. It may be, for instance, that depriving the Supreme Court of jurisdiction to review admissions to the State bar, that that entire category of cases might be accepted by the Court as a reasonable category and the elimination of that jurisdiction as not violating the due process clause.

Some of the other matters, on the other hand, might be treated differently. I was a little bit surprised, incidentally, to hear the gentleman representing the Confederate States who preceded me expressing his resentment over the Supreme Court's ever thinking that it could review State exclusions from the bar, because the Supreme Court's first intervention in that field was on behalf of the former adherents of the Confederacy.

Following the Civil War various States barred the practice of ex-Confederates' practice of the law and in *Ex parte Garland* the Supreme Court held these State laws were unconstitutional, that being, I think, the first Supreme Court ruling on the right to practice law before a State bar.

Mr. SOURWINE. There is no similitude between the *Konigsberg* and *Schwartz* cases and that situation, is there? There you had under construction a State statute which was declared and found by the Supreme Court to set up an unreasonable classification. Here you have cases of the exercise of a discretion by a board of bar examiners in a finding with respect to the character of an applicant.

Mr. HARRIS. The cases obviously are not the same.

I think the Missouri statute in the *Garland* case was held to be an ex post facto law. If you had a State statute which now barred from the practice of law anyone who had ever been a member of the Communist Party, you would have, I think, the same sort of question that was presented in the *Garland* case, though as a good Southerner I am not suggesting that adherence to the Confederacy would stand on the same footing as membership in the party.

Mr. SOURWINE. In the *Garland* case was there involved the question of disbarment in effect or only the question of admissions? Did it seek to bar from the practice of law men who had been at the bar of those States but who had adhered to the Confederacy?

Mr. HARRIS. I would say both.

Mr. SOURWINE. It did then involve the taking away from a practicing lawyer his right to his livelihood?

Mr. HARRIS. Both practicing or prospective.

Mr. SOURWINE. But it did involve the taking. If a statute of that nature was a statute and if a statute is bad it is bad, and if it included, as you say, an ex post facto feature of punishing a man by taking away from him his livelihood for a crime that was not a crime at the time it was committed, wouldn't it be a considerably different principle from what is involved in the *Schwartz* and *Konigsberg* case?

Mr. HARRIS. I do not think so myself. I really do not think admission to the bar stands on any different footing from disbarment.

Mr. SOURWINE. Do you think a man has a right to admission to the bar?

Mr. HARRIS. I think he has a right to be admitted to the bar without the interposition of unconstitutional obstacles, or that he has a

right to have his admission to the bar passed upon in consonance with constitutional principles.

I think that he would have a right, for example, to a fair hearing before being denied admission to the bar.

Now, unlike some of these other witnesses, I do not assume from those cases that a court cannot disbar Communists; I do not assume that membership in the Communist Party cannot be made a ground for disbarment.

It seems to me it probably can. Certainly in the *American Communications Commission v. Dowds* in upholding the constitutionality of a non-Communist affidavit provision of the Taft-Hartley Act, I understand that case as saying that it is constitutional to bar union officers who are Communists or to bar Communists from union office. It seems to me that decision holds.

Incidentally, I argued the case and lost it. If Communists can be barred from holding union office, it seems to me it would be surprising indeed if they cannot be barred from practicing law. I would suppose that they can be.

One of the earlier witnesses was asked whether he knew of any cases that bore on the constitutionality of the bill. I would suggest that *Truax* and *Corrigan* may have some bearing.

Mr. SOURWINE. What is that case, sir?

Mr. HARRIS. *Truax v. Corrigan*.

Mr. SOURWINE. Do you have the citation of the case?

Mr. HARRIS. No, I'm sorry, I don't. It was about 1920. It did not have to do with a Federal statute but it had to do with an Arizona statute taking from the State equity courts jurisdiction in certain types of picketing cases.

Mr. SOURWINE. Was that decided under the Federal Constitution?

Mr. HARRIS. It was decided under the Federal Constitution, primarily, I think, the equal protection clause. I am not sure that the case would be followed today. It was a 5-4 decision even then.

Mr. SOURWINE. Did it in any way deal with the right of the Congress to regulate the appellate jurisdiction of the United States Supreme Court?

Mr. HARRIS. No, but I would suppose that the right of the States to regulate the jurisdiction of the State courts is not less than the right of the Congress to regulate the jurisdiction of the Federal courts.

Mr. SOURWINE. That would depend entirely upon what the State constitution provided, and whether the attempted regulations were in violation of the Federal Constitution.

Mr. HARRIS. I meant as far as the Federal Constitution is concerned.

Mr. SOURWINE. You say the State power would be not less?

Mr. HARRIS. I would say that as far as the Federal Constitution is concerned, the power of the State legislature to regulate the jurisdiction of State courts, I should think, would be no less than the power of the Congress to regulate the jurisdiction of the Federal courts.

Mr. SOURWINE. But the power of the Congress to regulate the jurisdiction of the Federal courts was a specific grant carved out of the whole power, the power of the States is residual and not granted by the Constitution.

Mr. HARRIS. I do not assume that a residual power is any more restricted than a granted one. If the States are subject to the limitations of—

Mr. SOURWINE. But it would be if the grant is absolute, as in terms this grant appears to be.

Mr. HARRIS. Yes, that is exactly why I think the *Truax* and *Corrigan* is relevant, showing that the grant is not absolute but is subject to the restrictions of the due process or in the case of the equal—

Mr. SOURWINE. As you have stated it, it did not have anything to do with the grant in section 3, article 3 of the Constitution.

Mr. HARRIS. No, no. Although the States presumably were granted authority to fix the jurisdiction of their courts as far as State law is concerned, and that of course is not a Federal question—

Mr. SOURWINE. No.

Mr. HARRIS. Their authority in that regard was held in that case to be subject to the restrictions of the 14th amendment. Now I would suppose that, on exactly the same basis, the authority of the Congress to fix the appellate jurisdiction of the Supreme Court would be subject to the due process clause of the fifth amendment.

Mr. SOURWINE. I see your point. It would fall entirely on the basis of a different amendment, however.

Mr. HARRIS. Yes.

Mr. SOURWINE. The State power does not come in the same line, nor would the restriction upon it fall in the same line as any restriction upon the congressional power.

Now going back to due process, would you point out please the sections in here—you said they all involve due process questions—would you please tell us how they do, so that we can see how the due process question is going to arise.

Mr. HARRIS. Your first category is contempt of Congress cases.

Mr. SOURWINE. Is that what the bill says?

Mr. HARRIS. Yes:

Any case where there is gone into the question of validity of any action or proceeding against a witness charged with contempt of Congress.

In those cases, the Congress, instead of punishing contempt itself, is resorting to the Federal courts for punishment of this offense. It is invoking the judicial power of the United States, and yet at the same time it is singling out this class of cases as one that may not go to the Supreme Court. Now does this involve an issue of due process or does it not?

Mr. SOURWINE. The Congress could initially in writing the contempt statute, or could now by way of a repeal and substitution provide in a contempt statute that the cases should be tried before special three-judge courts and that the judgments of those courts should be final; could it not?

Mr. HARRIS. I am not sure. I think there is a question, as I say, it is not something that I would—

Mr. SOURWINE. Is that a question because of the subject matter here or because you question the right of the Congress to set up a three-judge court and make its decision final on appeal.

Mr. HARRIS. No, I raise the question rather than answer it, but I question whether Congress can single out particular categories of cases and exclude them from Supreme Court review.

Mr. SOUPWINE. Hasn't that been done in a number of occasions?

Mr. HARRIS. The type of case that you pose, the type of statute that you pose of a three-judge court with final powers of decision, I would think that the constitutionality of that stood on a clearer footing than the constitutionality of the provision in this bill, as there your distinction would be more procedural and less substantive than it is here.

Mr. SOUPWINE. You mean there the review by the Supreme Court was not in fact excluded.

Mr. HARRIS. No. I think in the situation you are supposing of a three-judge court with the final power of decision, it would apply for the future to all of this general category of cases, and I think that that might stand on a better footing as regards due process than a statute singling out 4 or 5 subject matters and saying that the Court cannot review them.

Mr. SOUPWINE. But this three-judge court proposition would apply perhaps to only a particular subject matter. That has been done before in our jurisprudence; hasn't it?

Mr. HARRIS. Well, I can recall that in the aluminum case the final power of decision was vested in the court of appeals. There were, of course, particular reasons for doing that.

The Supreme Court could not get a quorum. But if you had certain general categories of cases, and a reasonable basis for specifying a different procedure with regard to them not ending in Supreme Court review, I would think that in some cases that could be done consistently with the Constitution.

Mr. SOUPWINE. Yes, but you say here you don't think it can be.

Mr. HARRIS. No, I said that I am doubtful about it. I do not regard it as at all an open-and-shut question.

Mr. SOUPWINE. You do not think this is a reasonable category, and therefore it raises a due-process question?

Mr. HARRIS. I think that that is the due-process question. I think that if the Supreme Court concluded that these were not reasonable categories, that they would hold that there was a violation of due process.

Now I have given you, for example, some examples of categories that I am sure it would hold were not reasonable, such as colored people, or Democrats or Republicans. Whether any of these categories would be held not reasonable, I do not know, but I think that there is a question.

Mr. SOUPWINE. What is it that a man may not be deprived of without due process of law?

Mr. HARRIS. Life, liberty, or property.

Mr. SOUPWINE. Does a man have any property in an appeal or a right of appeal to the Supreme Court of the United States?

Mr. HARRIS. I do not think that the problem is whether he has property.

Certainly in criminal prosecutions liberty is at stake, and the question is rather whether he is being deprived of it without due process of law. Then from there your question would be whether a procedure which singles out this particular category of cases and excludes it from Supreme Court review is due process.

Now to take the contempt-of-Congress cases, for example; I should suppose that the argument in support of excluding them from Supreme Court review is that contempt of congressional committees is widespread, that it is interfering with the work of those committees, that you need a speedy and final resolution of contempt prosecutions in order for congressional committees properly to do their work, and so on.

That is the sort of argument I would think would be made in support of it, and I think I have already indicated the other way.

Mr. SOURWINE. Does any person have a right to have his cause adjudicated in more than one court? Can it be lack of due process to fail to provide a review procedure in a higher court?

Mr. HARRIS. I think it can, if the refusal to provide appellate procedure involves an unreasonable classification. If it applied to everybody, I think it couldn't. I don't think that—

Mr. SOURWINE. But when you are dealing with a class of crime, when you make the appellate procedure available or withdraw it with respect to a particular class of crime, that cannot be said to be an unreasonable classification of persons, can it, even if your class of crime is so narrow as a particular offense?

Mr. HARRIS. If it were so narrow as to be a particular offense, I think it might be held to be invalid.

Mr. SOURWINE. I do not mean "particular offense" in the sense of what is done by one individual, but I mean a particular offense, a particular offense in the sense of anybody who does it commits a crime.

Mr. HARRIS. I am not sure that the McCordle statute which was aimed at a particular case would be decided the same way these days. I am a little bit surprised that some of the people have defended it who have.

According to some of the historical accounts of the decision, I think the Supreme Court rather welcomed avoiding the hot potato that was involved in that case, and probably welcomed having Congress take the jurisdiction away from it. But the precedent has usually been regarded as a very bad one of having the Congress move to bar a particular appellant or a particular case from the Supreme Court because of fear how it might decide.

Mr. SOURWINE. Is that what McCordle did?

Mr. HARRIS. Yes.

Mr. SOURWINE. Not in terms.

Mr. HARRIS. Not in terms, but in purpose.

Mr. SOURWINE. The McCordle statute in terms, as you know, did not withdraw anything from the Supreme Court. It did not bar anything from the Supreme Court. It simply repealed a prior grant of authority.

Mr. HARRIS. Of authority.

Mr. SOURWINE. And the Supreme Court said, "We have no appellate authority except that which Congress gives us."

Mr. HARRIS. And they said, "We have no authority to go behind the motives of Congress in passing the statute."

Mr. SOURWINE. That used to be good law, they would not interfere with matters political as they call them.

Mr. HARRIS. I am not sure that it is still good law.

Mr. SOURWINE. Certainly the Supreme Court has narrowed the field of what they will consider politically and of what they will keep

their hands off. Would you continue, sir, with the other points there which you consider raise the question?

Mr. HARRIS. The next category of cases which would be withdrawn from Supreme Court review are those involving the validity of any action of any officer or agency of the executive branch of the Government with respect to individuals whose retention may impair the security of the United States Government.

I have cut that down. I take it that the general category is cases involving the security or loyalty of United States employees.

Here again, as I suspect that we both recognize, we are dealing with a very uncertain field of law in which the precedents are few and far between. My own feeling is that elimination of Supreme Court review of these cases might not raise the problems that it would in some of the other situations.

It may be that I am simply influenced by the many years that passed without this ever being the subject of litigation at all.

Mr. SOURWINE. Aren't you really just saying that, if the Supreme Court makes up its mind not to let the Congress do this, they are going to find a basis for declaring the act of Congress unconstitutional?

Mr. HARRIS. I do not know that I would pitch it that strongly, but when you say something is unconstitutional, you can use the phrase in 2 or 3 different ways.

You can use it to mean—if I say it is unconstitutional that may mean that I think it ought to be, it may mean that I think the Supreme Court would so hold it. The latter may be the practical definition.

Mr. SOURWINE. Which way did you intend to use it with respect to the provisions of this bill?

Mr. HARRIS. I think it would present a constitutional issue for decision by the Supreme Court, and I think that it would be a substantial question.

How the Court would decide it, I do not know. I think it might decide differently under one subsection than under another.

What I wish to do is express my disagreement with some of the prior witnesses who have said that there is no limitation whatever upon the power of Congress to say what cases may go to the Supreme court and what may not.

I take it that you may agree with me at least if the legislation were written in the language of classes of appellants.

Mr. SOURWINE. Wouldn't you say that, in view of (1) the long line of Supreme Court cases which have held that the appellate power of the Supreme Court was achieved only by grant from the Congress, and that it had no appellate power not granted by the Congress, and (2) the somewhat substantially shorter line of cases which represent the only divergent view, that is Mr. Storey's view, that the appellate power of the Supreme Court under article III is a constitutionally granted power but is subject to the exceptions and regulations of the Congress, and that when the Congress by act purports to grant certain appellate powers, it is in fact only by implication, by leaving them out of the specific grant language, indicating the powers that it wants to restrict or to keep from the court, and (3) the further fact that the Supreme Court, so far as we have been able to find, has never held that Congress did not have the power to regulate or make ex-

ceptions to the Supreme Court's jurisdiction, find a virtual necessity in the holding that so long at least as Congress makes a reasonable classification it may make exceptions.

Mr. HARRIS. Yes, I would agree with that. I think the problem is the reasonableness of the classification.

Mr. SOURWINE. And you say you have doubts as to the reasonableness of all five of the classifications in this bill.

Mr. HARRIS. Doubts as to all five, but not the same degree of doubt exactly.

Mr. SOURWINE. Yes. Which ones do you think are the worst?

Mr. HARRIS. I think in any criminal case that you have got a greater problem to begin with than in a civil case. I tend to think also that the cases involving government employment may be the easiest ones from the standpoint of upholding the statute.

Mr. SOURWINE. All right, sir.

I'm sorry I have asked so many questions. I hope I have not unduly prolonged the matter here, but I did want to get your views clearly on the record.

Mr. HARRIS. Thank you. It has been a pleasure.

Mr. SOURWINE. Is there anything else you want to add, sir?

Mr. HARRIS. No, I do not think so. Thanks.

Senator IRUSKA. We want to thank you, Mr. Harris, and I do thank you on behalf of the subcommittee for your appearance here and your contribution to the hearing in this case.

(Whereupon, at 5:30 p. m., the subcommittee adjourned to reconvene at 10 a. m. Tuesday, March 4, 1958.)

LIMITATION OF APPELLATE JURISDICTION OF THE SUPREME COURT

TUESDAY, MARCH 4, 1958

**UNITED STATES SENATE,
SUBCOMMITTEE TO INVESTIGATE THE
ADMINISTRATION OF THE INTERNAL SECURITY ACT,
AND OTHER INTERNAL SECURITY LAWS,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D. C.**

The subcommittee met, pursuant to recess, at 10:30 a. m., in Room 424, Senate Office Building, Senator John Marshall Butler presiding.

Also present: J. G. Sourwine, chief counsel; Benjamin Mandel, research director; F. W. Schroeder, chief investigator, and Robert C. McManus, investigations analyst.

Senator BUTLER. The subcommittee will come to order.

I think there are some insertions to be made in the record.

Mr. SOURWINE. Mr. Chairman, I offer the following for the record. From the Library of Congress Legislative Reference Service, briefs in support of and in opposition to the constitutionality of this bill.

Senator BUTLER. It will be made a part of the record.

(The document referred to is as follows:)

**THE LIBRARY OF CONGRESS,
LEGISLATIVE REFERENCE SERVICE,
Washington, D. C., February 19, 1958.**

To: James O. Eastland, Chairman, Internal Security Subcommittee.

From: James P. Radigan, Jr., Senior Specialist in American Public Law.

Subject: Briefs in Support of and in Opposition to the Constitutionality of S. 2646.

In response to your request received February 12, 1958, for briefs in support of and in opposition to the constitutionality of S. 2646, the following two are submitted.

I. BRIEF IN SUPPORT OF THE CONSTITUTIONALITY OF S. 2646

The constitutionality of S. 2646 depends upon the constitutional power of the Congress to regulate the appellate jurisdiction of the Supreme Court. The pertinent provision reads:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make (Art. III, Sec. 2, Cl. 2).

The plain meaning of the words of this provision of the Constitution is such as to permit of but one construction, viz: Congress can regulate, as it proposes in S. 2646, the appellate jurisdiction of the Supreme Court. Words of the Constitution are to be given the meanings they have in common use. *Tennessee v. Whitworth* ((1886) 117 U. S. 139, 147); *Fairbanks v. United States* ((1901) 181 U. S. 283, 287).

While the appellate power of the United States extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe. *Martin v. Hunter* ((1816) 1 Wheat. 304, 337); *The Francis Wright* ((1882) 105 U. S. 381, 385); *Ex parte Yerger* ((1869) 8 Wall. 85, 98). See also *Luckenbach S. S. Co. v. United States* ((1926) 272 U. S. 533) and *St. Louis, R. R. Co. v. Taylor* ((1908) 210 U. S. 281).

Where the Congress has been granted a discretionary power, it may use any means within the scope of the grant. *Hepburn v. Griswold* ((1870) 8 Wall. 603); *Hampton v. Ames* (the Lottery case) ((1903) 188 U. S. 321). "Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to reexamination and review while others are not." *The Francis Wright* ((1882) 105 U. S. 381, 386).

As right of appeal is not essential to due process, *Reetz v. Michigan* ((1903) 188 U. S. 505); *Lott v. Pittman* ((1917) 243 U. S. 588); *Luckenbach S. S. Co. v. United States* ((1926) 272 U. S. 533); *District of Columbia v. Clawans* ((1937) 300 U. S. 617), S. 2646 raises no question of due process.

It, therefore, is submitted that the plain meaning of the pertinent provision of the Constitution authorizes the Congress to limit the appellate jurisdiction of the Supreme Court as is provided by the terms of S. 2646.

II. BRIEF IN OPPOSITION TO THE CONSTITUTIONALITY OF S. 2646

No provision of the Constitution is without effect, *Knowlton v. Moore* ((1900) 178 U. S. 41, 87). However, every provision must be compared, *Marbury v. Madison* ((1803) 1 Cr. 137), and reconciled *Cohens v. Virginia* ((1821) 6 Wheat. 264), with the others, as it is well settled that the Constitution is to be regarded as one whole and construed accordingly, *Prout v. Starr* ((1903) 188 U. S. 537, 543). As a meaning cannot be attributed to a provision that will defeat rather than effectuate the constitutional purposes of other provisions, *United States v. Classio* ((1941) 313 U. S. 299), manifestly the power of Congress to make exceptions to the appellate jurisdiction of the Supreme Court must be exercised with due regard to the provision of the Constitution vesting appellate jurisdiction in the Supreme Court, cf. *United States v. Bitly* ((1906) 208 U. S. 393, 399).

One of the great leading purposes of the Constitution, which must be kept constantly in view, *Ex parte Yerger* ((1868) 8 Wall. 85, 101), is that the Constitution provides the Supreme Court as the tribunal for its final interpretation, *Dodge v. Woolsey* ((1856) 18 Howard 331). Subsections 1 and 2 of the proposed bill in effect abrogate this purpose, including the interpretation of the protections guaranteed by the fifth amendment to which all persons within the territory of the United States are entitled, *Wong Wing v. United States* ((1896) 163 U. S. 228, 238).

Congress cannot under its power to make exceptions to the appellate jurisdiction of the Supreme Court subordinate, as is proposed by S. 2646, the provisions of the supremacy clause (art. VI, sec. 1, clause 2) to laws enacted by the States. It is to be borne in mind that the Constitution is as much a part of the law of every State as its own local laws and constitution. This is a fundamental principle in our system of complex national polity, *Hauenstein v. Lynham* ((1880) 100 U. S. 483). The Constitution would not be in practice or in fact the supreme law of the land if S. 2646 were enacted, as the judges of several courts could finally determine its meaning, cf. *Dodge v. Woolsey*, *supra*. Subsections 3, 4, and 5 of the bill would permit State courts to decide with finality the constitutionality of the subject matters covered.

It, therefore, is submitted that S. 2646 is unconstitutional because it violates the true intents and purposes of article III and of article VI, section 1, clause 2, of the Constitution of the United States.

Mr. SOURWINE. A letter and a statement from Whitney North Seymour. Mr. Seymour was supposed to be a witness. His letter states why he cannot be.

Senator BUTLER. That will be made a part of the record.

(The document referred to is as follows:)

SIMPSON THACHER & BARTLETT,
New York, N. Y., February 28, 1958.

Re S. 2046.

Hon. J. G. SOURWINE,
Chief Counsel, Internal Security Subcommittee,
Committee on the Judiciary,
Senate Office Building, Washington, D. C.

DEAR MR. SOURWINE: I had hoped to be able to testify before the subcommittee on March 5, in accordance with the arrangements which you were kind enough to make to suit my convenience. Unfortunately, family illness which has just developed will prevent me from attending in person. However, I have prepared a statement which would have been the basis of my testimony and I enclose 15 copies herewith. I hope that this statement can be accepted in lieu of my testimony.

I am very sorry for this development and express again my appreciation of your courtesy.

With kind regards,

Sincerely yours,

WHITNEY NORTH SEYMOUR.

STATEMENT OF WHITNEY NORTH SEYMOUR OF NEW YORK, ON SENATE BILL NO. 2046

I am a member of the New York bar with an office at 120 Broadway, New York, and have been a practicing attorney for more than 34 years. I was Assistant Solicitor General of the United States from 1931 to 1933, and except for that period have been associated with and a member of a large New York law firm where my experience has been principally in the trial and appellate courts, State and Federal. I was formerly president of the Association of the Bar of the City of New York, formerly vice president of the New York County Lawyers' Association and I am presently a member of the board of governors and of the house of delegates of the American Bar Association. I was formerly a member of the committee on federal judiciary and formerly chairman of the special committee on individual rights as affected by national security of the American Bar Association. I have studied the American system of government and particularly the balance of powers between the three branches of government, and have lectured on law and government in various universities. I was invited by counsel to the subcommittee to testify in connection with S. 2046. Unfortunately, family illness prevents me from appearing in person and I hope that this statement may be considered in lieu of oral testimony. It is made as an individual and not on behalf of any organization.

I respectfully submit that Senate No. 2046 should not be adopted. Any such tampering with the Supreme Court's appellate jurisdiction is undesirable and dangerous. It would upset the balance of powers. It would interfere with the independence of the judiciary. To take away review of important questions in the highest Court, because of disagreement with decisions of the Court, would ultimately destroy the integrity of judicial review. Withdrawal of the particular areas covered by this bill would leave important questions to the probably conflicting decisions of lower courts, with no way to resolve those conflicts. These results would be extremely serious and no difference of opinion about particular decisions should induce Congress to take such action.

The idea of limiting or tampering with the appellate jurisdiction of the Supreme Court because of disagreement with decisions or for other reasons has long been opposed by the organized bar.

In 1953 Senator Butler introduced a joint resolution (S. J. Res. 44) proposing an amendment to the Constitution, which, among other things, would have prohibited such interference with appellate jurisdiction as is now proposed. In prophetic language he said that a—

“* * * dangerous loophole that would be plugged up by the proposals in this joint resolution is the one whereby Congress has the power to diminish or abolish the present power of the Supreme Court to hear and decide appeals involving constitutional questions, except to such extent as the Court itself, in the exercise of its own discretion, may deem advisable * * *.”

"Upon several occasions, during attacks upon the Court's independence, there have been threats to strip it of the right to review cases raising constitutional issues. Such threats found expression as recently as the 1937 controversy."

Groups and leaders of the organized bar have given long and careful study to the power granted in clause 3 of the Constitution whereby Congress may legislate as to the appellate jurisdiction of the Supreme Court. The constitutional amendment proposed by Senator Butler in 1933 had previously been recommended by the Association of the Bar of the city of New York in 1947, by the New York State Bar Association in 1940 and by the American Bar Association in 1930.

The late Mr. Justice Roberts, after he resigned from the Supreme Court, strongly advocated the necessity for protection of the independence of the judiciary. Writing in the American Bar Association Journal (35 ABAJ 1 (1949)), he commented on the *McCardle* case (7 Wall. 506 (1868)), which had recognized the authority of Congress to remove the appellate jurisdiction of the Supreme Court, that such action as that of Congress there—

"* * * has never been done again. Nothing like it has ever been attempted, but it was done for political reasons and in a political exigency to meet a supposed emergency."

The real issue before this committee, so far as this bill is concerned, ought not to be whether some members differ with some of the Court's decisions (as to which every citizen and Senator is entitled to his own opinion), but rather whether the balance of powers should be unhinged by this sort of legislation. It is imperative, in our system of government, that no one branch of government be subservient to the other branches and that the courts retain the ultimate freedom to exercise independent judgment. No court can be completely independent if it is forced to feel that, when its decisions are unpopular, it may be stripped of its right to hear and decide similar cases. In the field of individual rights, such a shadow on the independence of courts might seriously jeopardize those rights.

The importance of an independent judiciary has always been emphasized. Alexander Hamilton outlined the problem clearly in No. 78 of the *Federalist*:

"The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."

At a hearing in January 1954 on the Butler amendment, Mr. Harrison Tweed, a leading New York lawyer, testifying before a subcommittee of this committee (speaking of congressional removal of the Supreme Court's appellate jurisdiction) said:

"Since the time at which Congress will be tempted to restrain the Court will be one of controversy and political pressure, congressional action will not be taken deliberately and with the desire to do the sound and farsighted thing, but rather, with the desire to accomplish the particular purpose to which it is committed and which has been frustrated by the Court. Remembering that the issue in controversy will be one that cuts deep into governmental philosophy or economic welfare, it seems clear that it is wrong that it should be decided in such an atmosphere and in such haste."

A great leader of the American bar, Elihu Root, at the time when the recall of judges and judicial decisions was suggested, expressed the point with clarity when he said:

"If the people of our country yield to the impatience which would destroy the system that alone makes effective these great impersonal rules and preserves our constitutional government, rather than endure the temporary inconvenience of pursuing regulated methods of changing the law, we shall not be reforming, we shall not be making progress, but shall be exhibiting * * * the lack of that self-control which enables great bodies of men to abide the slow process of orderly government rather than to break down the barriers of order when they have struck the impulse of the moment."

A 1949 report of the American Bar Association's committee on jurisprudence and law reform (at page 11) noted that congressional limitation of the Supreme Court's appellate jurisdiction was a potential danger because

"This direct and easy closing of all roads to the Supreme Court that Americans have grown to regard as highways leading to judicial protection that is always available might well be the device of the next cyclical effort to circumvent the principal check upon the executive or the legislative branch of government under our system."

This rather echoed Hamilton, quoting Montesquieu, in No. 78 of the *Federalist*: "For I agree, that 'there is no liberty, if power of judging be not separated from the legislative and executive powers.'"

As the late Edwin A. Falk, an outstanding lawyer who was chairman of the committee of the Association of the Bar which actively supported the Butler amendment, said:

"To Locke's 'Wherever law ends, tyranny begins' there always should be added the truism that wherever courts suffer an invasion of their independence, law ends."

As you will have learned from the secretary of the association, consistently with its earlier position favoring a constitutional amendment to prevent interference with the appellate jurisdiction of the Supreme Court, the American Bar Association, at its recent meeting in Atlanta, declared its opposition to this bill. In response to an inquiry from Senator Wiley as to the views of the association, the board of governors recommended to the house of delegates that the house adopt a resolution opposing the bill. A similar recommendation was made by the special committee on individual rights as affected by national security, of which I am a member, and a copy of the report of that committee is attached hereto. The house of delegates adopted the following resolution in opposition to S. 2646:

"Whereas, in 1949 the American Bar Association adopted a resolution urging the Congress to submit to the electorate an amendment to the Constitution of the United States, to provide that the Supreme Court of the United States shall have appellate jurisdiction in all matters arising under the Constitution; and

"Whereas, S. 2646 now pending before the Congress, if enacted, would forbid the Supreme Court from assuming appellate jurisdiction in certain matters, contrary to the action heretofore taken by this association and contrary to the maintenance of the balance of powers set up in the Constitution between the executive, legislative, and judicial branches of our Government: Now, therefore, be it

Resolved, That, reserving our right to criticize decisions of any court in any case and without approving or disapproving any decisions of the Supreme Court of the United States, the American Bar Association opposes the enactment of Senate bill 2646, which would limit the appellate jurisdiction of the Supreme Court of the United States."

February 1958, No. 53

AMERICAN BAR ASSOCIATION REPORT OF THE SPECIAL COMMITTEE ON INDIVIDUAL RIGHTS AS AFFECTED BY NATIONAL SECURITY

The committee by majority vote favors the resolution recommended by the board of governors that the American Bar Association oppose Senate 2646.

S. 2646 would withdraw from the appellate jurisdiction of the Supreme Court five types of cases which are now reviewable in that Court. They may be summarized as cases involving: congressional committees; executive security programs; State security programs; school boards; or admissions to the bar. The proposal obviously stems from disagreements with some recent decisions of the Supreme Court in these fields.

The integrity and uniformity of judicial review and the independence of the judiciary are vital to our system of government. If they are impaired, individual rights will be imperiled. Since maintenance of individual rights is the most notable distinction between our system and the Communist system, and the one on which we must rely to rally the hearts and minds of men to our cause, their impairment would also, in a broad sense, injure our national security.

The bill would leave lower courts to make final decisions in the fields withdrawn from Supreme Court jurisdiction. We do not believe it sound to prevent review in the highest Court of such important questions. The lower courts may differ among themselves so that there may be great confusion in decisions. Resolutions of such conflict is a historic contribution of review in the Supreme Court. It is difficult to conceive of an independent judiciary if it must decide cases with constant apprehension that if a decision is unpopular with a temporary majority in Congress, the Court's judicial review may be withdrawn.

In 1950 the association took action favoring a constitutional amendment which would go far to preclude such tampering with the Supreme Court's appellate jurisdiction. The logic of that position requires opposition to the present proposal.

ROSS L. MALONE, *Chairman*,
ARTHUR J. FREUND,
WILLIAM J. FUCHS,
CHARLES G. MORGAN,
WHITNEY NORTH SEYMOUR.

Mr. SOURWINE. A letter with an attachment from Mr. R. Carter Pittman, whose statement has previously gone into the record.
Senator BUTLER. The letter will be made a part of the record.
(The document is as follows:)

PITTMAN, KINNEY & POPE,
ATTORNEYS AT LAW,
Dalton, Ga., February 27, 1958.

HON. JAMES O. EASTLAND,
Chairman, Internal Security Subcommittee,
Senate Office Building, Washington, D. C.

Dear SENATOR EASTLAND: I am not surprised that Dean Erwin N. Griswold of Harvard Law School should have been invited by Senator Hennings to testify before your subcommittee on Senate bill 2646. Dean Griswold's book, *The Fifth Amendment Today*, has been lately cited frequently by the Supreme Court as justification for its unjustifiable decisions on the fifth amendment. Since my statement, now on file with the committee, may be regarded as unworthy of consideration in view of Dean Griswold's title, position, and resources for research, I attach hereto a photostatic copy of Dean Griswold's letter to me of June 16, 1954.

In order that you may fully understand the contents of this letter it is necessary that I explain that Dean Griswold had an article in the June 1951 issue of the American Bar Association Journal on the fifth amendment. Upon reading it I discovered that some of the historical materials in the article was based on an article by me appearing in the June 1935 issue of the Virginia Law Review and, indeed, that a part of his material was copied verbatim from my article. I called the dean's attention to my discovery. His letter is a confession without the claim of the privilege against self-incrimination.

Thereafter Dean Griswold prepared a booklet on the subject, of 82 pages, financed by the Ford Foundation Fund for the Republic. In his booklet, which was mailed free to judges and others in sensitive positions all over America, Dean Griswold sanctioned and urged the extension of the privilege far beyond any possible meaning of the unambiguous words of the amendment itself and beyond that justified by its history. He went back to the original sources cited by me in 1935 and, incidentally, corrected a printer's error. Instead of citing my article (which he said in his letter of June 16, "should have been cited and would have been cited if not in a speech"), he used my citations, in the very teeth of his own estimate of proper ethics. Dean Griswold did insert as the first sentence of his booklet: "The material in this little book is not presented as a scholarly essay"—But the Supreme Court has stricken that from his book just as it has stricken the Lawrence amendment from the fifth.

My article on the fifth amendment, which demonstrates the chimerical basis of the Griswold opus, appeared as a lead article in the June 1953 issue of the ABA Journal.

The Ford Foundation Fund for the Republic replied to many lawyers of America that it just didn't have any heart or inclination to follow Griswold with Pittman and so that is the story.

Respectfully,

R. CARTER PITTMAN.

LAW SCHOOL OF HARVARD UNIVERSITY,
Cambridge, Mass., June 16, 1954.

R. CARTER PITTMAN, Esq.,
Dalton, Ga.

DEAR MR. PITTMAN: Thank you very much for your letter of June 8.

Of course, I am much indebted to you for your article on the history of the fifth amendment. I can only say that I regret that it was published in the Virginia Law Review rather than in the Harvard Law Review. As you know, this is the only substantial treatment of the history of the fifth amendment, and I found it invaluable in the preparation of my speech.

Indeed, your article should have been cited. However, as I have indicated, it was first written as a speech, and it is not too easy to include citations in speeches.

Yes, I have talked with Mark Howe about the Anne Hutchinson and Wheelwright episode.

I read with much interest your article in the May 1954 issue of the American Bar Association Journal. I am glad to have your picture available there, too. The June issue of the Harvard Law Review contains two very critical reviews of the Crosskey volumes, written by two members of our faculty here.

Thank you again for writing me.

With best wishes,

Very truly yours,

ERWIN N. GRISWOLD, *Dean.*

Mr. SOURWINE. A letter and statement from Dean Griswold of Harvard University Law School.

Senator BUTLER. Dean Griswold's statement will be made a part of the record.

(The document referred to is as follows:)

LAW SCHOOL OF HARVARD UNIVERSITY,
Cambridge, Mass., February 28, 1958.

J. G. SOURWINE, Esq.,
*Chief Counsel, Subcommittee on Internal Security,
Senate Office Building, Washington, D. C.*

DEAR MR. SOURWINE: Thank you very much for your letter of February 22.

I appreciate your willingness to accept a statement from me with respect to S. 2040. I am enclosing the statement herewith, and trust that it will reach you on time.

With best wishes,

Very truly yours,

ERWIN N. GRISWOLD, *Dean.*

STATEMENT FILED BY ERWIN N. GRISWOLD WITH THE INTERNAL SECURITY SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY OF THE UNITED STATES SENATE

My name is Erwin N. Griswold. I reside at 36 Kenmore Road, Belmont, Mass. I am the dean of the Harvard Law School, but I speak in this statement for myself, and in no sense for Harvard University or Harvard Law School. I am also during the current year the president of the Association of American Law Schools. I do not in this statement speak for that association or any of its members.

I have read and carefully considered S. 2040, which would limit the jurisdiction of the Supreme Court of the United States in certain specified classes of cases. The classes listed are obviously suggested by certain decisions of the Supreme Court, with some of which I disagree. There are others where I think I would have stated the conclusion in somewhat different language.

S. 2040 is probably constitutional. But not everything that is constitutional is wise or desirable. It seems to me, though, that S. 2040 is contrary to the spirit of the Constitution, and that its enactment would not be a wise exercise of the powers given to the Congress by the Constitution. It is of the essence of the Constitution that we have an independent judiciary. We will not have an independent judiciary if the Congress takes jurisdiction away from the Supreme Court whenever the Court decides a case that the Congress does not like.

The present proposal is, in many ways, like the Court-packing plan advanced by President Roosevelt in 1937. That was, in essence, an executive attack on

the independence of the courts, which the President sought to make effective through an exercise by Congress of its power to increase the number of judges on the Court. This was, in my opinion, an unwise and unfortunate proposal. I was one of those who appeared as a witness before the Senate Judiciary Committee in 1937 in opposition to the Court-packing plan. Because of the determined opposition of many citizens and many Senators, that proposal was defeated despite the vigorous activity of the executive branch of the Government.

It is, I think, the clear evaluation of history that the Court-packing plan was both unwise and unnecessary. The people believe deeply in their hearts in the importance of maintaining a free and independent Judiciary. Of course, any decision of the courts should be subject to responsible criticism. But the Supreme Court as an institution plays an essential role in our Government, and stands very high in the regard of the people. The provisions of S. 2040 are clearly punitive in purpose and effect. The enactment of this bill would, in my opinion, be an excessive and unfortunate exercise of congressional power.

It is the American tradition to criticize court decisions freely, and that is as it should be. No one thinks that courts are inevitably right; but they are the institutions which are established in our system to make decisions in justifiable controversies, to resolve the difficult questions where there are conflicting claims of right. Decisional law has always grown and developed by a process of trial and error. Where a case has been found to have gone too far, it is later qualified or distinguished, or even overruled. This is the function of courts. It is through this process, as the future Lord Mansfield said more than 200 years ago, that decisional law "works itself pure." There is no doubt that this process will continue in decisions of the Supreme Court. No possible good that I can see will be served by taking away from the Supreme Court power to perform this judicial function in the types of cases specified in the pending bill.

Moreover, the enactment of S. 2040 could only lead to conflicts in decisions of the lower courts, and resulting intolerable confusion. The bill takes away jurisdiction in the Supreme Court to review decisions in certain classes of cases. The district courts, the courts of appeals, and other Federal courts, would still retain jurisdiction to decide these cases. It is obvious enough that the decisions of these lower courts throughout the country could not be always consistent. Without final authority in the Supreme Court to resolve these conflicts, the country's law on these important matters would become a patchwork. It would be one thing in one State or circuit, and another thing in another. At that point, I think that it would soon become apparent that having no Supreme Court for these matters, we would have to invent one. Thus, if S. 2040 should be enacted, it would inevitably have to be repealed to eliminate the legal chaos which it would produce.

At the recent meeting of the house of delegates of the American Bar Association held in Atlanta, Ga., on February 25, 1938, that body adopted a resolution opposing the enactment of S. 2040. It was plain from the discussion that there were many members of the house of delegates who did not themselves agree with particular decisions of the Supreme Court. Nevertheless, there was wide agreement that these differences of opinion could not be wisely dealt with by depriving the Supreme Court of authority to decide these cases. When the matter was put to vote, there were only a few scattered No's. I am not the one to present this resolution of the house of delegates to this committee. But I was a member of the house, and voted for it. I am setting forth the text of the resolution as an appendix to this statement.

The Supreme Court is an essentially conservative institution. It is in the nature of things that it should be the subject of controversy, since the questions which come to it are difficult and important ones. But the Court is the balance wheel in our Government, proceeding slowly and deliberately, always disinterested and dispassionate. It keeps us from swinging too far one way or the other. Throughout our history, the Court has, on the whole performed well the essential function of keeping our Government on a sound middle course. The United States would not work well in the long run with a weak Supreme Court, just as it would not work well with a weak Congress or a weak Executive Department. All three branches of the Government are essential, and the Supreme Court should not be impaired in carrying out its important tasks as one of the truly independent and coordinate branches of our Government. If the Supreme Court is once made subservient, which would be the effect of the enactment of S. 2040, a great conservative influence, which has played a key part in the successful functioning of our Government, would be substantially impaired.

In summary, I am opposed to the enactment of S. 2040 because:

1. It is contrary to the spirit of the Constitution which requires the maintenance of a free and independent judiciary.
2. It is unwise, even if it should be constitutional.
3. It would be thoroughly unpopular once the public understands what is involved, just as the court-packing plan touched something deep in American emotions, and resulted in widespread public opposition.
4. It would lead to confusion and conflict, since there would be no means of resolving the inevitable contradictions among the many lower Federal courts.
5. It would impair a fundamental and essentially conservative influence in our Government.

APPENDIX

RESOLUTION ADOPTED BY THE HOUSE OF DELEGATES OF THE AMERICAN BAR ASSOCIATION
AT ITS MEETING HELD IN ATLANTA, GA., ON FEBRUARY 25, 1958

Whereas in 1940 the American Bar Association adopted a resolution urging the Congress to submit to the electorate an amendment to the Constitution of the United States, to provide that the Supreme Court of the United States shall have appellate jurisdiction in all matters arising under the Constitution; and

Whereas S. 2040 now pending before the Congress, if enacted, would forbid the Supreme Court from assuming jurisdiction in certain matters, contrary to the action heretofore taken by this association and contrary to the maintenance of the balance of powers set up in the Constitution between the executive, legislative, and judicial branches of our Government: Now, therefore, be it

Resolved, That, reserving our right to criticize decisions of any court in any case and without approving or disapproving any decisions of the Supreme Court of the United States, the American Bar Association opposes the enactment of Senate bill 2040, which would limit the appellate jurisdiction of the Supreme Court of the United States.

Mr. SOURWINE. A letter and a statement from Dean Roscoe Pound, Senator BUTLER. Dean Pound's statement will be made a part of the record.

(The document referred to is as follows:)

LAW SCHOOL OF HARVARD UNIVERSITY,
Cambridge, Mass., March 1, 1958.

J. G. SOURWINE, ESQ.,

*Chief Counsel, Committee on the Judiciary, United States Senate,
Washington, D. C.*

DEAR MR. SOURWINE: I am obliged by your letter of February 10. It would not be easy for me to go to Washington in person and I am glad to be able instead of going to send a statement.

My statement does not cover the first of the two key issues of which you write. It seems to me enough to say that if Congress does have the power (which seems fairly clear) the particular exercise of it in this case would be very unfortunate. I have confined myself therefore to that proposition.

With all good wishes,

Yours very truly,

ROSCOE POUND.

STATEMENT OF ROSCOE POUND, UNIVERSITY PROFESSOR EMERITUS AT HARVARD AND
FORMER DEAN OF THE HARVARD LAW SCHOOL, FORMERLY COMMISSIONER OF
APPEALS OF THE SUPREME COURT OF NEBRASKA

As one of the Citizens Advisory Committee of the Commission on Government Security following its meeting in May 1957, I had occasion to make a thorough study of the recent decisions of the Supreme Court of the United States which seem to have chiefly motivated the bill in question. Also I have read and considered carefully the address "States' Rights, Security, and the Supreme Court" delivered by Hon. Louis O. Wyman, attorney general of New Hampshire, before the National Association of Attorneys General in June 1957, which is the most thorough presentation of the case for such a bill which has been presented. Consideration of these decisions may well be our starting point. The cases in question fall into five groups.

1. Cases finding the line between maintaining the general security and maintaining freedom of individual holding and expression of religious, political, economic, and philosophical opinions. In a constitutional government operating under law this is a difficult task with which government has been preoccupied from the beginning.

In the present connection it is coming to be drawn by the Supreme Court of the United States as a distinction between speculative opinions held or expressed as to religion, politics, economics, and social organizations, on the one hand, and active endeavor to overthrow the established legal order, on the other hand. This has been brought out especially in cases of attempted barring of individuals from professions or occupations because of former association with political Communists or advocacy of political or economic Communist theories. *Schwartz v. Board of Bar Examiners* (353 U. S. 232 (1956)); *Konigsberg v. State Board of California* (352 U. S. 252 (1957)); *Sieczczyk v. State of New Hampshire* (354 U. S. 234 (1957)); and *Yulca v. U. S.* (354 U. S. 208 (1957)).

Cases maintaining constitutional guarantees of fair prosecution of persons charged with or suspected of acts or association inimical to the general security. Here belong (a) cases of relief from double prosecution and punishment for one act—*Nelson v. Pennsylvania* (350 U. S. 497 (1956)); (b) provision of fair opportunity to obtain review of a criminal trial, *Griffin v. Illinois* (351 U. S. 12 (1956)); (c) provision of full opportunity to know and meet the case urged against an accused, *Watkins v. U. S.* (354 U. S. 178 (1957)).

3. Cases enforcing a requirement of actual decision upon charges preferred and prohibiting summary action on charges, *Service v. Dulles* (354 U. S. 353 (1957)).

4. Cases safeguarding the privilege against self-incrimination—insisting there is no presumption to be drawn from assertion of the constitutional privilege. Such a case is *Stachower v. Board of Education* (350 U. S. 551 (1956)).

5. Cases applying strict construction of penal statutes and regulations—a fundamental proposition of Anglo-American law. Such a case is *Gale v. Young* (351 U. S. 336 (1956)).

It is worthwhile to look at these cases in some detail.

In *Schwartz v. Board of Bar Examiners* (353 U. S. 232 (1956)), it was held that a State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the provisions of the 14th amendment as to due process of law and equal protection of the laws. Justices Frankfurter, Clark, and Harlan held due process of law was violated, considering that Communist affiliation 15 years before application was made to take the bar examination did not make the applicant "a person of questionable character." It should be noted (1) that there was here no clear or present danger in practice of law by a onetime Communist, who was now in no way taking part in any organization advocating or attempting to subvert our institutions, (2) there was nothing in advocacy of theoretical communism of itself to show bad character.

In *Konigsberg v. State Board of California* (352 U. S. 253 (1957)), there was denial of an application for admission to the bar. In an opinion by Mr. Justice Black, five judges held that the evidence did not rationally support a finding that the petitioner had failed to prove he was of good moral character. Justices Frankfurter, Clark, and Harlan considered that the case should be sent back to the Supreme Court of California to certify the ground on which its denial of relief from the holding of the State bar was grounded. There was nothing to indicate that there was anything involved beyond former adherence to a party advocating Communist economic and political views as distinguished from subversive activity.

In *Sieczczyk v. State of New Hampshire* (354 U. S. 234 (1957)), there was a prosecution for contempt in refusing to answer questions as to a lecture given by Professor Sweezy at the State university and concerning the Progressive Party and its adherents, under a State subversive activities act. Upon petition of the attorney general the State trial court propounded the questions to the witness and on his refusal to answer adjudged him in contempt. This judgment was affirmed by the State supreme court. It was reversed by the Supreme Court of the United States.

Two categories of questions put to the witnesses are discussed by the State supreme court and by the Supreme Court of the United States.

(1) Questions having to do with certain lectures delivered to a class at the University of New Hampshire at the invitation of the members of the faculty teaching a course in the humanities. The questions were: "What was the sub-

ject of your lecture? Didn't you tell your class * * * that socialism was inevitable in this country? Did you advocate Marxism at that time? Did you express an opinion or did you make the statement at that time that socialism was inevitable in America? Did you in this last lecture or in any of the former lectures espouse the theory of dialectical materialism?"

(2) Questions as to the "Progressive Party and its predecessor, the Progressive Citizens of America; whether his wife was active in forming the Progressive Citizens of America, and was she working with individuals who were members of the Communist Party; was O. B. active in forming the Progressive Citizens of America; was O. B. active in the Progressive Party in New Hampshire; did O. B. work with your present wife in 1947; did a meeting at the house of A. W. in 1949 have anything to do with the Progressive Party?"

Four judges, Chief Justice Warren, and Justices Black, Douglas, and Brennan held that conviction for contempt in refusing to answer these questions as to a lecture delivered by the witness at a State university and relating to the Progressive Party and its adherents was in violation of the 14th amendment where there was no reference in the legislation authorizing the inquiry as to the kind of evidence which the legislature desired to have so that it cannot be said authoritatively that the legislature directed the attorney general to cover the facts upon which the witness is questioned. Lack of indication that the legislature desired the information which the attorney general sought to elicit was to be treated as want of authority to seek it.

Two Justices (Mr. Justice Frankfurter and Mr. Justice Harlan) concurred in reversing the judgment of conviction but rejected the reasons given in the opinion of the Chief Justice that where the attorney general interrogated the witness with respect to the witness' knowledge of the Progressive Party and its adherents he infringed the witness' rights with respect to political activity which are protected by the due process clause in the 14th amendment and such infringement was not justified by a remote and shadowy threat in the origin and contributing elements of the party and the witness' relation to them.

Two Justices (Mr. Justice Clark and Mr. Justice Burton) dissented on the ground set forth in the dissent of Mr. Justice Clark in the Watkins case discussed below.

It seems reasonably clear that nothing is settled finally by this case and that in the orderly course of decision a sound result will sooner or later be reached. Reaching it will not be accelerated by cutting off appeal to the Supreme Court of the United States and leaving application of the Federal Constitution on this subject to determination of the 11 courts of appeal.

In *Yates v. United States* (354 U. S. 308 (1957)), there were 3 cases of indictment in 1 count for conspiracy contrary to the Smith Act to (1) advocate and teach forcible overthrow of the Government of the United States; (2) to organize a society as the Communist Party of the United States to advocate and teach such forcible overthrow of the Government of the United States. As to (1) the trial court refused instructions that the advocacy not of an abstract doctrine but of concrete action toward such forcible overthrow was meant. The court of appeals held such instruction unnecessary because conspiracy required some overt act which would satisfy the element of action. As to (2) both the trial court and the court of appeals held that the word "organize" as used in the Smith Act was a continuing proceeding during the life of the organization. This was reversed by the Supreme Court of the United States. Only seven justices sat.

As to point (1) the opinion of the court by Justice Harlan, Chief Justice Warren, Justices Frankfurter and Burton (four justices), held that the statute forbade not an abstract doctrine of forcible overthrow of the Government of the United States but action directed to such overthrow so the instruction on that point should have been granted. Justices Black and Douglas agreed but added that tendered instructions according to which the defendant could be convicted for advocating action were not allowable under the Constitution. Justice Clark dissented holding that the instructions given by the trial court were correct and sufficient.

As to point (2) the opinion of the Court by Justice Harlan, held that the term "organize" must refer to the creation of a new organization since the Communist Party was organized in 1945, while the indictment was filed in 1951, and prosecution therefore was barred by the statutory limitation of 2 years. This was concurred in by Chief Justice Warren, and Justices Frankfurter, Black, and Douglas. Justices Burton and Clark dissented.

(3) It was held in the opinion of the Court (six justices, Clark, J. dissenting) that the Supreme Court had the power to direct acquittal where the evidence in the record would be clearly insufficient upon a new trial; that the evidence was so insufficient as to five of the defendants, as to whom acquittal was ordered, but not as to nine who were ordered to be retried (Black and Douglas, JJ. dissenting) and that overt acts in furtherance of the conspiracy could be proved by participation in meetings of the Communist Party although participation was lawful in itself.

II. Cases maintaining a constitutional guaranty of fair prosecution of persons charged with or suspected of acts or associations inimical to the general security. Here belong (a) cases of relief from double prosecution and punishment for one act. Such a case is *Nelson v. Pennsylvania* (250 U. S. 497 (1950)). This case holds that when Congress has enacted legislation occupying a particular field, State legislation coinciding therewith is as ineffective as State legislation in opposition to it. It will be assumed that Congress intended to supersede State legislation on the subject, where there is danger of serious conflict with administration of the Federal program. The same question is involved in labor legislation, in legislation on the border between State and interstate commerce, and as to trusts and restraint of trade. But the third proposition of the proposed bill meets only the case of legislation to control subversive activities. Why single out this one instance in which there is a clear interference with State administration of justice?

(b) Cases making provision for fair opportunity to obtain review of a trial. Here the case complained of is *Griffin v. Illinois* (351 U. S. 12 (1956)). This was a case of denial to a person convicted of felony in a State court of a transcript of the trial proceedings from which to prepare a bill of exceptions, which by State statute was provided to persons sentenced to death, but the convicted person in the instant case could not procure this because of poverty. Deprivation of this transcript was held deprivation of due process of law in a 5 to 4 decision. This case adapts the 14th amendment to the procedure in criminal cases today and makes for a real equality before the law. I am confident that the opinion of mankind will not concur in the pronouncement of the Legislature of Georgia "that the effect of this decision is to place upon each of the States the duty of guaranteeing the financial ability of every Communist and felon to exercise constitutional rights." That financial ability should not be a prerequisite of securing exercise of constitutional rights ought not to be an arguable question in the United States. (See Willcox and Blaustein, the *Griffin Case—Poverty and the 14th amendment*, 43 *Cornell Law Quarterly* 1 (1957).)

(c) Cases providing full opportunity to know and meet the case urged against the accused. Two cases of this sort are complained of.

Jencks v. United States (353 U. S. 657 (1957)) was an indictment of the president of a labor union for falsely swearing in an affidavit filed with the National Labor Relations Board that he was not a member of and had no affiliation with the Communist Party. At the trial he asked for inspection of reports to the Federal Bureau of Investigation by two witnesses about activities and occurrences to which they had testified at the trial. The motion was denied and he was convicted. Reversed by the Supreme Court of the United States, eight justices sitting. Brennan, J. delivered the opinion of the Court and four justices concurred. It was held (1) that defendant was entitled to an order requiring the Government to produce the reports for his inspection where they contained statements of Government witnesses as to activities and occurrences to which they testified at the trial; (2) that the producing of Government documents to the trial judge for his ruling as to relevancy and allowability without hearing the accused was disapproved of; and (3) that if the Government exercised its privilege to withhold the reports in the public interest the prosecution must be dismissed; and (4) that it was for the Government and not for the trial judge to determine the question of the public interest in this connection. Burton and Harlan, JJ. held that the documents should be produced for examination before the trial judge to determine whether they were relevant and were privileged as claimed by the Government, but they agreed to reversal of the judgment of conviction because of the instructions as to membership and affiliation with the Communist Party.

Frankfurter, J., who joined in the opinion of the Court agreed with Justices Burton and Harlan that the instructions were erroneous.

Clark, J. considered the instructions sufficient and dissented.

Watkins v. United States (354 U. S. 178 (1957)). Eight Justices sat.

In this case a labor union official and organizer as a witness before a subcommittee of the House Committee on Un-American Activities refused to answer questions as to whether certain persons had been in the past members of the Communist Party, on the ground that this was not pertinent to the subject of inquiry by the subcommittee. The statute made it criminal for a witness before a congressional committee to refuse to answer any question pertinent to the question under inquiry. Judgment of conviction was reversed by the Supreme Court of the United States in an opinion by Warren, C. J., four judges concurring. It was held (1) where the witness objects on the ground that the question is not pertinent the committee must state for the record what is the subject under inquiry at the time and how the question put is pertinent thereto. (2) The evidence did not show what the question under inquiry at the time was so as to make it known to the accused. Frankfurter, J. (1 of the 5) added that the scope of the inquiry must be defined with sufficient clearness to safeguard a witness against danger of vagueness and that had been no such definition of the subject.

Clark, J. dissented holding that pertinency of the question had been shown sufficiently. He agreed that the question between him and the majority of the Court was whether the system of inquiry practiced by the committee provided adequate safeguards for the protection of individual rights of free speech. In view of recent examples of what may be done from good motives by committees in the course of investigation, the importance of reasonable checks upon the inquiry has become evident.

III. Cases requiring actual decision upon the charges made: insisting there shall be no summary action on charges of disloyalty or relations with subversive organizations.

In this connection the case referred to is *Service v. Dulles* (354 U. S. 363 (1957)).

In this case a foreign service officer in the Department of State was repeatedly investigated as to his loyalty and as to whether he was a security risk. The State Department Board decided in his favor and its decision was approved by the Deputy Under Secretary. Later the Loyalty Review Board of the Civil Service Commission found against him and recommended his discharge. Thereupon on this basis, the Secretary of State, without reading the evidence and making an independent determination whether the evidence justified discharge, discharged him. The district court sustained the discharge as an exercise of the absolute discretion conferred upon the Secretary of State to discharge employees where necessary or advisable in the interest of the United States. This was affirmed by the court of appeals. The judgment of the court of appeals was reversed by a unanimous Court, seven judges sitting.

It was held in an opinion by Harlan, J. that the discharge was contrary to the loyalty and security regulations of the Department of State by which the Secretary of State was bound. The relevant provision was: "The discharge shall be reached after consideration of the complete file, arguments, briefs, and testimony presented." The case was remanded for compliance with that provision.

IV. Cases safeguarding the privilege against self-incrimination, holding that no presumption is to be drawn from assertion of the constitutional privilege.

Here the case complained of is *Slochower v. Board of Education* (350 U. S. 551 (1956)).

A professor in Brooklyn College, an institution of the city of New York, was summarily discharged for claiming the privilege against self-incrimination in refusing to answer questions as to past membership in the Communist Party at a hearing before a congressional committee investigating national security. In previous appearances before a State legislative committee and a board of the college faculty as to membership in the Communist Party, he had testified fully and the university authorities had his testimony at the time of his discharge. They acted under a provision of the city charter requiring discharge without notice or hearing of a municipal employee who invoked the privilege against self-incrimination in refusing to answer legally authorized questions into his official conduct. Proceedings for review were dismissed by the State trial court and the dismissal was sustained by the appellate division and the court of appeals. This judgment was reversed in an opinion by Mr. Justice Clark, Justices Reed, Minton, and Burton dissenting. The provision of the municipal charter was held to involve denial of due process of law. Justices Black and Douglas, who voted with the majority, reiterated the view they expressed in *Wyman v. Updegraff* (344 U. S. 183 (1952)).

Mr. Justice Clark said: "The privilege against self-incrimination would be reduced to a hollow mockery or a conclusive presumption of perjury." (p. 557.) Mr. Justice Black had said in *Wyman v. Updegraff*, *supra*: "Tyrannical totalitarian governments cannot safely allow their people to speak with entire freedom. I believe with the framers that our free government can." (314 U. S. 183, 190 (1952).)

V. Cases applying the rule of strict construction of penal statutes and regulations—a fundamental proposition of Anglo-American law.

The case complained of in this connection is *Cole v. Young* (351 U. S. 530 (1956)). In that case the Summary Suspension Act of 1950 empowered the head of specified Government agencies to dismiss employees summarily when necessary in the interest of national security. The head of the Department of Health, Education, and Welfare summarily dismissed an employee holding a "nonsensitive" position who was charged with "sympathetic association with Communists." The act made determination by the head of an agency that a dismissal was necessary, conclusive, and final so that appeal to the Civil Service Commission, which would otherwise have been open to the employee under the Veterans Preference Act, was cut off. Action by the employee for a declaratory judgment that the discharge was in contravention of the Veterans Preference Act was dismissed by the district court, and this action was affirmed by the court of appeals. Reversed by the Supreme Court of the United States, the justices deciding 6 to 3. The opinion was delivered by Mr. Justice Harlan, holding that "national security" in the act has reference only to activity directly connected with the safety of the Nation as distinguished from the general welfare; and as there was no determination that the employee's position was related to the national security in this sense, the executive order implementing the Summary Suspension Act was invalid insofar as it allowed summary dismissal without determination as to relation between the employee's work and the national security.

Justices Clark, Reed, and Minton dissented in an opinion by Mr. Justice Clark.

Going back to cases finding the line between maintaining the general security and maintaining freedom of individual holding and expressing of religious, economic, political, and philosophical opinions, I recall well the time when I was an undergraduate (my college class was 1888) when everyone had mortal terror of anarchists. The philosophical anarchists were perfectly harmless except as their theories were misjudged and misapplied by the bomb-throwing anarchists who were under general attack. One of the leaders among the philosophical anarchists, in the student body of which I was one, afterward became a bishop in the Episcopal Church. On matters of personal conduct, respect for law, and belief in the established order, he was thoroughly sound. But he did not believe in maintaining society by force. At one time he was near being thwarted in his ambitions as a theological student and a minister because of something he had said when a student about theoretical adjustment of relations and ordering of conduct without resort to force.

Another student in the late 1880's of the last century who was a vigorous debater and regularly took the side of the philosophical anarchists, afterward became a leading member of the bar and was for a time one of the regents of the State university.

In the last 10 years the Supreme Court of the United States has had a hard task of maintaining the constitutional guarantees of free speech and free political, economic, and sociological opinion in a time of excitement in which years for the political and economic order are easily aroused and dissents from established modes of belief are suspect, and there is pressure for overriding the guarantees of individual freedom which are at the foundation of our polity. The Court has been finding its way by the process of applying reason to experience and testing experience by reason by which our law has grown, and is steadily working out a sound body of interpretation and application of the constitutional guarantees to new conditions. The opinions complained of were rendered within the last few years, and some of the most important by less than a majority of the full bench of the Court. There is every reason for saying that in the orderly course of judicial decision a sound body of judicial determination will be worked out and there will be no need of legislative interference with the development of interpretation and application of the Bill of Rights and the 14th amendment to meet new problems in the light of old principles.

I submit, therefore, the proposed bill is unnecessary. It provides only a partial remedy if one is needed. It involves serious reversal of our constitutional polity to take the matters complained of out of the domain of the courts, and this is

not attempted beyond cutting off review of decisions on questions of Federal constitutional law by the State courts from review by the Supreme Court of the United States. As the Judges in the State are bound by the Constitution the only result would be that each State supreme court could take its own view of the Bill of Rights and as to the fundamental liberties of mankind so that on questions of constitutional law we might be 1 people today and 48 tomorrow. But many questions as to the Bill of Rights could get into the Federal courts and then there could be independent construction in each of the 11 circuits. Or conceivably the courts of appeal might hold themselves bound by the decisions of the Supreme Court of the United States at the time when it had reviewing power and so might unite in applying the decisions now complained of. While if the bill were enacted it would cut off direct review of State decisions by certiorari it would not cut off upholding of the constitutional guarantees by the Federal courts by *habeas corpus* in cases where the State courts acted in contravention of the 14th amendment, and thus would lead only to a chaotic condition of pronouncements by courts not reviewable and so not capable of being reduced to a consistent body of law.

Specifically what in these decisions is complained of as justifying the bill?

First, it is complained that they have made nugatory the investigating powers of Congress, apparently assuming that in order to be effective congressional investigation must be free from judicial check. At the outset of our constitutional history it was found necessary by the first nine amendments of the Federal Constitution to limit exercise of both legislative and executive powers of the Federal Government in derogation of the rights of individuals. Experience has shown abundantly that legislative investigations are capable of serious abuses. It has been the task of the Supreme Court of the United States to define in particular cases, by laying down principles of decision, what is not permissible in the course of congressional investigations in view of the Bill of Rights. Unless this can be done judicially the guarantees of the Bill of Rights remain mere preachment.

Second, it is considered that the Court has impaired, so far as substantially to nullify, the Government security program. Hence its appellate jurisdiction as to that program is to be taken away. If this is carried out as it is put it too would mean making of the Bill of Rights a mere preachment as to any program for security set up by Congress or by the Executive, thus abandoning a cardinal principle of our polity.

Third, it is said that the decisions in question take away the right of the people to protect themselves through their State government from subversive activity at the State level. The Nelson and Sweezy cases are cited here. But since the 14th amendment due process of law has become a national concern. Of the 2 decisions objected to, 1 has to do with the difficult questions arising when both State and national legislation on the same subject create danger of conflict and double vexation or unreasonable inflictions upon the individual. Experience has shown the need of applying principles to such conflicts.

As to the Sweezy case, State legislative investigation has proved to involve the same possibilities of abuse as has Federal. Each calls for restraint imposed by judicially administered constitutional law.

Fourth, we are told that the bill will preserve home rule over our schools. But home rule, fundamental as it is in our polity, does not mean full authority in the local government to suppress free holding and on proper occasions and in proper places expressing opinions on religious, political, and economic subjects. The truth is that the danger to the general security from free discussion of questions of economics and politics in colleges and universities has been enormously exaggerated. These institutions are not to be thought of in terms of grade schools. Teaching in colleges is not like teaching of spelling or of the multiplication table. Teaching in an atmosphere of free discussion does not mean that everything a teacher says will be at once accepted by his hearers as gospel. The idea that no political or economic heresy is to be allowed to contaminate college teaching belongs to Soviet rather than to American education.

Fifth, the decisions in the Schwabe and Konigsberg cases are said to infringe the freedom of the States to determine the qualifications for practice of law. But in the crowded world of today the power of the individual to make a livelihood for himself by free choice of occupation for which he shows himself fitted by character, training, and ability cannot be cut off in a free land by attaching labels on the basis of past association with advocates of political or economic heresies or even association with those shown subsequently to have been active and not merely theoretical believers in overthrow of government. There must be rea-

sonable limits within which ambitious youth may make and later correct mistakes.

In summary, the bill, however well intentioned, can achieve no useful result and has possibilities of achieving much mischief.

1. The decisions themselves of which complaint is made are not the threats to the general security or hindrances to needed protection against subversive activities against the Government that they are assumed to be. They serve to define and maintain a balance of the general security and guaranteed rights and to maintain it against well meant hasty and overzealous governmental action. There is no occasion for radical departure from our characteristic American constitutional polity.

2. If there were any need, the remedy proposed is partial and ineffective. It covers only a part of what is claimed to call for correction and even that part at most imperfectly.

3. It would be reasonably certain to lead to clashes of Federal and State courts, since the Constitution expressly provides that the judges in every State shall be bound thereby and any conflict becomes a Federal question.

4. It would lead to a confused body of decisions of 11 independent Federal courts of appeals and 48 State supreme courts, with no final reviewing authority, or else to the Federal courts of appeals, holding themselves bound by and so following the decisions of the Supreme Court of the United States at the time it had reviewing authority—the cases of which complaint is now made—would leave things as they are as to all matters passed on in those cases.

5. As to cases decided by the highest State courts, should those courts decide contrary to the provisions of the Federal Constitution, if direct review is cut off remedies such as habeas corpus could often be had in the Federal courts, and although review of these proceedings by the Supreme Court would be cut off, the Federal courts of appeals would be able to make the constructions and applications of the Federal Constitution complained of very much what they are now.

I submit that the proposed legislation is unnecessary and if enacted would be to a great extent futile and for the rest productive of confusion and altogether mischievous.

Mr. SOURWINE. A letter and statement from Mr. Edward A. Rumely of the Committee for Constitutional Government, Inc.

Senator BUTLER. Mr. Rumely's statement will be received and made part of the record.

(The document referred to is as follows:)

COMMITTEE FOR CONSTITUTIONAL GOVERNMENT, INC.,
New York, N. Y., February 28, 1958.

Hon. WILLIAM E. JENNER,
Senate Office Building, Washington, D. C.

DEAR SENATOR JENNER: I am very sorry that I am so overwhelmed with my duties here that I cannot make a personal appearance at the hearings on Senate bill 2040.

However, I have worked up a statement, copy of which is enclosed, which I wish to file. I am sorry that my own costly experience with a congressional committee requires my taking exception to section 1 of Senate bill 2040.

You are doing a service highly worth while.

Sincerely yours,

EDWARD A. RUMELY, *Executive Secretary*.

STATEMENT OF EDWARD A. RUMELY RE SENATE BILL 2040, FILED WITH THE
SENATE COMMITTEE ON THE JUDICIARY, FEBRUARY 27, 1958

My name is Edward A. Rumely. I am executive secretary of the Committee for Constitutional Government, with offices at 205 East 42d Street, New York, N. Y. I regret my inability to accept the kind invitation extended through your chief counsel, Mr. Sourwine, to testify before you, with respect to Senate bill 2040. Instead, I offer on my own behalf only the following comments, based in part on my personal experience and observations, for your consideration.

STATEMENT

In 1937, when the attempt was made to pack the Supreme Court with five additional members, I acted as executive secretary for the National Committee to

Uphold Constitutional Government, of which Frank E. Gannett was the founder and chairman. That committee, in 6 months, poured out millions of letters and 15 million franked statements defending the independence of the Court against executive invasion.

The extent to which the public was interested was evidenced by the fact that the cost of this educational campaign, \$250,000, was secured from 13,000 individuals giving less than \$20 each. Now, again, the proper function of the Supreme Court is a matter of grave issue.

I cannot concur in the first provision of the pending bill, which would take from the Court the right to hear an appeal in a case where a defendant is charged with contempt of Congress. I myself, was voted (183-175) in contempt of Congress in August 1950. The Buchanan committee, with the aid of leaders of labor union monopolies, had built up a nationwide propaganda, I would say largely because I had been instrumental in distributing 850,000 copies of a book, *The Road Ahead*, which showed how British trades unions took England into socialism, poverty and socialized medicine. The case was tried in the district court, in the District of Columbia, where I was convicted, because I had refused to name the quantity purchasers of *The Road Ahead* and other literature which the Committee for Constitutional Government distributed.

I was convicted, fined and sentenced to imprisonment, but the sentence was suspended. Through right of appeal to the court of appeals and even the Supreme Court against invasion of my rights by a committee of Congress, I was protected against the unconstitutional proceedings of a congressional committee violating the first article of the Bill of Rights. Finally, a historically important, unanimous decision of the Supreme Court, March 9, 1953, upheld the position I had taken.

Just as it was important to protect the Supreme Court against the proposal of the Executive, to pack it with five additional members, and to protect an individual against the unconstitutional demands of congressional committee, so now it is highly important to keep the Supreme Court from invading the legislative functions of government, as it did in the desegregation decision, which was contrary to precedent and was based upon unsound ideology, as for example that of Gunnar Myrdal, a Swedish socialist.

Of course, any officer or agency of the executive branch should be free to eliminate from service employees whose retention might impair the security of the United States Government. There should be no right of appeal against any State statute or executive regulation, the purpose of which is to control subversive activities.

It is a breakdown of the Constitution to take from the States matters left in the States' hands under the Constitution, and which they can handle with greater effectiveness than a highly centralized government. Of course, education is a State function, and the Supreme Court should not attempt to take from State control any rule, bylaw or regulation adopted by the educational authorities within a State.

States should be left to regulate all matters in which they have not specifically yielded their authority to the Federal Government, in the Constitution. A case in point is regulation of the admission to the practice of law in State courts.

In sections 2, 3, 4 and 5 of the proposed bill, limitation of the appellate jurisdiction of the Supreme Court is highly desirable, in fact necessary because the Supreme Court has gone out of bounds into an area where, instead of interpreting law, it is, in fact and in practice, legislating.

Opposition to the first section of Senate bill 2646 is called for in order that a citizen may be protected against the abuse or power by one branch of the Government. In all the other sections of the bill, the issue is the invasion of States rights by a branch of the Federal Government.

The decisions of the Supreme Court have tended, more and more, to break down the independence of the States and to move this country toward centralizing power in the Federal Government. Hitler, at one stage, made the statement that his first years were consumed in breaking down the independence of the German states and moving their powers and functions to Berlin.

We have already gone far toward centralizing powers in Washington, and taxes in the Federal Government, and this process needs to be checked and reversed. Provisions 2, 3, 4 and 5, in Senate bill 2646 are a step in this direction.

Mr. SOURWINE. This [indicating] is a letter in the nature of a statement from John Lord O'Brian of Washington, D. C.

Senator BUTLER. Mr. O'Brian's letter in the nature of a statement will be received and made a part of the record.

(The document referred to is as follows:)

COVINGTON & BURLING,
Washington, D. C., March 3, 1958.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
United States Senate,
Washington, D. C.

DEAR MR. CHAIRMAN: In accordance with the invitation of your Subcommittee on Internal Security, I am submitting this statement of my views on S. 2646, a bill to limit the appellate jurisdiction of the Supreme Court of the United States. I appreciate the courtesy of your invitation and respectfully request that this statement be included in the record of the hearings now being held by the subcommittee.

The bill would withdraw from the Supreme Court of the United States appellate jurisdiction to review cases arising from the investigative functions of Congress, the security program of the executive branch of the Federal Government, State antisubversive legislation, local governmental rules concerning subversive activities of public-school teachers, and, finally, the admission of persons to the practice of law within the individual States.

I am unalterably opposed to the bill. In voicing my opposition, I speak on the basis of more than half a century of familiarity with American public law, both in an official and in a private capacity, and more than 40 years of active practice at the bar of the Supreme Court. Further, I have had a continuing interest in the problems of antisubversive and national security legislation since World War I, during which I served as head of the War Emergency Division of the Department of Justice. In this capacity during most of that period I was responsible for the administration of the civilian laws relating to the war and for the supervision and internment of alien enemies. As counsel for the Government I also presented the arguments before the Supreme Court in the first series of sedition cases, including the Debs and Schenck cases, in which the Court unanimously upheld the validity of the Espionage Act of 1917.

I object to S. 2646 because it is an attempt to strip citizens of the protection of judicial review by the highest court of our land, a protection that has existed since the first days of our Republic. The bill is a direct attack on our Federal system of government, threatens the independence of our judiciary, and brushes aside as unimportant all considerations of personal freedom. As such, it is so sweeping and so squarely at odds with our constitutional structure as to cast grave doubt on its constitutional validity.

I say this fully aware of the constitutional provision permitting Congress to legislate certain exceptions to the jurisdiction of the Supreme Court. But our basic charter must be read as a whole and in the light of the major purpose of its authors to establish an institutional system capable of maintaining freedom and conducting effective government amid the changing and unforeseeable demands of the future. The validity of S. 2646 cannot be assumed by reading one phrase of the Constitution in isolation. The entire constitutional plan and the Bill of Rights and subsequent amendments must be considered. When this is done, it becomes apparent that S. 2646 strikes at the heart of the Supreme Court's functions as 1 of the 3 coordinate branches of the Federal Government, as impartial arbiter of Federal-State relationships and as historic protector of the freedoms of the individual.

The proposed legislation would also create chaos in judicial administration. It should be noted that the bill does not purport to deprive lower Federal courts, or State courts, of their power to pass upon the questions which are to be taken from the Supreme Court. Accordingly, by seeking to eliminate the jurisdiction of the only tribunal capable of resolving conflicts of decisions on these questions among the Federal courts and of guaranteeing the enforcement of these Federal rights in State tribunals, the bill would necessarily preclude uniformity of decision and encourage disrespect for Federal law. This would appear clear beyond argument and has been emphasized only recently by the American Bar Association in registering its opposition to the pending bill.

The proponents of the bill apparently have proposed it because they feel that certain Supreme Court decisions are wrong. I am familiar with the cases that are claimed to demonstrate the need for this legislation and with the constitutional aspects of the difficult problem of reconciling national security and individual freedom. It serves no purpose, however, to discuss these cases individually here. The important point is that in our system of government the Supreme Court is properly and necessarily the final arbiter of such questions.

Looking at the issue from a broader point of view, one's attitude toward this legislation may well reflect his views on two basic and related points: First, how much faith and confidence he has in the sense of decency and patriotism of the millions of people who make up our country; and second, how much importance he attaches to the freedoms guaranteed by our Constitution. Our people are now fully aware of the grave dangers, both of Communist activities and Communist ideologies, and I respectfully insist that in dealing with those dangers it is not necessary that our citizens be themselves deprived of their historic rights.

Fundamentally, S. 2646 rests upon the assumption that the American people are so lacking in intelligence and faith in our democratic system as to require for their protection governmental security measures that cannot withstand traditional constitutional scrutiny by the highest Court of the land. Without here laboring the point, which I have considered at length elsewhere (the Godkin lectures, 1955, "National Security and Individual Freedom"), I wish to emphasize that our fellow countrymen share no such lack of confidence in themselves. Time and again the people of the United States have demonstrated that they are firm believers in our constitutional system. Isolated instances of subversion have only served to emphasize their rarity and to demonstrate the fact that antidemocratic ideologies have never found fertile soil in America.

Equally unfortunate is the bill's disregard of our individual freedoms, particularly those age-old rights guaranteed against Federal encroachment by the Bill of Rights and against State encroachment by the 14th amendment. To me these liberties are of supreme importance.

I am confident that the people of our country, despite the strident voices of a few, continue to look to the Supreme Court as the independent organ of Government indispensable for resolving the kinds of issues that this bill seeks to remove from its jurisdiction. In my opinion the public will not tolerate any such tinkering as S. 2646 proposes. This is the plain teaching of the public reaction to the 1937 Court-packing plan. Only recently the vigor of our public conscience was again demonstrated in the reassertion of American standards of decency against political practices that violate our sense of fair play. Evidence is already mounting that the present bill would be equally obnoxious to our people.

Shortly before his death, my fellow upstate-New Yorker and long-time colleague at the bar, the late Mr. Justice Robert H. Jackson, addressed himself to the problem confronting your subcommittee in words that are singularly pertinent today:

"Public opinion, however, seems always to sustain the power of the Court, even against attack by popular Executives and even though the public more than once has repudiated particular decisions. It is inescapable in our form of government that authority exists somewhere to interpret an instrument which sets up our whole structure and defines the powers of the Federal Government in about 4,000 words, to which a century and a half have added only about half as many amendatory words. The people have seemed to feel that the Supreme Court, whatever its defects, is still the most detached, dispassionate, and trustworthy custodian that our system affords for the translation of abstract into concrete constitutional commands."

I am in complete accord with this statement and earnestly hope that S. 2646 will be rejected as contrary to our constitutional system and to the American tradition of freedom and fair play.

Yours sincerely,

JOHN LORD O'BRIAN.

Mr. SOURWINE. Here is a letter of transmittal and a copy of the text of the proceedings of the house of delegates of the American Bar Association of the discussion with respect to this bill. At an earlier session a statement was made that the staff secure this for the record.

Senator BUTLER. It will be made part of the record.

(The document referred to is as follows:)

AMERICAN BAR ASSOCIATION,
Chicago, Ill., February 28, 1958.

Mr. J. G. SOURWINE,
Chief Counsel, Internal Security Subcommittee,
Senate Office Building, Washington, D. C.

DEAR MR. SOURWINE: Miss Sinnott of our Washington office phoned this morning to say that you would like to have a copy of the transcript of discussions in our house of delegates on February 25 with respect to the association's position of opposition to S. 2040. I am pleased to attach hereto excerpt from the transcript covering this discussion.

Certified copies of the resolution adopted by the house of delegates opposing S. 2040 will be transmitted on Monday, March 3, by the secretary of the association to Senator Eastland and Senator Wiley. Copy of this transmittal will also be sent to you.

Sincerely yours,

RUTH WHITE,
Administrative Secretary.

EXCERPTS FROM PROCEEDINGS OF THE HOUSE OF DELEGATES, AMERICAN BAR ASSOCIATION, FEBRUARY 25, 1958

DISCUSSION WITH RESPECT TO S. 2040

Chairman SHEPHERD. It has been moved on behalf of rules and calendar that item 53 be now made a special order of business on the calendar because of later engagements of the chairman. That is Individual Rights as Affected by National Security, Mr. Ross L. Malone.

Is there a second to that motion?

(The motion was duly seconded.)

Those in favor of it say "aye"; opposed "no." The Chair declares it is carried by the necessary two-thirds vote.

Mr. Malone, come forward. [Applause.]

Mr. ROSS L. MALONE. Thank you very much, ladies and gentlemen of the house. The report of the committee on individual rights as affected by national security is before you. It does not contain any recommendation for action. It does deal entirely with S. 2040 which is likewise on the desk before you and which is generally known as the Jenner bill.

I might preface the committee report by saying that when the committee met to consider the bill on Sunday, we were advised that the board of governors had already taken action with reference to the bill.

As I understand that recommendation, it is that the house disapprove or oppose the enactment of S. 2040. I assume the secretary will report that motion.¹

Inasmuch as the board of governors which is the executive committee of this house had already acted on the question, there appeared to be no occasion for this committee to make any recommendation, and I will merely briefly state the proposition involved in the bill in connection with whatever action the house may wish to take on the action recommended by the board of governors.

S. 2040 briefly would withdraw from the appellate jurisdiction of the Supreme Court five types of cases. They may be summarized as cases involving congressional committees, executive security programs, State security programs, school boards, or admissions to the bar.

The report of the committee, it should be clearly understood, takes no position whatever with reference to the decisions which obviously occasion the enactment of the legislation.

As we view it, the question with which this house is concerned is the modification of the appellate jurisdiction of the Supreme Court by action of the Congress.

Now, that is not a new subject for consideration by this house. You will recall that in 1950 on recommendation of the committee on jurisprudence and law reform, this house approved a proposed constitutional amendment which would include in the Constitution the appellate jurisdiction of the Supreme Court to the end that it might not be threatened or modified as a result of decisions by the Court from time to time which may not meet with the approval of the Congress.

¹ This motion is reported at p. 284 of the transcript.

That recommendation was incorporated into what is known as the Butler resolution which has been introduced into the Senate and which has been considered by this house since 1950. As late as 1954 the record indicates that the house enacted with reference to certain aspects of that resolution and in effect continued the action previously taken in recommending that the appellate jurisdiction of the Supreme Court be nailed down, shall we say, by constitutional amendment and be not left subject to action of the legislative body.

It's the feeling of the committee that it is an integral part of our judicial system that there be uniformity in appellate review, and that the enactment of this legislation would destroy entirely the uniformity which might otherwise exist, would in effect make of the courts of appeals individual supreme courts as to the particular subjects which are encompassed in the legislation.

I might reinforce my statement that in recommending adoption of the resolution by the board of governors, the committee is not expressing any view on the decisions themselves inasmuch as your speaker happened to be one of the members of the board of bar examiners of the State of New Mexico that was rather soundly slapped in the Schwere case.

The report of the committee requires no action by the house. Any action which the house takes will be upon the recommendation of the board of governors. Thank you.

Chairman SHEPHERD. Thank you, Mr. Malone.

I think the house would be interested in knowing how this matter came before the board and why it is that the board is recommending action without first having had some report from one of its committee. I will ask the secretary to make that report. Mr. Calhoun.

Mr. CALHOUN. Members of the house, prior to the recent board meeting here in Atlanta, I received a letter as secretary of the American Bar Association from Senator Alexander Wiley, a member of the Judiciary Committee of the Senate, as follows:

"DEAR MR. CALHOUN. As you may have heard, S. 2040, a bill to limit the appellate jurisdiction of the Supreme Court, is coming up for rehearing in the near future. Hearings are set to begin February 10 and to close before March 10. At the first hearing no public witnesses appeared either for or against the bill.

"It would exclude from the appellate jurisdiction of the Supreme Court such matters as contempt of a congressional committee or discharge of an employee on alleged internal security grounds.

"In order to make sure that the American system of checks and balances is fully maintained, it seems to me of supreme importance that there be a full discussion of this bill at the hearings.

"May I, therefore, urge that at the coming midwinter southern regional meeting in Atlanta on February 10, a position be firmly taken on behalf of the American Bar association with respect to this proposed legislation. I believe that you and the other officers of the association would wish to have the point of view of your great organization fully expressed at hearings on the bill.

"Sincerely yours,

ALEXANDER WILEY."

I reported this letter to the meeting of the board of governors, and the board adopted a recommendation to this House that it adopt a resolution opposing the enactment of Senate bill 2040 which would limit the appellate jurisdiction of the Supreme Court of the United States.

I think it is proper on behalf of the board at this time to move such a resolution.

(The motion was duly seconded.)

Chairman SHEPHERD. I recognize Mr. Satterfield.

Mr. SATTERFIELD (Mississippi). Mr. Chairman, ladies and gentlemen of the house, I am in accord with the action of the board of governors in this matter in opposing Senate bill 2040. I move the following amendment to the resolution and explain the reasons why the motion is made after I read the amendment.

The resolution before you now is simply:

Be it resolved by the American Bar Association, That it opposes the passage of S. 2040. That is the resolution now before you. Amend the resolution by adding before the word "Resolved" the following:

"Whereas in 1949 the American Bar Association adopted a resolution urging the Congress to submit to the electorate an amendment to the Constitution of the United States, to provide that the Supreme Court of the United States shall have appellate jurisdiction in all matters arising under the Constitution; and

"Whereas S. 2040 now pending before the Congress, if enacted, would forbid the Supreme Court from assuming jurisdiction in certain matters, contrary to the action heretofore taken by this association and contrary to the maintenance of the balance of powers set up in the Constitution between the executive, legislative, and judicial branches of our Government; and

"Whereas although since 1940 there have been rendered by the Supreme Court decisions within the fields specified in S. 2040 which are felt by many to be contrary to recognized constitutional precedents and which undertake to confer upon the Federal Government powers reserved to the States by the Constitution of the United States and to confer upon the Supreme Court authority not vested in it by that document, nevertheless the welfare of the people of the United States will be better served by preserving the checks and balances of our constitutional form of government than by in effect removing from the legislative branch restraints of constitutional limitations within vital fields of human conduct."

So that, if adopted, the resolution would read with these preliminary paragraphs, and would then be adopted as proposed by the board of governors.

Mr. Chairman, I move the adoption of this amendment. If it is seconded, I would like to discuss it.

Chairman SHEPHERD. Is there a second?

(The amendment was duly seconded.)

You may discuss it.

Mr. SATTERFIELD. It seems to me that in preserving our constitutional form of government, we must never be in a position that when the Supreme Court renders a decision with which we do not agree that our reaction thereupon would be to remove the jurisdiction of that Court within the fields of the decision. We have had a balance of power since the days of *Madison v. Marbury*, which has maintained a relationship between the three branches of government.

I am sure, as I am from Mississippi, you will realize that I do disagree heartily—and wholeheartedly—with the decisions of the Supreme Court in most of these areas.

I feel it is our duty as members of the bar of the United States to urge by every lawful means that those decisions which are not in accordance with constitutional principles or constitutional precedents should be overruled. I feel it is entirely proper for us to criticize those decisions within proper legal bounds, and to criticize those actions of the Court from a legal viewpoint.

I agree with Justice David Brewer who said in 1893: "It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. But that criticism must be kept within bounds, and regardless of our feeling as to decisions, we must never let that feeling permit us to destroy that balance which maintains our constitutional form of government."

I believe in the board of governors this matter was brought up as has been stated. I moved that this be referred to the committee on jurisprudence and law reform from which came the action adopted in 1940. The board felt it should not be thus referred. When I ascertained the chairman of this committee was not at this meeting, I was thoroughly in accord with the board of governors, because if we could not obtain action at this meeting, I think we should act on the matter at this meeting. Therefore, it is proper for us to consider this without the consideration of the committee, but I do feel this: If we adopt the resolution simply in opposition, that will be construed by the Congress, that will be construed by the mediums, in accordance with the judgment of he who is construing it.

Therefore, it is my judgment that if this body is to adopt the resolution as presented, and I have no criticism for the board of governors because we have to pass things out, and we do not have time to prepare matters of this type, I think if we adopted it as stated without a statement of this kind, it would be subject to misconstruction. It would be and could be possibly construed as being in approbation of those things that were in Senate bill 2040 which, as stated by the committee, it is not so intended.

I believe we should adopt this amendment.

May I point out, however, that I believe it would go further than the statement of the chairman as to what could occur if Senate 2040 were to be adopted. You all remember the case of *McCullough v. Maryland* in which there was pending before the Supreme Court the question of constitutional attitude of certain acts. The Congress withdrew from the Supreme Court its appellate jurisdiction.

You perhaps remember during the New Deal days, shall we say, there was created an emergency court of appeals to which it was provided by statute all appeals as to certain statutes then enacted should be taken and as to which

there was no provision for appeal to the Supreme Court of the United States.

Therefore, if this S. 2043 were to be adopted, a power-hungry Congress could pass any legislation in this field, could then create an appellate court to which all appeals would go whose members would then be appointed by the then Chief Executive, and there could be no appeal from that court to the Supreme Court of the United States.

It not only would leave a lack of uniformity among the circuits, but it would place within the executive and legislative power of our Government the full right in these fields of legislation to do what they pleased without any constitutional limitation.

Mr. Chairman, I hope the house will adopt this amendment.

Chairman SHEPHERD. Mr. Satterfield, will you let me have your amendment so we may have the wording?

I recognize Mr. Wright, of California.

Mr. WRIGHT. Mr. Chairman and ladies and gentlemen of the house: I want to second the motion and the amendment. I want, however, to have the record clear. I have discussed this with the distinguished chairman, and he interprets this language agreeably to what I understand is the position, or I hope is the position of the majority of this house.

As you may or may not know, I have had some little experience in recent months with that unhappy thing called distortion in the mediums of our great country.

I am very fearful that in the second paragraph of this report a small element of the press will say that the American Bar Association is sustaining the Court in its ideological pronouncements, decisions that you and I recognize are devoid of foundation and law and do violence to the Anglo-Saxon cornerstone of freedom.

The language I specifically refer to is this: The first paragraph classifies five types of cases. Then in the second paragraph this report says, "Since maintenance of individual rights is the most notable distinction between our system and the Communist system," and so on. That will be spread by certain small (and I emphasize "small") but nevertheless effective elements of the press as implied approval by this great organization of these unhappy decisions, and I want the record to show that the distinguished chairman of this committee who is rendering this report has told me that there is no such intention in their language.

This is a very delicate field we are dealing with. There is presently before the Congress many bills covering this necessary and delicate legislation. Certain bleeding hearts are apparently looking under the bed for an invasion of civil rights, unmindful entirely of the rights of 173 million loyal Americans, but forever yelling about those traitorous people who try to subvert us and, when caught, plead the protection of the very Constitution they seek to undo.

With that explanation I very happily second the amendment.

Mr. RITTER. Gentlemen, on this debate I could not allow mine to be a silent voice, sharing as I do the sentiments of Mr. Satterfield on this subject, and remembering Ex parte McCardle, and with the shades of Thaddeus Stevens and Charles Sumner parading down Peachtree Street last night I ask your support of this amendment because I do not want certain New York newspapers, a certain newspaper in Washington and one in Denver and one in San Francisco to say even in my humble capacity I was a party to an act of approbation of certain recent decisions of the Supreme Court of the United States. I ask your support of this amendment.

Mr. SKYMOUS. Mr. Chairman and members of the house, I think it would be a tragic mistake to adopt this substitute, and I hope the house will reject the substitute and will adopt the original motion recommended by the board of governors.

I do not see that there can be any doubt that the American Bar Association is on record that both national security and individual rights are a prime concern of the association, and it is unnecessary to adopt a complicated resolution attacking decisions of the Supreme Court in order to make that point. That point has been made for years.

We have had an effective committee on individual rights as affected by national security, a committee of which Ross Malone is now chairman, which has been trying to make it clear that national security came first but that individual rights and their maintenance are a part of national security.

Each of us has a right as an individual to take any view he wants to about any decision of the Supreme Court, and of course members of the house in various fields and on various decisions differ with decisions of the Supreme

Court. I think to adopt a general resolution which includes in a vague general way an attack upon undefined decisions of the Supreme Court would be a tragic departure from the tradition of the house and the association to uphold the independence of the judiciary and the integrity of judicial review. We do not surrender the right of individual criticism of individual decisions by upholding the integrity of judicial review or the independence of the judiciary.

As to Mr. Wright, for whom I have great affection and respect, if you gentlemen will read the proclamation by the President of the United States, which is the first document in this handsome brochure, *Law Day—U. S. A.*, and then the resolution of the board of governors of the American Bar Association which brought about the declaration of that day, it will become apparent that we have taken the position quite correctly (and I don't believe anyone here will really differ with it) that it is our system of individual liberty under law which is the great distinction between this system and the Communist system.

I submit that it would be quite inconsistent with that position to now take a general sideswipe at a lot of individual decisions just because one or more of us may differ with one or more decisions.

Our basic question here is, do we think that the independence of the judiciary should be subjected to the attack involved in withdrawal of appellate jurisdiction because a group in Congress at a particular time differs with particular decisions?

I submit that we should limit our action here to opposition to this measure, which would be consistent with the historic position of the association in favoring a constitutional amendment that would prevent such interference with appellate jurisdiction, and consistent also with the great fight that this association made in 1937 to maintain the integrity of the judicial system.

This does not surrender the right of private criticism in the slightest. It simply keeps the American Bar Association, I submit, on the true line which it has always taken. [Applause.]

Mr. DAVID MAXWELL [Philadelphia, Pa.]: Mr. Chairman and members of the house, I subscribe 100 percent to the views just expressed by my friend, Mr. Seymour, from New York. It seems to me that the adoption of this amendment would put the emphasis in the wrong place.

This is the first time this association has had an opportunity to go on record in defense of the Supreme Court as an institution since the rash of decisions which created so much confusion in the minds of the public because of the widespread criticism against them.

You all know, members of the house, that I personally took issue with some of these decisions; in fact, they were the subject-matter of the president's address in New York, and I will defend to the last drop the right of any member of this house to criticize any decision of the Supreme Court with which he does not happen to agree, because I believe firmly that the Supreme Court is not sacrosanct. But in this instance we are defending the Supreme Court as an institution, as a cornerstone of the American Government, and I do not believe our defense should be diluted or diminished by the language contained in the amendment. [Applause.]

Mr. WILLIAM B. SPANN, JR. [Atlanta, Ga.]: Mr. Chairman, I arise to support Mr. Satterfield's amendment. I want to vote in favor of the resolution, but I do not want to be in the position of voting in favor of the resolution without the amendment because I don't want to vote in favor of any resolution which may be considered an endorsement collectively by this group of some of the decisions of the Supreme Court.

Mr. Maxwell has said that he criticized the Arizona and California State bar cases. I know his feeling on them. I am not here because of what the Court did to *Picasey v. Ferguson*. I am here because I think any endorsement of the ignoring of all law, such as the law of wills in the Girard College case, is a dangerous thing. If anything we do could be interpreted by any press or other media as an endorsement of those cases, I could not vote for it; and yet I think we must vote for the resolution. Therefore, I submit, we must also have the amendment.

Thank you.

Mr. E. B. SMITH (Boise, Idaho). Mr. Chairman, I want the record straight as far as I am concerned and my State. I wholeheartedly support Mr. Satterfield and his amendment. I come from a State where there has been a consistent and concerted effort during the last few years to do away with our State's rights in the National Congress. You all know the tremendous fight that we have had to

put up in the National Congress in order to protect our power interests and our State's rights.

The fight between the two isms, that of free enterprise and that of governmental control of our resources, centered upon what you know to be Hell's Canyon.

As I analyze this question, it is very much greater than what is contained on the surface of what is before this House. The matter before this House is a matter of legislatively forbidding appellate jurisdiction of the Supreme Court of the United States in certain matters. The main question now that is before this house, and which this house must be aware of, is a much greater principle, and it involves the principle of interference by the legislative branch of the Government into the judicial branch.

I, for one, am thoroughly and entirely in support of the consensus of S. 2040, but I am thoroughly and unalterably opposed to the theory. In other words, I cannot and will not and never can support the theory that we are going to countenance in this great body the interference by the legislative branch of the Government into our judicial branch, and that is what it involves.

It therefore involves a choice by this body as between these two great principles, and it seems to me that the great principle that must be adopted and be recognized—it isn't anything we have to adopt, it is a recognized fundamental principle of our great Government that we must keep the legislative branch from encroaching upon the judicial branch.

In other words, Mr. Chairman, to me this thing involves again something that is most vital. This bill is a reflection of Government by men and their passions rather than of a government by law.

There was some question a few moments ago as to whether we have any right to criticize the judiciary. I am a member of the judiciary of my State. I have recognized before my bar association, and I will recognize here and for as long as I live, that there is a fundamental and inalienable right to criticize the judiciary, and it is only by virtue of criticism of the judiciary that we in some measure are able to keep the judiciary going straight, and in some measure are able to preserve our form of government which is so sacred to us.

Again, Mr. Chairman, for the purpose of this record I thoroughly and unalterably oppose the theory of this legislation by virtue of the greater principle that is involved, while in discussion of the lesser principle certainly we agree with the bill. Again I second Mr. Satterfield's amendment.

Chairman SHEPHERD. Gentlemen, I wonder whether you would like to take a vote now or would prefer to go to lunch first.

VOICE. Mr. Chairman, I move we recess until 2 o'clock.

Chairman SHEPHERD. We will have this mimeographed and on everyone's desk at that time. Is there a second to the motion? We will be back at 10 minutes to 2.

The meeting recessed at 12:50 p. m.

TUESDAY AFTERNOON SESSION

The meeting reconvened at 2 p. m., Mr. James L. Shepherd, Jr., chairman of the house of delegates, presiding.

Chairman SHEPHERD. Will the house please come to order.

I recognize Mr. Satterfield.

Mr. SATTERFIELD. Mr. Chairman, ladies and gentlemen of the house, during the noon recess we have conferred with a number of members of the house, including President Rhyme and the chairman of the committee; therefore, in accordance with the discussion that we have and, I believe, in order to fully record the position of the house in such a way that it cannot be misunderstood, I move as a substitute for the pending motion the following, the pending motion being the motion to amend the resolution. This is a substitute for both the pending motion and the resolution now before the house:

"Whereas in 1949 the American Bar Association adopted a resolution urging the Congress to submit to the electorate an amendment to the Constitution of the United States to provide that the Supreme Court of the United States shall have appellate jurisdiction in all matters arising under the Constitution, and

"Whereas, S. 2046, now pending before the Congress, if enacted would forbid the Supreme Court from assuming appellate jurisdiction in certain matters, contrary to the action heretofore taken by this association and contrary to the maintenance of the balance of powers set up in the Constitution between the executive, legislative, and judicial branches of our Government; now, therefore, be it

"Resolved, That, reserving our right to criticize decisions of any court in any case, and without approving or disapproving any decisions of the Supreme Court

of the United States, the American Bar Association opposes the enactment of Senate bill 2640, which would limit the appellate jurisdiction of the Supreme Court of the United States."

I So move, Mr. Chairman. If there is a second I will discuss it very briefly.

[The motion was duly seconded.]

Mr. SATTERFIELD. Mr. Chairman, the purpose of all of us, I believe, is to take a position which cannot and will not be misunderstood. The point has been raised that in the third paragraph of the original resolution it would be possible that the same could be misunderstood.

Since I wrote it, I didn't think it could; but better men have said it could be misunderstood. I do believe that the resolution as now proposed is one which cannot be misunderstood. I believe it is in accordance with proper constitutional principles and with proper principles of procedure by this house.

I therefore hope that this house will adopt the substitute for all pending matters

President RHYNE. Mr. Chairman and members of the House, I speak in support of the substitute resolution. I really believe it expresses the views of all lawyers, and I would hope that this House will be unanimous as one voice on it.

There is a lot of confusion in this field of discussion and thought. I believe all lawyers really feel this way about it: They feel that we have an obligation under our Canons of Ethics to defend the Supreme Court of the United States as an institution of government, and all courts as an institution of government, while reserving the right to criticize any decision of any court that they believe to be in error.

After all, every time we appeal any decision of any court—and there are thousands of appeals that are taken in this country every year—we represent to the appellate court that the lower court committed error. That does not mean to us lawyers that we want to wipe out the lower court as an institution of government nor to criticize the court as a court. We are merely saying that we believe the decision of that court was wrong.

When we were welcomed here to Atlanta, for example—and I think this pretty well illustrates some of the misapprehension as to the position of the bar on this subject—we had an editorial in the Atlanta Constitution which I would like to read a few sentences from, and it says this:

"Atlanta is honored by the meeting here of the American Bar Association. The Atlanta Constitution joins in welcome to the association, its distinguished members and guests.

"The United States is a Nation of law. This newspaper, which stands by the law and the courts, regrets the sometime unbridled criticism of our courts by some extremists. They do not represent the voice of the thinking people who know that we will have either law or anarchy.

"In this connection, if the ABA members will pardon us, we advance the opinion that the bar itself perhaps has been derelict in its duty officially and individually in not standing for the right in defense of our Supreme Court and all lesser courts. Each lawyer, as we understand it, is an officer of the court. We expect a stronger defense from the legal profession. It is necessary that all of us stand up and be counted on the side of the law."

I would like to say to the editor of the Atlanta Constitution and to all editors and to all newspapermen that we have indeed been defending the institution of the Court. I myself have made at least ten major speeches on the subject. In this February issue of our ABA Journal the substance of those speeches is set forth. I think the bar has indeed lived up to its duty and has indeed defended the institution of the courts including the Supreme Court of the United States, and I think that by this resolution we will tell the whole Nation that we back that very idea. I hope it will be adopted, and adopted unanimously.

Chairman SHEPHERD. Mr. Malone, this comes up in connection with your report. Do you want to close now?

Mr. GERALD P. HAYES (Milwaukee, Wis.) Is this going to close? I wish to be recognized, sir.

Mr. Chairman and members of the house, I very much dislike to disagree with the president and with Mr. Satterfield. There is no man in this house who has more respect for the Supreme Court than I. There is no man in this house who has more dislike for some of the recent Supreme Court decisions than I.

Every person in this country knows that we reserve the right as lawyers to criticize the decisions of the Supreme Court or any other court in the land or any trial court. It seems to me that the wording of the substitute which has now been offered is a whining way of saying that we don't agree with the Supreme Court.

It seems to me that is entirely superfluous for us to say that we reserve the right to criticize the Supreme Court.

What is offered in the substitute resolution is completely a self-serving declaration and, as a matter of evidence, ought to be ruled out. We have before us a simple proposition of whether or not we want to regard the Supreme Court as the final arbiter in this country of our judicial affairs, and we ought to stand by the Court and say so, and not do it with any reservations.

I am absolutely opposed to our defining of our right to criticize the decisions of the Supreme Court; it is entirely unnecessary, and I think we should adopt the resolution as offered by the board of governors, with its opposition to the enactment of S. 2046.

Mr. SCHWEPPE. I don't like to disagree with my very good friend from the State of Wisconsin, but I should like to speak in support of the substitute resolution; in fact, I would have spoken in support of the original substitute resolution originally moved by Mr. Satterfield.

The reason I do it is this: As against the bare resolution proposed by the board of governors that we are against S. 2046, to me it is a far more effective and powerful resolution if we support the Supreme Court of the United States as an institution against congressional raids on its appellate jurisdiction, even though many of us disagree and say that we disagree with some of the things that that Court has ruled.

It is far more impressive on the public. It will be far more impressive on the Senate and the House in Washington, D. C., to say that here is an organization which, although many of its members disagree with certain rulings of that Court, nevertheless support that institution against congressional raids on its appellate jurisdiction in order to maintain the constitutional balance of power.

Thank you, Mr. Chairman. [Applause.]

Chairman SHEPHERD. Mr. Malone, this came up on the report of your committee. Is there something you would like to say to it?

Mr. MALONE. While the committee, of course, did not have an opportunity to act on the substitute motion, 3 of the 5 members of the committee are members of the house and have indicated that the proposed substitute now moved by Mr. Satterfield is acceptable to them.

Before the debate is closed, and in order that the record may be abundantly clear, I would like to refer to the statement of our distinguished ex-president, Mr. Wright, who quoted me with reference to the committee report in saying (and saying correctly) that I said the report did not imply approval of certain decisions of the United States Supreme Court. It is equally true that it does not imply disapproval. In our view, those questions have no relation to this bill and its effect on the appellate jurisdiction of the Court.

Thank you.

Chairman SHEPHERD. Are you ready for the question? The vote on the substitute motion, the Chair rules, will be final, and it will not be necessary to put the motion again.

Those in favor of the substitute motion by Mr. Satterfield will say "Aye"; those opposed, "No." The motion is adopted.

Mr. SOURWINE. This is a letter in the nature of a statement from Mr. Julius Applebaum, who was invited as a witness but was unable to appear.

Senator BUTLER. Mr. Applebaum's statement will be made a part of the record.

(The document referred to is as follows:)

LAW OFFICES, JULIUS APPLEBAUM,
Miami, Fla., February 27, 1958.

JAY G. SOURWINE,
Chief Counsel, Committee on the Judiciary,
Senate Office Building, Washington, D. C.

DEAR MR. SOURWINE: Your letter of February 12 addressed to me at my former New York office was received here last week. I could not immediately answer as I was leaving for the regional meeting of the American Bar Association in Atlanta. You will, therefore, understand the reason for the delay in writing to you.

May I suggest that you note my present address. I have moved to Florida, where I am now practicing law.

I appreciate immensely the honor of being invited by Senator Jenner and you to testify at the hearings before your committee on bill S. 2646. I have read the copy of the bill which you so thoughtfully sent to me.

While I am in agreement with much of the criticism of some of the decisions rendered by the United States Supreme Court in recent times and believe them to be unsound in law, it is my view that the remedy for such unsoundness does not lie in the amendment proposed by the bill. I feel that the adoption of the bill will create even more problems than it will solve. It is my view that Congress has the duty to consider each of the decisions deemed unsound or contrary to the intent of Congress in enacting the law and to reenact the laws remedying the alleged defects in language so clear and so precise as to be beyond misconception. I believe that this will be a piecemeal task which cannot, without serious danger, be encompassed in any omnibus proposal. Congress will also have to restate the resolutions under which its committees function to leave no room for doubt of their jurisdiction or permit evasion by witnesses later sanctioned by the Court.

The United States Supreme Court, as an institution, is worthy of the high respect by the bar and by the public even while we deplore the unsoundness of some of the decisions and its contemporary members. In my activities in local, State, and the American Bar Association, I have long urged the selection of the most able, available men for the bench. Had this policy consistently been pursued by the appointing and the confirming powers, there would have been less cause for dissatisfaction with the decisions of the Court which have inspired the bill by Senator Jenner.

It is my belief that many of the judges have not an adequate understanding of the menace of communism, its tactics, and its resultant problems. I also believe that it is possible to protect all individual rights under our Constitution, properly construed, and simultaneously safeguard the security of our Nation against communism.

I regret that I shall be unable to accept the invitation to appear before your committee for I have a very high regard for its work and its burdens in fulfilling its responsibilities.

With warm and cordial regards to the members of the committee and yourself, I am

Sincerely yours,

JULIUS APFLEBAUM.

Mr. SOURWINE. A letter in the nature of a statement from Mr. Frank Porebski of the Massachusetts Committee of Correspondence, Polish-American Chapter, North Abington, Mass.

Senator BUTLER. It will be so received and made part of the record. (The document referred to is as follows:)

NORTH ABINGTON, MASS., February 28, 1958.

Chairman JAMES O. EASTLAND,
Judiciary Committee, Senate Office Building,
Washington, D. C.

DEAR SENATOR EASTLAND: We ask that this letter be offered as testimony in the hearings on S. 2646, Senator William Jenner's bill to strip the Supreme Court of appellate jurisdiction in five specific areas—State anti-Communist laws; congressional investigations; the Federal security program; local control over subversive teachers; and the admission of lawyers to State practice.

We demand approval of S. 2646 and early enactment by the Congress of the United States during this session of the Congress.

It is the function of the Congress to make the laws of our country, not nine arrogant, irresponsible men. The present Supreme Court should be impeached. Their un-American and pro-Communist decisions are akin to treason.

Respectfully yours,

FRANK POREBSKI,
BARBARA POREBSKI
(Mr. and Mrs. Frank Porebski),

Polish-American Chapter, Massachusetts Committee of Correspondence.

Mr. SOURWINE. This is a newspaper clipping from the Washington Post, page 6-B of February 27, statements by Senator Ervin and Representative Keating on the subject matter of this bill.

Senator BUTLER. It will be made part of the record.
(The clipping referred to is as follows:)

SUPREME COURT CALLED A JUDICIAL OLIGARCHY

Senator Sam J. Ervin, Jr., Democrat of North Carolina, and Representative Kenneth B. Keating, Republican of New York, assailed the Supreme Court last night and warned that recent decisions demonstrate a need for Congress to curb the Court's power.

Speaking at Catholic University on a panel sponsored by the Columbus School of Law, Ervin declared:

"We are ruled in large measure by a judicial oligarchy. The Court is destroying the power of the States and is encroaching on Congress and the executive."

Ervin, who is a member of the Senate Judiciary Committee, said recent Supreme Court decisions "show a total lack of comprehension of the problems of Congress."

The judges, he said, should be required to "give up the idea of what the law ought to be and instead base their decisions on what the law is."

Keating, who sits on the House Judiciary Committee declared that "I have been deeply disturbed by many recent decisions of the Court."

"The Court," he said, "has often misinterpreted the intent of Congress and I think public alarm is warranted."

Congress, he said, would be warranted in revising Court decisions when:

"The Court departs from its role as interpreter of the law and presumes to pass upon the wisdom of statutes."

"It has mistaken the intention of Congress in construing the meaning of the law."

"It has sought to adopt laws of its own where Congress has been silent."

Another participant in the panel, Eileen Shanahan of the New York Journal of Commerce, said public understanding of the Supreme Court's activities would be increased if the Court briefed reporters on its decisions. She also suggested that decisions should be handed down at least twice a week, instead of on Mondays only, to reduce the pressure on reporters covering the Court.

Mr. SOURWINE. Those are the only statements I have to offer.

Senator BUTLER. Today we have as our first witness a very distinguished Marylander. If not the leader of the American bar, certainly one of the leaders of the American bar, a man who has a wide experience in the field of subversive activities, and I think a man who is the author of the first State law covering subversive activity, Mr. Frank B. Ober, of Baltimore City.

Mr. Ober, it is certainly a great honor and pleasure to have you here, and you may proceed at your leisure.

Mr. OBER. Thank you, Mr. Chairman.

STATEMENT OF FRANK B. OBER, BALTIMORE CITY, MD.

Mr. OBER. Perhaps I might commence by stating for the record my background.

I first became interested in subversive activity matters during the First World War, for while I served as a line officer, I also had some added duties as counterespionage officer.

During the Second World War, I was one of the advisers to Governor Lane's Commission on Emergency War Powers. I was also—

Senator BUTLER. May the record show that Senator Hennings has just entered the room, and, Senator, would you like to be heard immediately or—

Senator HENNINGS. I am ready. The State is ready, Your Honor.

Senator BUTLER. Mr. Ober, do you mind? We will preserve the continuity of the record and not put Senator Hennings in with Mr. Ober, but separate.

Off the record.

(Discussion off the record.)

Senator BUTLER. Back on the record.

It is certainly a great distinction to have the fine member of the Judiciary Committee, the Senator from Missouri, as our first witness this morning. He is not only a member of the full committee, he is the chairman of the Subcommittee on Constitutional Rights, along with his many other assignments on the Committee on the Judiciary, and I know he has a very vital interest in the matters covered by this bill.

Senator HENNINGS. Thank you very much, Mr. Chairman. I appreciate your kind reference.

With the permission of the chairman, I have a prepared statement relating to S. 2046.

Senator BUTLER. Is it the Senator's desire to introduce the statement in the record and then talk?

Senator HENNINGS. No. I thought I would just read from the statement and then subject myself to such interrogation as may seem meet and proper.

Senator BUTLER. Fine.

TESTIMONY OF HON. THOMAS C. HENNINGS, JR., UNITED STATES SENATOR FROM THE STATE OF MISSOURI

Senator HENNINGS. Mr. Chairman, I would like to begin by saying that I don't think that any member of the subcommittee of the parent Committee on the Judiciary or indeed the full Senate committee is uninformed as to the nature and objectives of the Communist conspiracy. I dare say, without fear of successful contradiction, that the Justices of the Supreme Court—I am just getting over the flu. If my voice doesn't carry, I am doing the best I can.

Senator BUTLER. Fine, Senator.

Senator HENNINGS. I dare say, without fear of successful contradiction, the Justices on the Supreme Court understand equally well both the nature and the objectives of this conspiracy. To say otherwise is, I think, exceedingly naive and might even be termed "obtuse."

I have complete confidence in the ability and commonsense of the nine men who occupy the highest bench in the land, the Supreme Court of the United States. These men, as the chairman well knows, have been selected by three different Presidents of the United States.

The Chief Justice of the United States, the Honorable Earl Warren, and three other Justices, Harlan, Brennan, and Whittaker, were appointed by President Eisenhower. Three Justices, Black, Frankfurter, and Douglas, were appointed by President Roosevelt. And two Justices, Justices Burton and Clark, by President Truman.

All of the nine Justices have been confirmed by the United States Senate. If one man sits on that bench who does not understand the nature of the Communist conspiracy, then the appointing President and the Senate have been utterly remiss in the performance of their duty.

I do not believe that either had acted with such irresponsibility.

The Communist conspiracy, as we all know, is an ever-present danger to our Government. It seeks to destroy our traditional democratic processes. It is absolutely necessary that we have laws which

will protect our Nation against such destruction. But, Mr. Chairman, I believe in establishing barriers against the destruction of our system; let us not ourselves destroy one of the great bulwarks of our country.

For over 170 years the Supreme Court has been the court of last resort respecting the meaning of the Constitution. This, of course, as the chairman well knows, is our traditional legal system which is part of our democratic processes. And even though Congress has had the power to limit the Supreme Court's appellate jurisdiction, it has always given to the Court broad appellate jurisdiction over cases where the Constitution is involved. Only once—and that I would like to emphasize—just once has the Congress limited the Court's appellate jurisdiction. I adverted to that, as the chairman may recall, at the time of Senator Jenner's presenting this bill for consideration. Only once has this power of jurisdiction been limited and this limitation went only to the Court's power to review denials of writs of habeas corpus. It did not cut out the Court's review power over a complete area of law.

I believe, Mr. Chairman, that S. 2646, if enacted, would take from the Court its appellate jurisdiction in five separate prescribed areas.

As I have tried to explain earlier, it would result in the Constitution meaning one thing in one place and something else in another.

The ultimate effect of the bill would be to destroy a significant part of our legal system, a part of our democratic processes. Therefore, to meet the threat against our system of government posed by the Communist conspiracy, this bill proposes that the Congress destroy an integral part of the traditional system itself.

Senator BUTLER. Senator. Is it your desire to complete your statement and then be questioned or do you—

Senator HENNING. I would like to complete the statement, if I may, Mr. Chairman.

Senator BUTLER. Yes, because I had a question I would like to ask at that point, but I will make a note of it.

Senator HENNING. If that is agreeable to the chairman.

I most emphatically do not believe it is necessary to take from the Supreme Court a part of its jurisdiction to meet the threats of the Communist conspiracy. Furthermore, and to the contrary, such a step would belittle our system of government in the eyes of the rest of the world.

Now, our present colleague, Senator Jenner, when testifying earlier before this subcommittee in support of the bill, asked to have included in the hearings the report of the committee on Communist strategy and tactics of the American Bar Association, as the chairman and counsel may well recall.

I would like to call attention of the subcommittee to certain conclusions in the report, and I quote:

For the reason that our committee has been charged with the duty of studying the problems caused by international communism, and we have observed the Communist tactics and realized the danger to American life and to the free world, we must urge an unremitting effort to maintain a judicial system which will ever function as impartial, resolute, and vigilant. There must ever be one standard of justice under law for both high and low, for those who are accused of serious offenses as well as for lesser crimes.

There must never be different and varying standards for determination of rights or duties or violations applicable to cases involving Communist problems as compared to other issues.

I would like to repeat, if I may, that last sentence.

There must never be different and varying standards for determination of rights or duties or violations applicable to cases involving Communist problems as compared to other issues.

Other issues that may come before the Court.

It should not happen that sound and established concepts of law and standards are disregarded and different standards employed simply because the problem involved Communist activity.

A group of lawyers which made up this committee of the American Bar Association disagreed with many of the Supreme Court's decisions. I might say parenthetically that I disagreed with some of the Court's decisions over the years. The Court does not dwell upon any high plateau of infallibility. Under our system, the Court is open to criticism and the Court should, like all of us, be subject to criticism by men of good will and learned in the law and who are informed on these matters.

However, even though this committee disagreed with the Court and criticized the Court, they reached a conclusion which I think is completely at variance with the proposals of S. 2640.

Their conclusion dramatically states that they oppose this bill. They emphatically warn against the very danger which this bill proposes to create. I think, Mr. Chairman, it must not be forgotten that the members of this committee have done a great deal of work and study on the subject of internal security and their conclusions cannot be set aside lightly. I happen to have been a member of that committee for 2 years and I asked to be relieved only because of a very heavy workload I am carrying on this committee and other committees.

Now, let us go back for a moment to another era, in the main, almost 100 years ago, when Congress enacted the only statute limiting the Court's jurisdiction, and that, as I said—and I know the distinguished Senator from Maryland, the chairman of this subcommittee at this time, will recall that that was during the early reconstruction period.

At that time Senator Hendricks of Indiana opposed the limitation of the Supreme Court's appellate jurisdiction, but despite his opposition, the bill was enacted and although the arguments of Senator Hendricks failed to stop the legislation in 1867, I think they should be considered by this committee with respect to this bill.

And in this connection, Senator Hendricks said:

When I vote for a law I expect that law to undergo all the tests that the Constitution contemplates. Does not the Constitution contemplate that all legislation shall undergo the test of the United States Supreme Court? Then, sir, whether the Constitution or an act of Congress is the law of a particular case, you will not allow the Supreme Court of the United States to decide. Why? I say, before the country and the world, it is an admission that your legislation will not stand the test of judicial examination. You need not expect that this country will be satisfied when you force upon it a species of legislation that you are unwilling shall go before the highest Court of the land.

I regard it as very serious when we propose to strip any one of the departments of the Government of its legislative power with a view to our exercising power without restraint.

Senator BUTLER. That is legitimate power.

Senator HENNINGS. Yes.

Senator BUTLER. That may be very much misconstrued at that particular junction.

Senator HENNING. Yes. We have that in our copies.

There is one more point I think this subcommittee should consider. The Supreme Court in *Ex parte McCardle* upheld the power of Congress to limit the appellate jurisdiction of the Court. Congress had withdrawn from the Court its jurisdiction to review on appeal a denial of a writ of habeas corpus. I think it must be remembered that in such cases the defendant had the opportunity to raise all constitutional questions in the original trial and to appeal the same to the Supreme Court. The limitation enacted in 1867, during the days of reconstruction, merely took from the Court its power to hear appeals in one collateral action.

S. 2646, on the other hand, would completely destroy the privilege to appeal to the Supreme Court in the five areas of the law. If a person claimed that his constitutional rights has been violated in any of these areas, he could not go to the Supreme Court with his grievance. The final determination of his claim would be made by a State supreme court or a Federal circuit court of appeals.

So, then, the decision would depend upon which court had the last say. There would no longer be conformity as to the meaning of the Constitution. The constitutional issue involved in almost every case in these areas is the due-process clause of the 5th or 14th amendment.

Now, Congress was given the power to limit the Supreme Court's appellate jurisdiction by article III, section 2 of the Constitution. This power of the Congress became effective upon the ratification of the Constitution. The people of our Nation in 1789 had certain misgivings as to the power which they had bestowed upon the Government, as we all know from reading the debates of the Constitutional Convention. They quickly engrossed upon the Constitution what we now know as the Bill of Rights. The Bill of Rights limits the powers given to the Government by the original Constitution. Therefore, the power of Congress to limit the appellate jurisdiction of the Supreme Court is subject to the restrictions, several restrictions of the Bill of Rights.

In *United States v. Bitty* (203 U. S. 303), decided in 1907, the Court in constructing article III, section 2, said:

What such exceptions and regulations should be, it is for Congress in its wisdom, to establish, having, of course, due regard to all the provisions of the Constitution.

The Supreme Court has held that the due-process clause is satisfied by one judicial determination. So, in this respect, an appeal is not guaranteed by the Constitution and its amendments. However, I have very serious misgivings as to the constitutionality of S. 2646. Due process of law, I believe, requires that the Constitution mean the same to everyone within the four corners of our Nation.

A proposal such as we have here will destroy the philosophy of equal justice under law which is basic to our system of jurisprudence, Anglo-Saxon jurisprudence.

A bill which will result in the Constitution requiring certain safeguards in one part of the Nation and not requiring the same safeguards in another would be repugnant to the due-process clause.

Therefore, it might well be declared void on that ground. Congress must always keep in mind that the amendments to the Constitution restrict the powers originally given to it by the Constitution.

Now, in addition, Mr. Chairman, to the foregoing arguments against the bill, there is one more point which I would like to emphasize at this time.

This bill would establish a very dangerous precedent and would be a first step toward the destruction of our present judicial system.

By S. 2646, we would take from the Supreme Court its appellate jurisdiction in certain areas because of disagreement with its decisions in these respective areas. The next step might be to take from the Supreme Court its jurisdiction in other areas where there is disagreement with its decisions. To lay a foundation for this, Senator Jenner, when discussing this bill in a speech on the floor of the Senate criticized the Court for its decision in the Stephen Girard case. My distinguished friend also bitterly criticized the Supreme Court for its decision in *United States v. Mullory*.

Now, Mr. Chairman, I fail to see how either of these cases has any logical connection with the present bill, because these cases dealt with subject matters entirely outside the realm of the five areas prescribed in S. 2646. Is it possible that these two cases were discussed in order to lay the foundation for two further limitations on the Supreme Court at some future date? I can think of no other reason for discussing them in respect to the present bill.

Furthermore, if the Supreme Court's jurisdiction is limited, I can also visualize an attempt to limit the jurisdiction of the United States circuit courts, if they should reach decisions which are contrary to the views of the proponents of this bill.

And this sequence logically could easily lead to the piecemeal destruction of our independent judiciary. Our courts would possess only limited power, and the guaranties of the Constitution, from a practical point of view, I think would become meaningless.

Mr. Chairman, I am pleased to see that my hometown newspaper, the St. Louis Post-Dispatch, called S. 2646—

An angry irresponsible proposal if ever there was one.

I was not surprised when the Milwaukee Journal said fortunately the brakes had been put—

on an ill-conceived and dangerous attempt to eliminate five legal areas from the jurisdiction of the Supreme Court.

However, I must admit that I was a bit surprised, although indeed pleased, when the Chicago Tribune, which I don't think would fall in a category of what we might call leftwing newspapers or rightwing newspapers said, and I quote:

S. 2646 is imprudent if only because it invites confusion.

And I quote again:

A conservative must be very shortsighted, indeed, to uphold S. 2646.

And I ask permission at this time to have the editorials from these three newspapers, plus editorials from the Washington Post and the New York Times respecting this bill put in the record.

Senator BUTLER. The editorials will be received and made part of the record.

(The material referred to is as follow:)

[From St. Louis Post-Dispatch, February 17, 1958]

A WILD COURT BILL

Senator Hennings has done all the country a service in halting the rapid advance of the Jenner bill to cripple the United States Supreme Court. It is the kind of good work that Missouri's senior Senator so often does—without benefit of large headlines or notice on the radio and television news reports.

The Jenner bill, S. 2040, is an angry, irresponsible proposal if ever there was one. It would strip the Supreme Court of its authority to review cases in five important fields. It would, for example, bar the Supreme Court from appellate jurisdiction in all actions taken by congressional investigating committees in internal security matters, including citations for contempt against witnesses. It would also shut off the right of appeal to the Supreme Court of any person dropped from the Government payroll because of alleged subversive connections.

The reason why the Jenner bill would remove from Supreme Court review these areas and three others relating to teachers, lawyers, and certain convictions in State courts is as plain as a pikestaff. Senator Jenner seeks to hit back at the Supreme Court because of the Watkins decision and other decisions of the last term which tend to restore fair dealing and due process of law to proceedings that had fallen into the hands of officials who cared little about the guarantees of the Bill of Rights.

Yet the Jenner bill passed the Senate Judiciary Subcommittee on Internal Security after only 1 day of hearings and without so much as 1 opponent of the bill being heard. Thanks to Senator Hennings, the bill has now been returned by the Judiciary Committee to the subcommittee for hearings that best a proposal of so sweeping a character.

Senator Jenner's swing at the Supreme Court is only one of the wildest that has followed in the wake of the historic decisions of the last term. There have been many more from individuals, from Members of Congress, from organizations and from editors.

The Supreme Court today is more representative than it has been for many years. Here is its personnel, by Presidential appointment, State of origin, and previous party affiliation.

Appointed by Eisenhower (4):

Earl Warren, California, Republican.

John Marshall Harlan, New York, Republican.

William J. Brennan, New Jersey, Democrat.

Charles E. Whittaker, Missouri, Republican.

Appointed by Roosevelt (3):

Hugo L. Black, Alabama, Democrat.

Felix Frankfurter, Massachusetts, Democrat.

William O. Douglas, Washington, Democrat.

Appointed by Truman (2):

Harold H. Burton, Ohio, Republican.

Tom C. Clark, Texas, Democrat.

This table shows that the present Supreme Court, which some of its critics are denouncing as "runaway," is the handiwork of 3 Presidents, Mr. Eisenhower having named more than either of his 2 Democratic predecessors. It contains 5 Democrats and 4 Republicans, 1 of the Democrats having been appointed by a Republican and 1 of the Republicans by a Democrat. Three are from the East, 2 from the Middle West, 2 from the South, and 2 from the Far West.

The notion that 9 Justices, so selected by 3 Presidents of both parties from 9 different States over a period of more than 20 years, should be deliberately and calculatedly opposed to the country's security is ridiculous on its face. Yet that notion is having its currency, as the Jenner bill attests.

The Supreme Court is not sacrosanct. It is not above criticism. It needs public attention, interest, and vigilance because its work is just as important in our Federal system as the work of the Presidency and of Congress. But the country ought to be grateful to Senator Hennings for holding up the vindictive Jenner bill to public inspection.

[From the Washington Post, February 8, 1958]

STAR AT THE COURT

A sneak attack on the Supreme Court has been thwarted, at least temporarily, thanks largely to Senator Hennings. The attack was engineered by Senator Jenner. Having introduced a bill to strip the Supreme Court of jurisdiction in five specified areas, Mr. Jenner became the chief witness in support of the bill before the Internal Security Subcommittee of which he is the ranking member. He also called a staff member to testify for the bill. The hearing was then closed at the end of 1 day, without a single opposition witness being called, and the measure was sent to the full Judiciary Committee.

Because of the stealth of this operation, it went almost unnoticed. On the initiative of Senator Hennings, however, the bill has been sent back to the Internal Security Subcommittee for further hearings. Now the bar, and perhaps the bench, will have an opportunity to expose the vicious character of the proposal. For what Mr. Jenner and his colleagues are attempting to do is nothing less than to deny citizens their constitutional rights in certain areas by forbidding the Supreme Court to take broad categories of cases.

Congress undoubtedly has the power to limit the jurisdiction of the Supreme Court. In one notorious instance, in the heat of the fight over reconstruction in 1868, Congress did take away from the Court its authority to review denials of writs of habeas corpus. Now Mr. Jenner and his colleagues would forbid the Court to pass upon the validity of any congressional committee action, any executive security measures, any State or educational body's regulations against subversives, and any State's regulations of admissions to the bar. Students of the Court will recognize in this list of forbidden areas of jurisdiction a senatorial thrust against many Supreme Court decisions.

It is true that the bill itself would not overthrow any of the decisions against which the extreme right wingers have railed. But it would give the highest State courts and the United States courts of appeals the last word in the restricted fields of law and thus invite an erosion of the principles that the Supreme Court has laid down. To say the least, the result would be chaos. The Constitution would soon be interpreted one way in Virginia and in a very different way in Kansas or Oregon.

Senator Hennings has described this scheme as an effort "to short-circuit justice by throwing the switch in Congress." It can be even more bluntly condemned as a stab in the back of the judicial system. For if Congress should make a practice of lopping off portions of the Supreme Court's jurisdiction because it did not like the decisions the Court has rendered, the whole concept of independent courts upholding inalienable rights would probably crumble.

[From Chicago Daily Tribune, February 24, 1958]

A DANGEROUS BILL.

Senator Jenner's bill (S. 2040) to deny the Supreme Court the right to review certain types of cases should be defeated.

Mr. Jenner is troubled by some recent decisions of the Court. For example, because some contempt of Congress verdicts were overruled Mr. Jenner proposes that the Supreme Court be forbidden to review convictions for contempt of Congress.

In general, he wishes to deprive the Court of the right to hear appeals from the decision of any public authority—Federal, State, or local—on any question concerning subversion. If a teacher objects to a ruling of a board of education on any matter concerning subversion, the appeal must stop short of the Supreme Court.

We can agree with Mr. Jenner in condemning a number of the recent decisions of the Court. We thought the Court was wrong in denying to any State the right to enforce antisubversion laws of its own, on the theory that this field of activity has been preempted by the Federal Government. We thought the Court was wrong again when it ordered a State to license a candidate to practice law after the State authorities had found him unqualified because of Communist affiliations. And we thought that the court was mistaken in its reading of the Smith Act.

But the remedy proposed by Mr. Jenner is imprudent if only because it invites confusion. If he has his way, a statute may be interpreted in a dozen ways in a dozen jurisdictions and there will be no Supreme Court to set the same course

for all. The right to appeal will not be taken away, but only the right to appeal to the Supreme Court in Washington. The consequence could be a 20-year-jail sentence affirmed by the United States court of appeals in Boston for an offense that the Ninth circuit in San Francisco will rule is not punishable at all.

And there are other dangers. Half a dozen years ago, Edward A. Rumely was found guilty of contempt of Congress for refusing to tell the names of some subscribers to books he published. It is true that his conviction was overturned by the Court of Appeals in the District of Columbia in a 2 to 1 opinion. The Government then appealed to the Supreme Court and, happily, the Court decided against the Government and for Mr. Rumely and the first amendment. Mr. Jenner's bill would deprive future Rumleys of the right to take their cases to the Supreme Court if they are unfortunate as to lose in the circuit courts.

Editors and publishers have reason to be especially concerned about this matter. Their freedom of expression, like that of everyone else, derives from the first amendment. Their freedom from unlawful search and seizure and unwarranted arrest, like everyone else's, derives from the Bill of Rights. Congressional committees [like the Black and Buchanan committees] have invaded these rights from time to time. Who, in these circumstances, can favor sacrificing the protection of a final appeal to the Supreme Court?

Unfortunately the chief witness so far against the Jenner proposal has been Mr. Joseph Rauh, Jr., who has made frequent appearance before congressional committees and the courts on behalf of leftwing causes and personalities. His testimony against the bill promoted the notion that the opposition to it is essentially leftwing opposition. Nothing could be farther from the truth. A conservative must be very shortsighted, indeed, to uphold the Jenner bill.

[From the Milwaukee Journal, February 1958]

BRAKES WISELY PUT ON MOVE TO CURB SUPREME COURT'S FIELD

Senator Hennings (Democrat, Missouri) has fortunately put the brakes on an ill conceived and dangerous attempt to eliminate five legal areas from the jurisdiction of the Supreme Court.

The plan was a brain child of Senator Jenner (Republican, Indiana). It would have forbidden the Supreme Court to decide on the validity of congressional committee activities, executive security measures, State or educational bodies' anti-subversive regulations and on State regulation of admissions to the bar. The Jenner plan was approved by a subcommittee of the Judiciary Committee and sent to the full committee after only 1 day of hearings.

What cuts Jenner, of course, is his bitter disagreement with certain decisions of the Supreme Court in the last several years. He can't overrule the decisions. But he wants to prevent the Court from making like decisions in the future by taking away the opportunity for them.

In almost every case the Court decisions Jenner opposes upheld the individual rights of citizens under the Constitution. And in almost every case the decisions rose out of abuse of those rights in connection with witch hunting or use of unfair methods in investigating or attempting to control alleged—or even real—subversion.

What Jenner opposes in the Court decisions have been striking reaffirmations of individual rights and constitutional guarantees.

Hennings pointed out to the full committee that the subcommittee had acted on "illimited and one-sided information"—most of it supplied by Jenner. To approve such a plan, he said, would be to take away from Americans their right to appeal to the highest Court in the land in five important areas. It would strip the Court of traditional power. It would make Federal circuit courts and the highest State courts the courts of last resort in those five areas.

As Hennings said, the circuit courts and highest State courts would still be bound by past rulings of the Supreme Court. But there might be, here and there, a tendency to overlook those decisions—without any means of appeal by persons concerned. And conceivably we would end up with as many different rulings in those areas as there are circuit and highest State courts. The meaning of constitutional guarantees would depend upon where you lived.

The Judiciary Committee agreed with Hennings that the Jenner plan needed at the very least a great deal more study. And careful and objective study will certainly send Jenner's dream to the incinerator where it belongs.

[From the New York Times, February 26, 1958]

MR. JENNER VERSUS THE COURT

William B. Jenner of Indiana, who is doing a service to the Nation by retiring from the Senate this year, is author of a bill to limit the appellate jurisdiction of the Supreme Court in certain areas where the Court has been courageously defending some of our basic American liberties.

The Jenner bill was suddenly whisked out of the Senate Internal Security Subcommittee last month; but at the insistence of Senator Hennings of Missouri, a long-time champion of the Bill of Rights, it was whisked back again for hearings, and, we hope, for burial. It is no surprise and no comfort that Robert Morris, former chief counsel of the Internal Security Subcommittee and now a Republican candidate for the New Jersey senatorial nomination, strongly endorsed the bill last week on the ground that an "aggressive majority on the Supreme Court has been hastening the decline of congressional investigatory power." This is Mr. Morris' way of saying that the Court has enforced some constitutional limitations on free-wheeling congressional committees, and that the Jenner bill would put a speedy end to that.

Not only would the bill deprive the Court of authority in cases involving congressional investigating committees, but it would do a host of other equally dangerous things as well. It would remove the Court's jurisdiction over Federal loyalty-security programs, or over any State action on subversive activities. Furthermore, it would exempt from review by the Supreme Court local rules on alleged subversion among teachers, and State regulations regarding admission of persons to the bar. In each of these five categories Senator Jenner was obviously aiming at one or more recent Supreme Court decisions.

In each of these cases the high tribunal decided in favor of individual rights and constitutional liberties; and Senator Jenner evidently figures that if he can't overturn these Supreme Court decisions, he may be able to prevent similar ones in the future.

Legislation of this kind would not merely leave constitutional law in these fields to the lower Federal or State courts, and therefore in a state of confusion. It would do something much worse: strike directly at the independence of the Judiciary. The Supreme Court is not above criticism, and sometimes its decisions may be wrong (though we do not happen to think so in the above cases). But it would be fatal to our form of government, and to civil liberties as well, if Congress punished the Court for unpopular decisions by taking away its authority in certain cases, which is precisely what Senator Jenner would have it do.

Senator HENNING. I might say, Mr. Chairman, we have quite a collection of editorials from all over the country in opposition to this bill. Not that I necessarily believe all editorial writers are infallible either, but it does show that papers like the St. Louis Post-Dispatch and the Milwaukee Journal, the Chicago Tribune, the Washington Post and the New York Times are of one mind as respecting the inherent dangers of this proposal.

I would also like permission of the subcommittee to have printed in the record of the hearings a memorandum I read to the Judiciary Committee on February 3.

Senator BUTLER. It will be so ordered. The memorandum will be received and made a part of the record.

(The document referred to is as follows:)

MEMORANDUM

S. 2646 involves a subject of very great importance to every American. This bill would take from every American his privilege to appeal to the Supreme Court in the five enumerated areas. This bill would strip from the Supreme Court a part of its traditional power. A power which the Court has had for over 100 years.

Notwithstanding the extraordinary nature of this bill it was reported to this committee by the subcommittee after only 1 day of hearings. Senator William Jenner, the proponent of the bill testified and at Senator Jenner's request, Mr.

Benjamin Mandel testified as to certain findings he had made in this field. Not one witness was called who opposed the bill. Both witnesses are connected with the subcommittee as a member or staff member.

I do not see how this committee can consider this bill with any amount of responsibility when we have such limited, one-sided information.

I believe that it is mandatory that further hearings be held. Witnesses should be heard on both sides and I am sure there are many outstanding citizens who are more than eager to testify. After such hearings the members should be given time to digest and consider the testimony. Then, and only then, can we properly carry out our duty.

As to the bill itself; why has it been introduced? The testimony of Senator Jenner before the subcommittee and the appendix to the hearings of the subcommittee supply this answer. The proponents of the bill simply disagree, quite violently, I might add, with certain decisions of the Supreme Court. They believe the Court reached the wrong decision in certain cases and have accused the Court of usurping legislative power. Therefore, to keep the Supreme Court from rendering further decisions which they might disagree with, they propose to take from the Court its jurisdiction in certain areas. They propose to take from the American citizen his privilege to appeal to the Supreme Court in these areas. They are not willing to argue their contentions before the Supreme Court in the prescribed judicial manner. They desire to short circuit justice by throwing the switch in Congress. In the last analysis, they desire, in some instances, to overturn the Supreme Court's past interpretations of the Constitution.

However, this bill, by its wording, will not affect the Supreme Court's constitutional interpretations. The bill would merely keep the Supreme Court in the future from reviewing cases in the five prescribed areas. This would result in the circuit courts and the highest State courts being the courts of last resort in these areas. According to our traditional legal system, these courts are bound by decisions of the United States Supreme Court as to the interpretation of the Constitution. Therefore, if a case arises which is similar to a case already decided by the Supreme Court, these lower courts are bound to follow the Supreme Court's decision and this includes those decisions to which the proponents of the bill are hostile. So, on its face, this bill would not accomplish what I believe is the desire of its proponents.

I believe the proponents hope that the lower courts will overlook our traditional legal system and either flagrantly, or under the cover of some type of a smokescreen, disregard the Supreme Court's decisions in the prescribed areas, if the lower courts do not agree with them. With all due respect to the judges who sit on these courts, I fear that this will occur in some places, if this bill becomes law. This bill will create great temptation for these lower courts to interpret the Constitution according to their own dictates and not according to the dictates of the Supreme Court of the United States. This would accomplish the desires of the bill's proponents. This would overturn the decisions which they attack.

What would be the end result of this? Many, if not most, of the circuit courts and highest State courts, would continue to follow the Supreme Court's decisions in these areas. These courts, when faced with a case for which they can find no Supreme Court precedence, would attempt to reach a decision which would be upheld by the Supreme Court, if they heard the case. Almost all these cases would turn on the due process clause and we all know how frequently such cases are decided by a 5-4 vote of the Supreme Court. So it is easy to see how difficult it would be for the lower courts. Undoubtedly, lower courts, when faced with similar cases, would come to opposite decisions, even though they strive to reach the same result the Supreme Court would, if it heard the case. This would result in the Constitution meaning one thing in one part of the country, and something else in another part. The meaning of the Constitution in the prescribed areas, would depend on where the case was initiated. This result would be compounded by those courts, which would reach their own decisions, without attempting to anticipate what the Supreme Court would do. The law in these five areas set out in the bill would become chaotic. Such a situation would be deplorable.

This proposal to take from the Supreme Court a part of its jurisdiction is not original. I have found at least three such attempts in our history.

In 1821, some Members of Congress and the press became quite upset over several Supreme Court decisions, which reversed decisions of State courts. In that year, a bill was introduced to take from the Court its appellate jurisdiction over State courts.

In 1807, an appeal from a denial of a writ of habeas corpus was pending before the Supreme Court. This case involved one of the Reconstruction acts. Because of the fear that the Supreme Court might hold this act unconstitutional, a bill was introduced in this Reconstruction Congress to take from the Supreme Court its jurisdiction to review denials of writs of habeas corpus.

In 1808, a bill was introduced to take from the Supreme Court its appellate jurisdiction over any case when a Reconstruction act was involved.

What did these earlier Congresses do when faced with these bills?

In 1821, there were several speeches made on the floor in regard to the bill, but no action was taken. In 1807, there was a great deal of hatred and bitterness toward the South. The case mentioned above could easily be the beginning of the end for the whole Reconstruction program. The Congress was determined that the South was not to get off easily. The southerner who was attempting to free himself before the Supreme Court was not to go free. In this atmosphere the bill was passed despite bitter opposition by such men as Senator Hendricks of Indiana. President Andrew Johnson vetoed the bill because he thought it was enacted in passion and without deliberation. Enough votes were mustered to override the veto and the Supreme Court dismissed the appeal for lack of jurisdiction.

The next year, in 1808, that same Congress could not bring itself to pass the bill which would take from the Supreme Court appellate jurisdiction in any case involving the Reconstruction acts. Even that Congress realized the effect of passing a law and taking from the Supreme Court jurisdiction over cases involving that law. I admit that, if there had been an important case pending before the Supreme Court involving a Reconstruction act in 1808, the proponents might have gathered enough strength to pass the bill, but, as it was, the proponents were not able to even bring it to a vote.

This historical outline shows that only once has Congress enacted such legislation. And this was in a time of emotional upheaval. Even then, the act was very limited in scope. It took from the Supreme Court its appellate jurisdiction over a collateral action only. It did not touch the Court's jurisdiction in primary actions. When a bill was introduced to accomplish this end in 1808, the same Congress failed to act.

Today, we are asked to enact legislation similar to the legislation that the Reconstruction Congress failed to enact. Surely, we can set aside our emotions and consider this bill with deliberateness.

Senator HENNINGS. Thank you. As you know, sir, the question before us is of tremendous importance. It is impossible for the subcommittee to hear from more than a few of the lawyers throughout the country who could shed light on this subject. In an attempt to fill this gap and to buttress our position, I solicited the opinions of many outstanding deans of American law schools throughout the Nation who are very much interested in constitutional problems. I would like to have permission of the subcommittee to have printed in the record of the hearings at this point a list of the outstanding attorneys we have gotten in touch with.

Senator BUTLER. It will be so ordered.

(The list referred to is as follows:)

LIST OF LAWYERS CONTACTED

Mr. Douglas Arant, Birmingham, Ala.	Mr. David Heath, Dallas, Tex.
Mr. Chauncey, Belknap, N. Y.	Mr. William L. Josslin, Portland, Oreg.
Mr. George H. Bond, Jr., Syracuse, N. Y.	Mr. Allen T. Klotz, New York City
Mr. Hugh Calkins, Cleveland, Ohio	Mr. Herbert S. Little, Seattle, Wash.
Mr. Jerome K. Crossman, Dallas, Tex.	Mr. Brunson MacChesney, Chicago, Ill.
Mr. John V. Duncan, New York City	Mr. William L. Marbury,
Mr. Paul F. Good, Omaha, Nebr.	Baltimore, Md.
Mr. Joseph Harrison, Newark, N. J.	Mr. Vincent L. McKusick,
Mr. Blakey Helm, Louisville, Ky.	Portland, Maine
Mr. Benjamin H. Kizer, Spokane, Wash.	Mr. D. Howe Moffat,
Mr. Sol M. Lhnowitz, Rochester, N. Y.	Salt Lake City, Utah
Mr. Lawrence M. Lombard,	Mr. John E. Mulder, Philadelphia, Pa.
Boston, Mass.	Mr. Endicott Peabody, Boston, Mass.
Mr. Gerald C. Mann, Dallas, Tex.	Mr. Theodore Pearson, New York City
Mr. Carlyle B. Maw, New York City	Mr. Raymond Pfeiffer,
Mr. John R. McJannet, Manchester, N. H.	Philadelphia, Pa.
Mr. E. W. Molse, Atlanta, Ga.	Mr. Thomas V. Rankin, Boston, Mass.
Mr. Arthur L. Newman, New York City	Mr. Francis Shackelford, Atlanta, Ga.
Mr. Dana C. Backus, New York City	Mr. Charles M. Spofford,
Mr. Francis M. Bird, Atlanta, Ga.	New York, N. Y.
Mr. Robert J. Bulkley, Cleveland, Ohio	Mr. Herman Phleger,
Mr. Stephen F. Chadwick, Jr.,	San Francisco, Calif.
Seattle, Wash.	Mr. William Poole, Wilmington, Del.
Mr. Joseph B. Cumming, Augusta, Ga.	Mr. Murray Seasingood,
Mr. Conover English, Newark, N. J.	Cincinnati, Ohio
Mr. Herbert M. Hamblen,	Mr. Harvey M. Spear, New York, N. Y.
Spokane, Wash.	Mr. John R. Stevenson, New York City

Senator HENNINGS. We have written these various law schools: Catholic University of America, here in Washington, D. C., Howard University, the University of California's Hastings College of Law in San Francisco, Yale University Law School. The dean of the Yale University Law School has written quite a memorandum on this subject and sent that down for our knowledge, consisting of four pages.

Senator BUTLER. Is it the Senator's desire that those letters should be made a part of the record?

Senator HENNINGS. I think they should be if there is no objection.

Senator BUTLER. It will be so ordered.

(The documents referred to appear at p. 394.)

Senator HENNINGS. University of Alabama, Chicago-Kent College of Law, Northwestern University.

These letters, I might say, Mr. Chairman, are most enlightening because they come from students of the law who have no partisan political axes to grind.

Here is one from the University of Illinois, the dean of the Law School of the University of Illinois.

Here is one from the Notre Dame Law School. In that connection, Dean O'Meara has sent the outline of a symposium on the Role of the Supreme Court in the American Constitutional System.

Drake University in Des Moines, Iowa; State University of Iowa; University of Kansas; Washburn University of Topeka; Boston University School of Law; Law School of Harvard University.

I might say to you, Mr. Chairman, these are not just routine form letters, they have taken the trouble, as the chairman can see, to go into the matter at some length.

Senator BURLEIN. If it is physically possible to do it, I want to read every one of them because, as you know, I am vitally interested in this question.

Senator HENNINGS. I know you are. You are a great lawyer yourself and you like to look at things as a lawyer would look at matters, and you and I have been together on several questions relating to some of these constitutional matters on the floor of the Senate.

The University of Minnesota:

It seems to me both dangerous and irresponsible. It would shift the ultimate responsibility for important judicial business from the Supreme Court to the lower courts, and the lower courts have no practical means of resolving differences among themselves, except through the unifying work that is done by the Supreme Court.

This is from the professor of constitutional law at the University of Minnesota.

St. Louis University in the same tenor:

In spirit, the proposal represents a partial but ominous challenge to the place which the Supreme Court has held in our history. It seeks to detract from the Court's historic role as protector of individual rights. To that extent it lays emphasis on legislative whim rather than on the due process which has always been the capstone of our liberties.

That is from John E. Dunsford, assistant professor of law, St. Louis University School of Law.

The University of Kansas City.

Washington University in which the dean says:

Although it is the privilege of anyone to disagree with or to criticize a decision of the Supreme Court, I am very much concerned with the intemperate criticism of the Court as such. In my opinion, the Supreme Court of the United States is doing an admirable job of performing the high function with which it is charged by the Constitution. I feel that many of the criticisms of particular decisions are unwarranted and are based upon an erroneous notion of what the cases actually held. I do not feel that any legislation is necessary to curb the power of the Supreme Court. Consequently, I am opposed to Senate bill 2040 and similar legislation.

Montana State University:

This bill strikes at the Supreme Court of the United States because certain on its decisions do not meet the personal approval of the bill's sponsors, not by a reasoned and generalized delimitation of the Court's jurisdiction—

and the chairman understands, of course, there is nothing invidious in what I am reading. I have respect for all of my colleagues on this committee, including Senator Jenner. I believe that he was acting in entirely good faith when the bill was presented.

Further, it places a vital area of personal liberties in a second-class position, subjecting it to the diverse opinions of lower Federal courts. Such legislation is exceedingly pernicious.

Rutgers, another one in the same vein.

The University of New Mexico, another in the same vein:

You may record me as being against this legislation.

'This is by A. L. Gausewitz, dean of law, University of New Mexico. Albany School of law:

The proposals in the bill are startling. Congress—
under this bill—

is made a court of first and last resort in contempt proceedings, the individual being denied access to the courts. This would appear to be an undue encroachment by the legislature upon the function of the judiciary, and it is our opinion that it would be unconstitutional.

'That is from the Albany Law School, Albany, N. Y.
Cornell Law School from Michael H. Cardozo, dean:

I am glad to submit an opinion on S. 2046, a bill to limit the appellate jurisdiction of the Supreme Court in certain cases. I regret that time does not permit me to prepare a lengthy commentary, and therefore, the following is simply a summary.

The summary includes a page and a little more. I think one thing that Dean Cardozo says is significant:

The foregoing remarks are addressed to the general danger of limiting the function of the Supreme Court in protecting liberties assured by the Constitution. In addition, the bill would make it impossible to reconcile conflicting decisions of courts in various parts of the country. It is interesting that this danger was clearly foreseen by Justice Story, speaking for a unanimous Supreme Court in 1810, when he said in *Marble v. Hunt*'s lease:

"This is not all. A motive of another kind. Perfectly compatible with the most sincere respect for State tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the Constitution. Judges of equal learning and integrity, in different States, might differently interpret a statute, or a treaty of the United States, or even the Constitution itself. If there were no revising authority to control these jarring and discordant judgments"—

this is Justice Story in 1810—

"and harmonize them into uniformity, the laws, the treaties and the Constitution of the United States would be different in different States, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two States * * *

The proposed legislation would cause such a change in our constitutional system that only the strongest possible reasons for its passage should be given consideration. I know of no such reasons, and therefore, I can only conclude that the legislation should be unequivocally rejected.

'That is from the dean of the Cornell University Law School.

New York University group, the Legal Research in the same tenor.
University of Nebraska.
Duke University:

Upon receipt of your letter I caused the bill in question, S. 2046, to be circulated to all members of the faculty of the Duke Law School, a group which represents many shades of political opinion and which reflects varying degrees of liberalism and conservatism. It may interest you to know that a poll taken of their opinion on S. 2046 shows every single member of the Duke Law faculty to be opposed to the bill.

Hoping this information may be of use to you. * * *

I don't want to burden you, Mr. Chairman, except that I do think that it is significant that these men who are engaged in construction of the law, who are scholars and students of the law, are as of one mind. We have only 4 out of 73 who are for this bill.

The Law College of the University of Cincinnati; University of Oklahoma; Willamette University.

University of Pennsylvania:

No Congress with any sense of responsibility, even in anger at something which the Court may have decided, is going to be tolerant of a frontal attack upon the entire plan and procedure of appellate jurisdiction which has been developed so painstakingly over the years in a series of major enactments beginning with the Judiciary Act of 1789. The Congress also has a literal power, I assume, to abolish all inferior Federal courts, but it is inconceivable that it would do so. The Congress is solely responsible for the raising of revenue and the making of appropriations; but again, I think it is simply inconceivable that it would strike at a coordinate department of the Government by refusing to provide funds.

S. 2610 proposes no mere modification of the Court's appellate jurisdiction. It is a frontal attack upon the Court's unique responsibility for the administration of judicial power under our tripartite system of government.

That is from the professor of law, emeritus, Edwin D. Dickinson.
University of Pennsylvania, from the professor of law:

I am grateful to you for calling to my attention, once again, what seems to be undesirable legislation. I very much appreciate your invitation to express my views. Dean Jefferson B. Fordham, my respected colleague here, is preparing to appear with a full statement in opposition to the legislation. I have discussed the proposals with Dean Fordham and with others and agree entirely with what Dean Fordham shall say in opposition to the legislation. I do not believe that I could bring forward any more cogent reasons than the ones which Dean Fordham, a recognized student of the legislative process, will develop.

I am certainly surprised that the action reporting the legislation favorably from the subcommittee should have been taken on the basis of such a "bottled" procedure. Surely any proposal which alters so seriously the working arrangement regarding appellate jurisdiction which was set up in the very earliest years of our history should be studied much more deliberately and much more fully than apparently it has been.

That is from Coy T. Oliver.

University of Pittsburgh; Cumberland University; Southern Methodist University; University of Texas; University of Utah; College of William and Mary; University of Washington, school of law, signed by the dean and two professors citing cases; University of Wisconsin.

(Following are the documents referred to above:)

THE CATHOLIC UNIVERSITY OF AMERICA,
Washington, D. C., March 3, 1958.

Hon. THOMAS C. HENNINGS, Jr.,

United States Senate, Committee on the Judiciary,
Washington, D. C.

DEAR SENATOR HENNINGS: I am sorry I have had to wait so long to prepare a statement for your committee. What I have been reading in the newspapers suggests that there is still time for you to use a statement from me.

The case on the merits against the bill is one-sided. It seems so obvious that restrictions through legislation on any functions of the Supreme Court are inconsistent with judicial independence. However, the people who are interested in this legislation have axes to grind. They do not adjust themselves to any arguments except those which relate to the immediate effects of decisions they do not like.

Ordinarily I try to meet issues on the merits. I try to adjust to policy choices. Only as a last resort do I support my case against a policy choice by something I find in a constitution. I do not like to tell any legislator that "he cannot do it." Twenty-five years ago I was happy to witness the erosion of the case law on substantive due process and freedom of contract. Nevertheless, I am concerned to search for basic limitations on legislation which touches civil rights. In these days of multiplying functions on all government levels I think it is imperative to formulate and reformulate limitations derived from the Constitution in the interest of individuals.

I see much in this proposed legislation which is related to the civil-rights area. I think the proponents of the bill will agree that the due-process clause of the fifth amendment affects the text of article III in the Constitution. Under the literal text of that article their case looks bad. Even those proponents must admit that the due process demands an opportunity for judicial review. I know we can get that in the courts of appeal. But due process is related also to the doctrine of judicial supremacy which John Marshall first expounded. When decisions of courts of appeal, State or Federal, are in conflict or are inadequate on Federal questions, there can be no judicial supremacy without the decisions of the Supreme Court. History is on our side. Certiorari has a tremendous potential in spite of Congress.

Sincerely yours,

VERNON X. MILLER,
Dean, School of Law.

P. S.—Prof. Arthur J. Keefe of our faculty agrees generally with my statement. I think he would write a stronger one.

HOWARD UNIVERSITY,
SCHOOL OF LAW,
Washington, D. C., February 28, 1958.

Hon. THOMAS C. HENNINGSON,
United States Senate, Washington, D. C.

MY DEAR SENATOR HENNINGSON: Your letter to Dean George M. Johnson in reference to S. 2040 was referred to me for answer. I have given the matter deepest consideration and wish to state to the Senator as follows:

A generation ago Mr. Justice Holmes observed that he did not "think the United States would come to an end if we (the Supreme Court) lost our power to declare an act of Congress void," but he did "think the Union would be imperilled if we (the Supreme Court) could not make that declaration as to the laws of the several States." Building on a generation of hindsight, we take the liberty to disagree in part with what that great jurist said; for we believe that amidst the governmental complexities of today and the impact of these complexities upon individual liberties, the Union would be imperilled if the Supreme Court could not act in either of the above-mentioned situations.

We feel beyond cavil that the passage by Congress of the legislation embodied in S. 2040 poses the most serious threat to the American system that that system has faced in modern times. In a sentence, this bill stands as precursor to the reduction of our traditional tripartite Federal Government to a novel, untried, and foredoomed bipartite form; in a phrase, national legal chaos.

At the outset we wish to state that, in our judgment, the constitutional power of the Congress of the United States to pass this bill is not free from doubt. We say that mindful of the fact that in the well-known case of *Ex parte McCordle* a postbellum Supreme Court, faced with the problem of resealing the Union in those troublesome times, indicated that Congress has some power in the premises. On this occasion, however, we do not press this point of doubtful constitutionality, but assume *arguendo* that constitutional power is vested in Congress to denude the Supreme Court of the United States of appellate jurisdiction. Building on this assumed premise, we would strongly urge that Congress vote down S. 2040. With all due respects to other branches of our Government, it is too late in the day to inveigh against the proposition demonstrated by the history of our people that that organ of government to which Americans look for the preservation of their individual liberties is the Supreme Court of the United States; with emphasis on the word "supreme." We all know that under our system of constitutional jurisprudence the original jurisdiction of the Supreme Court of the United States—important though it may be in its operation in the limited sphere to which relegated—is by comparison to its appellate jurisdiction of secondary importance. Put the other way around, it is in the exercise of its appellate jurisdiction that the Supreme Court is enabled to exert from its keystone position in the arch of Government the forces which cement the States into one Union and which interpose between arbitrary Government activity and individual liberties. Withdraw that appellate jurisdiction and instead of one court providing a unified force along the lines just adverted to, we automatically substitute therefor 48 State supreme courts, 10 Federal circuit courts of appeals, and several Territorial courts of last resort, all essaying to declare judicially what the law of the land is. Now, of course, this does not

mean we would have a different law in each of the above-enumerated courts, but it indubitably means that there would be a variety of legal judgments across the face of the Nation. We realize, of course, that S. 2040 does not repeal the entire appellate jurisdiction of the Court, but in these days and times it is a step in that direction. As has been often observed, we do not lose liberties in one "fell swoop," but rather lose them by a process of attrition, a chipping away, bit by bit. If we start in these times down the path of repeal of the appellate jurisdiction of the Supreme Court, it can be prophesied that, step by step, we would ultimately reach an ebb so low as to imperil the Union and the rights of its citizens. We think the situation could be aptly illustrated by drawing an analogy to the national pastime of baseball in which, at least in the major leagues, there are usually 4 umpires; 1 at each of the 3 bases and 1 at homeplate. To repeal the appellate jurisdiction as suggested by the proposed bill would be akin to repealing the power of the homeplate umpire to call the balls and strikes and to place that power in each and all of the three base umpires. We think we need carry the analogue no further. The resulting confusion is obvious to all. In passing, however, it should be remembered that if Congress has the power to "kill the chief Federal umpire" it certainly has the additional power to annihilate all the base umpires.

We are specifically concerned about the enforcement of the liberties guaranteed in the 14th and 15th amendments. In this connection, of course, some of the aspects of S. 2040 fall within the ambit of the 14th amendment. A reading of the cases dealing with the 14th amendment leads inexorably to the conclusion that unless there is one court which can finally declare that which is due process or that which is not due process; that which affords equal protection or that which does not afford equal protection, there may well be as many rules of law thereon as there are courts adjudicating the problem. To a lesser extent, this would also probably be true of the 15th amendment.

In closing, we note with satisfaction that with the exception of the very limited action taken by Congress with respect to appellate jurisdiction of the Supreme Court in the Reconstruction era, sustained in *Ex parte McCardle*, no Congress has, otherwise, in our entire history attempted to curb in this fashion the Supreme Court of the United States. The significance of this is self-apparent. Finally, we say to you with all the earnestness we can command that, in our judgment, this type of legislation is more dangerous than any which we can perceive to the future of this country.

Sincerely yours,

DORSEY H. LANK,
Assistant Professor of Law.

UNIVERSITY OF CALIFORNIA,
HARTING COLLEGE OF LAW,
San Francisco, Calif., February 11, 1958.

HON. THOMAS C. HENNING, JR.,
Senate Office Building, Washington, D. C.

DEAR SENATOR HENNING: This is to acknowledge your letter of February 7 with regard to Senate bill 2040, 83rd Congress.

I am glad to have an opportunity to let you know that I agree with your position in this matter. So do most of the other members of our faculty.

I think it a shocking thing, to repeal decisions of the Supreme Court of the United States by limiting its appellate jurisdiction. Senate bill 2040, if enacted, would indeed work a basic change in our governmental system.

Faithfully yours,

DAVID H. SNODGRASS, *Dean.*

YALE UNIVERSITY LAW SCHOOL,
New Haven, Conn., February 28, 1958.

HON. THOMAS C. HENNING, JR.,
United States Senate, Washington, D. C.

MY DEAR SENATOR HENNING: I am happy to respond to your letter of February 7, 1958, requesting my views on S. 2040, a bill to limit the appellate jurisdiction of the Supreme Court in certain cases. According to the text you sent me, the bill would withdraw appellate jurisdiction from the Supreme Court, but apparently would not alter the existing jurisdiction of the lower Federal courts, in cases "where there is drawn into question the validity" of Federal legislative

investigations, loyalty-security programs for Federal employees, State regulations or statutes dealing with subversive activities in general, and particularly those of teachers, and State regulations pertaining to membership in the bar.

I am opposed to this bill, and to the principle which it represents, of limiting the jurisdiction of the Supreme Court of the United States in cases involving civil rights.

First, S. 2040 appears to be studded with ambiguities, a few of which it might be well to advert to:

Does the bill foreclose review of all cases at any stage of which there was "drawn into question the validity of" one or more of the matters described in subparagraphs (1) through (6)? Or does the bill merely limit the issues which can be raised in the Supreme Court?

What, furthermore, does "validity" mean? Does it relate only to constitutionality, or does it also comprehend conformity with applicable statutes or regulations as well?

Testing the statutory language against concrete situations only deepens its mystery: For example, under subparagraph (1), would the Supreme Court be entitled to review a ruling on evidence, or an allegedly prejudicial statement by the prosecutor, or a challenge to the composition of the jury, in a trial for contempt of Congress? Would such an issue be deemed to have "drawn into question the validity of . . . any action or proceeding against a witness charged with contempt of Congress"?

The sweeping language of subparagraphs (3) and (4) also presents major problems of interpretation. Who determines, and by what standard, whether a statute or regulation is one "concerning subversive activities . . ."? Consider, for example, *Atkins v. School Board* (240 F. 2d 825, cert. denied, 78 Sup. Ct. 83), in which the Court of Appeals for the Fourth Circuit recently sustained the invalidation of the Virginia Pupil Placement Act of 1950. The State statute in question recited, in part, that "the mixing of white and colored children in any elementary or secondary public school . . . constitutes a clear and present danger . . .". Would S. 2040, had it been on the books, have foreclosed the Commonwealth of Virginia from seeking Supreme Court review of the adverse decisions of the lower Federal courts?

Second, S. 2040 would leave to the 11 Federal courts of appeal, and to the highest courts of the 48 States, the last word on Federal questions of major importance arising in the large but not plainly definable realm apparently embraced by the bill. We would have not 1 but 59 supreme courts—an invitation to confusion on a national scale. Such a system would prevent uniformity of result in similar cases throughout the country. While one of the advantages of the Federal system is that it permits considerable diversity of policy in accordance with local conditions, I can see no advantages and I do see many disadvantages, in allowing such questions to be settled as matters of regional rather than of national policy. On the contrary, the rights of persons in their relations to the Government seems transparently a question as to which uniformity of result is a principle of elementary fairness. Indeed, the danger is not merely that different litigants would fare differently as to the same issue depending on the forum. There is the real possibility that State officials would confront contrary determinations as to their power to enforce important State programs. Suppose, for example, that the Virginia Court of Appeals, in litigation paralleling the *Atkins* case, referred to above, were to sustain the Virginia Pupil Placement Act? What tribunal could resolve the dilemma in which the Commonwealth of Virginia would find herself?

Third, it would appear that S. 2040 is a response to recent decisions of the Supreme Court with which some Members of Congress may disagree. Some of those decisions, such as *Pennsylvania v. Nelson* (350 U. S. 497), overturning a State antisediton law, were based on the Court's conclusion that Congress had intended to exclude the States from concurrent regulation of some area of primary national responsibility. To the extent Congress feels that the ouster of State authority over a particular group of problems is unwise, the appropriate remedy would seem to be to legislate directly in explicit and uniform fashion. The device adopted by S. 2040 is an abdication of legislative responsibility, and presents the specter of diverse courts reaching wholly discrepant results as to the future vitality of, for example, State antisediton statutes other than that passed upon in the *Nelson* case.

The other recent decisions to which S. 2040 is doubtless a response are decisions finding that various fundamental rights of individuals had been abridged by the exercise of State or Federal authority. To the extent that the bill is

designed to prevent the Supreme Court from continuing to fulfill one of its most important historic missions—the protection of individual rights—are we to construe the bill as suggesting that State courts and the inferior Federal courts will be less libertarian than the Supreme Court of the United States in their stewardship of individual rights? If that be the premise of the bill, I think it is wrong as a prophecy, and is besides an insult to the independence of our judiciary. If, however, S. 2640 were likely to succeed in preventing judicial vindication of individual rights, the most relevant comment which can be offered is that made 60 years ago by President Andrew Johnson. As you will recall, President Johnson, with characteristic courage, wrote an eloquent but futile message vetoing the bill to deprive the Supreme Court of jurisdiction to entertain the *McCordle* case (7 Wall. 500)—the bill whose manifest purpose was to prevent the Supreme Court from passing on the validity of the reconstruction legislation:

"Thus far during the existence of the Government, the Supreme Court of the United States has been viewed by the people as the true expounder of their Constitution, and in the most violent party conflicts, its judgments and decrees have always been sought and deferred to with confidence and respect. In public estimation, it combines judicial wisdom and impartiality in a greater degree than any other authority known to the Constitution; and any act which may be construed into, or mistaken for, an attempt to prevent or evade its decisions on a question which affects the liberty of the citizens and agitates the country cannot fail to be attended with unpropitious consequences. It will be justly held by a large portion of the people as an admission of the unconstitutionality of the act on which its judgment may be forbidden or forestalled, and may interfere with that willing acquiescence in its provisions which is necessary for the harmonious and efficient execution of any law."

The bill is a shortsighted and self-defeating protest against opinions with which the proponents of the bill disagree. Such action would throw the baby out with the bath water. It would deny to persons involved in the classes of cases described in the bill the privilege of seeking review by the Supreme Court, under its usual rules, although parties in cognate lawsuits retain the privilege. There is no reason apparent to me why a person convicted of murder should have the privilege of requesting the Court to exercise its appellate jurisdiction, while a schoolteacher accused of subversive activities, perhaps in a hostile and gossip town, or a witness in the position of Mr. Rumely before a congressional committee, should lose the corresponding opportunity to vindicate his rights before the law. I believe there are some doubtful constitutional questions to be resolved about a bill which makes so abrupt and arbitrary a distinction among persons.

Whether such a bill would be constitutional, however, I deem it most unwise. Disagreement with particular decisions of the Supreme Court seems to me a poor reason for limiting its appellate jurisdiction. Would the Nation have been better off, in retrospect, if a Jeffersonian Congress had clipped the wings of John Marshall's Court? I don't think any serious person would now say "Yes," despite the intense unpopularity of many of the Court's most important opinions of that era.

On the contrary, every consideration of moderate policy counsels retaining the Courts' functions of review, most especially in cases dealing with the rights of the citizen against the steadily increasing power and influence of government in all its forms. The encroachments of the State into areas of life which had hitherto been entirely free of governmental influence is one of the most disturbing developments in recent years. Whether all such developments have been necessary may be doubted. Necessary or not, however, they surely require on the part of all who love liberty an extra measure of vigilance, not a relaxation of existing procedures for constitutional oversight.

Yours sincerely,

EUGENE V. ROSTOW, *Dean*.

UNIVERSITY OF ALABAMA,
SCHOOL OF LAW,
University, Ala., February 24, 1958.

HON. THOMAS O. HENNINGS, JR.,
United States Senate, Washington, D. C.

DEAR SENATOR HENNINGS: Dean Martin L. Harrison has referred to me your letter of February 7, 1958, soliciting comments on S. 2640, which would limit the appellate jurisdiction of the Supreme Court in certain cases. Your letter

indicates that the bill is under consideration by the Senate Subcommittee on Internal Security.

I teach the subjects of constitutional law and legislation at the University of Alabama Law School. I am especially interested in the field of written law processes, and am the author of a book on the subject for use by law students. I have also done extensive research on the responsibility of Congress to decide constitutional questions even in a system which embraces the institution of judicial review. This was the subject of a thesis which I submitted in 1950 to complete the requirements for a master of laws degree at Columbia University. I mention these things to explain the depth of my interest in questions pertaining to the power of Congress to control the institution of judicial review itself and how such power should be exercised, which are questions presented by S. 2040.

I believe S. 2040 is an unwise proposal. I believe that Congress and State legislatures as well are chargeable with much irresponsible action in recent years, especially in the name of security. This irresponsibility has affected enactments as well as inquisitions. It has also infected the administration of laws on the subject of security. During these times and under these conditions the Supreme Court has served as a responsible bulwark to safeguard the security of the individual against arbitrary, ill-considered, and unwarranted mistreatment by persons wielding the awful power of government. For these reasons I do not believe that this is the subject or now is the time for curbing the review powers of the Supreme Court.

Judicial review of the constitutionality of actions of the other departments of Government certainly encumbers the operation of democratic methods for determining what the Constitution means, since the Supreme Court is less directly subject to political controls than are Congress and the President. But in view of the Supreme Court's demonstrated willingness to defer to seriously considered and reasoned judgments of the "political" departments, I submit that, instead of curbing the jurisdiction of the Supreme Court, a better way to achieve a fuller measure of just and enduring democracy in our time is for Congress to exercise its own powers in a more reasonable, reasoned, and responsible manner.

I have plans to expand my LL. M. thesis, mentioned previously, to the proportions of a book dealing with Congress' responsibility to maintain constitutional government. Such a book should contain a thorough treatment of the power of Congress to regulate the jurisdiction of the Supreme Court and the way in which Congress has wielded this power. Up to now I have been prevented from doing the necessary research for this part of my book by the demands of a full schedule of teaching and the unavailability of necessary source materials. For these reasons I would be most grateful for copies of any reports, studies, or other materials of any kind bearing on this subject which your committee could make available to me. Moreover, I wonder if your committee or any other agency, whether governmental or private, would be interested in sponsoring a thorough study of this question. If so, I would like very much to be put in touch with persons who could handle the arrangements therefor.

Sincerely yours,

C. DALLAS SANDS,
Professor of Law.

CHICAGO-KENT COLLEGE OF LAW,
Chicago, Ill., February 24, 1958.

Senator THOMAS C. HENNINGS, Jr.,
United States Senate, Washington, D. C.

DEAR SENATOR HENNINGS: I am writing in response to your letter of February 7, 1958, regarding Senate bill No. S. 2040. This matter has been referred to me by our dean inasmuch as I teach constitutional law which is most closely allied with the subject matter of said bill. Before proceeding with my comments, I wish to make it clear that I am speaking only for myself and not for the college or the faculty as a whole.

Inasmuch as the United States Constitution specifically provides that the appellate jurisdiction of the Supreme Court shall be subject to such exceptions and regulations as the Congress may provide, there appears to be no constitutional defect in the above measure. However, it seems to me that it violates the spirit of the Constitution: in article III, section 1, provision is made for one Supreme Court and all other Federal constitutional courts are designated as inferior courts. Such a designation, it seems to me, contains a connotation that

the Supreme Court shall be a superior tribunal and the inferior courts shall be subject to its supervision. Even if this be deemed an inconsequential legal argument, it would seem to be an appropriate consideration for Congress.

My first reaction after reading this bill was the simple question—Why? I can see no apparent legitimate reason for such a departure from past practice. Surely, it is not born out of compassion for the Supreme Court. I am not aware that the Court is unduly burdened by cases in which review is sought by way of appeal, and it is now able to control the volume of cases, which comes before it by way of certiorari. And furthermore, the bill denies the Court jurisdiction in cases where review is sought by a writ of certiorari. The only readily apparent reason for such a measure is that the Congress, or some Members thereof, are disconcerted over some of the recent actions of the Supreme Court. This can hardly be considered a laudable motive.

Probably, the greatest vice of this bill is the lack of uniformity in judicial decisions that may be expected in its wake. While the Constitution and laws of the United States do not in all matters demand equal and identical treatment for all persons, equality under the law is one of the fundamental bases on which this country was founded and one of the most treasured concepts of our contemporary society. I think there would be general agreement that a departure therefrom can be justified only by the most compelling reasons. And yet, if this bill becomes law, there is a theoretical possibility that the rights of individuals in these sensitive areas will be decided in approximately 60 different ways, and a practical possibility, even probability, that they will be decided in 2, 3, or 4 different ways. There will be 48 State supreme courts, as well as the lower Federal courts, enjoying complete autonomy in deciding the rights of individuals under the laws of the United States without the possibility of one higher authority bringing their decisions into harmony. I think that one of the most salient reasons for having one Supreme Court at all is to achieve uniformity of judicial decision in questions on which reasonable minds might vary. And that occasional conflict between the decisions of the lower courts has consistently been one of the grounds on which the Supreme Court has chosen to exercise jurisdiction.

This bill seems to be particularly onerous insofar as State internal security and loyalty measures are immunized against scrutiny by the Supreme Court. One might describe it as a negative license—a license to the States to ignore Federal safeguards to individual freedom contained in the Constitution and laws of the United States. While it is true that the States are legally bound to enforce these rights, it is not, unfortunately equally true that they have always done so. Mute testimony to this fact may be found scattered throughout American judicial reports and some of the more shocking examples have been memorialized in the newspapers and periodicals of the Nation.

Lastly, it seems to me that this bill offers the Congress an unhealthy immunity from examination and inspection in the forum of public opinion. While the lower Federal courts are legally capable of restraining the Congress from its excesses, they are, as a practical matter, less able to do so. I think that the United States courts of appeals do not enjoy the same dignity as the United States Supreme Court in the eyes of the public. Hence, it would seem to follow that action taken by the courts of appeals would not receive the same publicity by way of newspaper coverage, editorial comment, and the like, as would follow like action by the Supreme Court. Where that action reflects upon the Congress, they would, to the extent of the above differential, be protected from adverse public reaction. It might be added that for the same reason, a rebuke by the courts of appeals would not have the same public impact as would be a rebuke by the United States Supreme Court. This factor would also tend to insulate the Congress from critical comment.

In conclusion, I would like to say that I regard this bill as inimical to the best interests of the American public for the reasons above stated and believe that it should never become law. I wish further to thank you for the opportunity to state my position.

Sincerely,

JAMES K. MARSHALL,
Professor of Law.

NORTHWESTERN UNIVERSITY,
THE SCHOOL OF LAW,
Chicago, Ill., February 20, 1958.

HON. THOMAS C. HENNINGER, Jr.,
United States Senate,
Committee on the Judiciary,
Washington, D. C.

DEAR SENATOR HENNINGER: In reply to your letter requesting my views concerning S. 2040, I wish to state that I am strongly opposed to this proposed legislation.

In the past year or two the Court, in my opinion, has made some unfortunate decisions within the area with which the bill is concerned. But I am convinced that this is no reason for depriving it of jurisdiction over such cases. Under our constitutional system the Court has a very important function to perform in the field of civil liberties. To relieve it of that function would mark a departure from cherished tradition and would, in my view, constitute a step in the direction of changing the system of government in which you and I and all true Americans believe.

Sometimes we do not like to pay the price for what we have, but a few wrong decisions are a small price, and it is one that we must pay.

Sincerely yours,

HAROLD C. HATCHBURST.

UNIVERSITY OF ILLINOIS, COLLEGE OF LAW,
Urbana, February 11, 1958.

HON. THOMAS C. HENNINGER, Jr.,
United States Senate,
Washington, D. C.

DEAR SENATOR HENNINGER: Under date of February 7, you addressed a letter to Dean Albert J. Harno, of the College of Law of the University of Illinois, concerning S. 2040. Dean Harno is now acting dean of the Law School of the University of California at Los Angeles, and therefore your letter has come to my attention. Since you also invite comments by other faculty members, and since I have taught constitutional law for many years, perhaps I may comment on this bill.

It seems to me that S. 2040 is based upon a fundamentally fallacious philosophy: That whenever the Congress disagrees with a judgment of the Supreme Court of the United States it will withdraw from the appellate jurisdiction of the Court the subject matter of the disagreement. This means that we would have no uniform law in the United States on this particular subject matter, because the 11 courts of appeal would be the final arbiters of the meaning of the statutes. This was the fundamental law to which Marshall pointed in the famous case of *Marbury v. Madison*, in which he justified judicial review of congressional legislation.

This proposal reminds me of the Court-packing bill of 1937. That situation was different, in that President Roosevelt himself became unhappy with the decisions of the Supreme Court and desired to appoint additional Judges for the purpose of securing a different interpretation of the Constitution. The Congress in that period refused to approve the President's recommendations. Many harsh words were spoken about that bill as being a violation of the doctrine of separation of powers. It seems to me that S. 2040 is just as fundamental a violation of that doctrine as was the Roosevelt Court bill.

Although S. 2040 seems to be within the power of the legislative branch under article III of the Constitution, it is a departure from the fundamental principle of separation of powers and would introduce into our statutory scheme a very unfortunate precedent, for if through this bill the Congress can withdraw this important subject matter from the Supreme Court of the United States, it can in the future continue to whittle away at the jurisdiction of the Court in any area in which the Congress finds disagreement with the Court's decision. This seems to me to be an unsound procedure and wholly unwarranted.

Very truly yours,

RUSSELL N. SULLIVAN, Dean.

NOTRE DAME LAW SCHOOL,
Notre Dame, Ind., February 25, 1958.

HON. THOMAS O. HENNINGS, JR.,
Committee on the Judiciary,
United States Senate, Washington, D. C.

DEAR SENATOR HENNINGS: This is in reply to your letter of February 7 enclosing a copy of S. 2040. It is my considered judgment that this is a vicious bill. It is a vicious bill because, under the guise of limiting the appellate jurisdiction of the Supreme Court, it would in practical effect destroy the constitutional guarantees without which America would become a land alien to itself. For if basic freedoms can be removed from the Court's protection, by the device of cutting down its jurisdiction, simply because a majority in Congress dislikes some of the Court's decisions, what is left of the Bill of Rights and the 14th amendment?

The assaults on the Supreme Court have created a situation which should engage the attention of all who love and serve the law. Accordingly, we are planning a symposium on the role of the Supreme Court in the American constitutional system, to be held here at the Notre Dame Law School on April 18. I attach an outline of the symposium. It states my views in some detail.

Sincerely yours,

JOSEPH O'MEARA, *Dean.*

OUTLINE OF A SYMPOSIUM ON THE ROLE OF THE SUPREME COURT IN THE AMERICAN CONSTITUTIONAL SYSTEM TO BE HELD AT THE NOTRE DAME LAW SCHOOL, FRIDAY, APRIL 18, 1958

The Supreme Court is under siege. The assaults upon it appear to me to be gathering force. I think they constitute a threat too serious to ignore and that there is a responsibility on the part of the legal profession, including the law schools, to do something about it. I do not for a moment suppose that the Court is above criticism. Nor am I presently concerned to defend the decisions which have occasioned the uproar. My concern is for the Court as an institution. This is not the first time, of course, that the Court has been beleaguered; it has survived earlier attacks; I have every hope that it will emerge stronger than ever from this one. The accusations and clamorous demands that fill the air are nevertheless calculated to weaken public confidence in the Court and thus diminish its influence as a symbol and spokesman of the rule of law in an increasingly lawless world. We are therefore arranging a symposium on the Role of the Supreme Court in the American Constitutional System, to be held at the Notre Dame Law School, on Friday, April 18, 1958.

Mr. David Maxwell, immediate past president of the American Bar Association, will preside.

There will be four papers dealing with various aspects of the problem arising from the efforts now being made to discredit and emasculate the Court. The first paper should bring the problem into focus by making clear the generic causes which give rise to it. The Court is under siege because the great issues it must decide are fiercely controversial issues. Disagreement and dissatisfaction with the Court are therefore unavoidable. The very nature of the Court's role as a balance wheel in our constitutional system makes it a target for attacks and abuse. The attacks vary in vigor and bitterness with the magnitude of the interests at stake and the depth and intensity of the feelings they arouse; but always, inescapably, the Court is at the center of the storm for the simple reason that powerful forces are arrayed on all sides of the great problems the Court must resolve—forces which do not readily accept defeat.

The preceding paragraph does no more than suggest in the most general way why the Court is so often under fire; and it would, of course, be appropriate to draw upon the Court's history for examples and illustrations. Perhaps what I have said should be obvious to any thoughtful person. In any event, it seems to me important to emphasize that the Court sits between great contending forces; that its function is to moderate their deadly struggles; and, accordingly, that it is not to be supposed the Court will be able to stay out of the line of fire. I think it important to stress this aspect of the matter because, unless I am mistaken, many well-meaning critics of the Court fail to recognize the hazards inherent in the Court's position and in the part assigned to it in our governmental system. My assumption, of course, is that recognition of these hazards would lead to a more understanding attitude on the part of those with an open mind.

In my view, as I have said, it would be helpful, in the first paper, to make it clear that the Court is inescapably on the spot. So are other departments of Government; they, however, can fight it out in the political arena. This the Court cannot do and, to that extent, is in a peculiarly difficult position.

The first paper will be prepared by Mr. Carl McGowan, formerly a member of the faculty of the School of Law at Northwestern, now a member of the Chicago firm of Ross & O'Keefe and general counsel of the Chicago and North Western Railroad.

But is it really true that the Court is on the spot? The Court has the Constitution for a polestar; and in many cases it has the benefit of legislation as well. Then how can its position be such a difficult one?

The fact is, of course, that one cannot simply look at the Constitution, or at a statute, and find there the answers to the great problems which are brought before the Court and must be decided by it. I cannot help believing that much of the criticism of the Court stems from failure to understand this basic fact. It is not sufficiently understood that the judicial function of necessity is a creative one. The judge is not an automaton proceeding mechanically to a predetermined conclusion. In large part Constitution and statute do no more than provide alternatives or set limits on decision. Creative, therefore, the judge's function most certainly is, and this involves the exercise of discretion though not, of course, unlimited discretion. As I see it, the symposium's second paper should undertake to get this point across, that is, that judging is not a mechanical process and that judges do in fact exercise discretion because there is simply no escape from doing so; but that decision is never at large, discretion being limited to choosing between alternatives within the framework of our traditional approach to legal problems.

But if Constitution and statute don't furnish answers, to what is a judge to turn? If decision is not to be arbitrary, there must be some principle of choice among the alternatives which every case presents. This question needs attention and, it seems to me, can best be taken up in the second paper immediately after the point is brought home that the judge is, perforce, pretty much on his own.

As I have said, there must be some principle of choice among the alternatives which virtually every case presents. But what principle of choice? Should the judge make a Gallup-poll approach and seek guidance from the multitude? Even if he should, can he? Has he the facilities necessary to do this? Of course he has not. What, then, should he do? Should he guess what a poll would show and let that determine choice? Or should he decide as best he can according to his own intellect and conscience? My own views are indicated in my article on the Notre Dame Program of Legal Education in the July issue of the American Bar Association Journal.

The second paper will be prepared by distinguished Prof. Robert A. Leflar of the University of Arkansas School of Law, formerly a member of the Supreme Court of Arkansas.

The idea that the judge's role is a creative one troubles many thoughtful persons. In the first place, it runs head on into the Austinian thesis. Quite aside from theoretical objections, however, it is feared that this conception of the judicial function is antidemocratic. Actually, of course, much of the current criticism of the Court results from its protection of values without which democracy would be impossible. Notwithstanding this fact, these doubts and difficulties, in my opinion, should be squarely met in the third paper. This will be prepared by Dean Eugene V. Rostow of the Yale Law School.

The final paper should be devoted to a critique of pending proposals to fence the Court in by curtailing its appellate jurisdiction or otherwise. This, I think, will entail both a review of previous attempts to restrict the Court and an appraisal of the situation which would result if current efforts should succeed. The historical review just indicated will involve some overlapping with the first paper if and to the extent that the same historical matter is used for illustration. I see no problem, however, since, in any case, the historical material will be approached from different points of view—in the first paper to illustrate why the Court is so frequently under attack, in the final paper to put in context specific proposals to weaken it. The final paper will be prepared by Prof. Sheldon D. Elliott of New York University School of Law. Professor Elliott is director of the Institute of Judicial Administration at New York University and secretary of the American Bar Association's section of legal education and admissions to the bar.

Though much of the abuse of the Court is purely partisan, a good deal of it, I think, results from a misunderstanding of the Court's function and of the conditions under which it necessarily operates. The symposium will be beamed at people who are honestly mistaken about these matters. As the preceding sentence implies, the proceedings will be published and we are hoping to make a rather wide distribution of them.

JOSEPH O'MEARA, *Dean*.

JANUARY 15, 1958.

NOTRE DAME LAW SCHOOL,
Notre Dame, Ind., February 27, 1958.

Hon. THOMAS C. HENNING, Jr.,
Committee on the Judiciary,
United States Senate, Washington, D. C.

DEAR SENATOR HENNING: Supplementing my letter of February 25, I enclose a quotation from Cardozo's *Nature of the Judicial Process*.

I was glad to see the action taken by the American Bar Association, as I know you were.

With warm regards, I am,
Sincerely,

JOSEPH O'MEARA, *Dean*.

EXTRACT FROM CARDOZO'S *THE NATURE OF THE JUDICIAL PROCESS* (PP. 91-94)
(1921)

Some critics of our public law insist that the power of the courts to fix the limits of permissible encroachment by statute upon the liberty of the individual is one that ought to be withdrawn. It means, they say, either too much or too little. If it is freely exercised, if it is made an excuse for imposing the individual beliefs and philosophies of the judges upon other branches of the Government, if it stereotypes legislation within the forms and limits that were expedient in the 19th or perhaps the 18th century, it shackles progress and breeds distrust and suspicion of the courts. If, on the other hand, it is interpreted in the broad and variable sense which I believe to be the true one, if statutes are to be sustained unless they are so plainly arbitrary and oppressive that right-minded men and women could not reasonably regard them otherwise, the right of supervision, it is said, is not worth the danger of abuse. "There no doubt comes a time when a statute is so obviously oppressive and absurd that it can have no justification in any sane polity." Such times may indeed come, yet only seldom. The occasions must be few when legislatures will enact a statute that will merit condemnation upon the application of a test so liberal; and if carelessness or haste or momentary passion may at rare intervals bring such statutes into being with hardship to individuals or classes, we may trust to succeeding legislatures for the undoing of the wrong. That is the argument of the critics of the existing system. My own belief is that it lays too little stress on the value of the "imponderables." The utility of an external power restraining the legislative judgment is not to be measured by counting the occasions of its exercise. The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders. By conscious or subconscious influence, the presence of this restraining power, aloof in the background, but nonetheless always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith. I do not mean to deny that there have been times when the possibility of judicial review has worked the other way. Legislatures have sometimes disregarded their own responsibility, and passed it on to the courts. Such dangers must be balanced against those of independence from all restraint, independence on the part of public officers elected for brief terms, without the guiding force of a continuous tradition. On the whole, I believe the latter dangers to be the more formidable of the two. Great maxims, if they may be violated with impunity, are honored often with lip service, which passes easily into irreverence. The restraining power of the judiciary does not manifest its chief worth in the few cases in which the legislature has gone beyond the lines that mark the limits of discretion. Rather shall we find its chief worth in making vocal and audible the ideals that

might otherwise be silenced, in giving them continuity of life and of expression, in guiding and directing choice within the limits where choice ranges. This function should preserve to the courts the power that now belongs to them, if only the power is exercised with insight into social values, and with suppleness of adaptation to changing social needs.

DRAKE UNIVERSITY,
THE LAW SCHOOL,
Des Moines, Iowa, February 17, 1958.

Hon. THOMAS C. HENNINGS, Jr.,
Committee on the Judiciary,
United States Senate, Washington, D. C.

DEAR SENATOR HENNINGS: You invited comments relative to S. 2640, as reported to the Judiciary Committee by the Subcommittee on Internal Security.

I concur in your view that this bill, if enacted, would work a basic change in our governmental system. It is an un-American attack upon the Supreme Court.

The bill is intended to limit the appellate jurisdiction of the Supreme Court, which is essentially what its jurisdiction is. It is designed to take away from the Court jurisdiction over five areas of enormous size and magnitude, and of like importance to the people of this country. In subtracting this jurisdiction from the Court the designers of the bill endeavor to set up arenas where they can fight their problems according to their own rules, or at least without being disturbed by the Supreme Court. This not only is an undesirable attack upon the Supreme Court but it deprives litigants from pursuing their alleged rights to the last resort. Although few cases, relatively speaking, reach the Supreme Court, it is important that this Court can reach out, in their discretion, and hear cases on certiorari, in addition to the more fixed or absolute appeals. This privilege, power, and authority on the part of the Court and the corresponding right of the individual to seek his remedies, his due process, before all the appropriate tribunals of the land, are among the choicest privileges that our democracy affords.

Again, this bill is undesirable because if these large areas can now be taken away from the Court, because some prefer not to have the Court meddle with these problems, it leads to the precedent that in the future other persons may wish likewise to subtract from the Court's jurisdiction other contentious constitutional problems.

Furthermore, legislation depriving the Supreme Court of its jurisdiction to the extent that its functions would be materially restricted, would probably be held by it to be unconstitutional.

I have no fear that the bill will be enacted. There is too much good judgment, discretion, and commonsense in Congress to enact into law a bill as vicious as this one. At that, I think it is important that those who share your views express their opposition in an effort to prevent any part of the bill from becoming law.

Sincerely,

MARTIN TOLLEFSON, Dean.

STATE UNIVERSITY OF IOWA,
COLLEGE OF LAW,
Iowa City, February 17, 1958.

Senator THOMAS C. HENNINGS, Jr.,
United States Senate,
Senate Office Building, Washington, D. C.

DEAR SENATOR HENNINGS: Dean Ladd has called to my attention that you may be interested in having the views of any faculty member who may have a specialized interest in S. 2640. Since I teach constitutional law and conduct a seminar in current Supreme Court decisions in the State University of Iowa, College of Law, I think I surely have the kind of interest in the bill that you refer to.

I have studied the bill and the record of the hearing before the subcommittee of the Committee on the Judiciary held on August 7, 1957.

But for the report that S. 2640 has been favorably reported by the Subcommittee on Internal Security, it would be difficult to take the proposal seriously. It is difficult to believe that anyone grounded in American history,

trained in the legal profession, and sensitive in any degree to the great heritage that we have in the tradition of an independent judiciary and the rule of law could permit his name to be associated with the kind of proposal that S. 2640 is.

I trust that there is no such lack in the United States Senate of devotees to the Bill of Rights and believers in the indispensability in our system of an independent judiciary to protect those rights, that there is any cause to fear the passage of such an ill-conceived measure as S. 2640.

Yours sincerely,

FRANK R. KENNEDY, *Professor of Law.*

STATE UNIVERSITY OF IOWA,
COLLEGE OF LAW,
Iowa City, February 10, 1958.

Senator THOMAS C. HENNINGS, Jr.,

United States Senate,

Senate Office Building, Washington, D. C.

DEAR SENATOR HENNINGS: I am writing to you as a member of the Committee on the Judiciary of the United States Senate. I have read the bill to limit the appellate jurisdiction of the Supreme Court by Senate No. 2640.

I cannot conceive the possibility of the introduction of a bill of this kind and hope that every effort will be used to prevent its having further consideration. In my opinion the bill is clearly unconstitutional in attempting to prevent the Supreme Court of the United States from exercising its judicial power. It strikes at the very structure of our Government and the American Constitution. It destroys the concept of the separation of powers between the executive, legislative, and judicial departments of government. It destroys the force of our article III, sections 1 and 2 of the Constitution of the United States. If enacted, in my opinion, there is no question but that the Supreme Court of the United States would declare the act unconstitutional.

There may be times when segments of the public may dislike a decision of the Supreme Court and there are times when a Supreme Court decision may be wrong as is indicated by the fact that the Court, itself, overrules its former opinions in some instances, but there is perhaps no part of the Government in which the public places greater trust than in the Supreme Court of the United States. A bill of this kind to me indicates a distrust in our American system of constitutional government and constitutes an attempt to usurp the proper judicial function of the highest court of the land.

It is hard to see how a bill of this kind would receive serious consideration by the United States Senate. I am writing this letter to express my strongest disapproval of Senate file 2640 and urge that every effort be made to prevent its adoption.

Sincerely yours,

MASON LADD, *Dean.*

UNIVERSITY OF KANSAS,
THE SCHOOL OF LAW,
Lawrence, February 12, 1958.

Hon. THOMAS C. HENNINGS, Jr.,

United States Senate,

Washington, D. C.

DEAR SENATOR HENNINGS: Dean Moreau retired on July 31, 1957, and now is on leave of absence in the Near East. This letter is in reply to your inquiry, dated February 7, 1958, addressed to him.

We have your fine letter regarding S. 2640 before us. All of the members of the Kansas University law faculty are pleased to endorse your position opposing this legislation.

Recently, we have completed an extensive study and analysis of this and related problems in the nature and function of the Government of the United States. The issue on S. 2640 is not so much its constitutionality but the awful consequences in its prophecy. The purpose of the Constitution was to build a nation. Of first importance was to provide a common clearinghouse for questions of rights and duties arising under the Nation's power. For this, the Supreme Court was denominated. Without this, the situation resolves itself to the intolerable that

there may be as many constitutions as there are final interpreters. Under this bill, not only the States may segment themselves but also even the parts of the Federal system itself can swing off into separate, satellite orbits of their own. The correlating power of the Nation would be short circuited by S. 2640.

We were pleased to have your inquiry, and recognizing the important work you are doing so well, I remain

Sincerely and respectfully,

M. C. SLOUGH, *Dean.*

WASHBURN UNIVERSITY OF TOPEKA,
SCHOOL OF LAW,
Topeka, Kans., February 10, 1958.

HON. THOMAS C. HENNING, JR.,
United States Senator,
Senate Office Building,
Washington, D. C.

DEAR SENATOR HENNING: Thank you for your letter of February 7, enclosing copy of S. 2640. It had not come to my attention that such a bill was pending before the Congress.

I agree with you that the bill presents a most serious issue. It is an unadulterated attempt to prevent an individual, who deems that the has been denied the rights guaranteed to him under the first nine amendments to the Constitution of the United States, from seeking redress before the Supreme Court of the United States. In fact, the bill is so broad as to attempt to deny the right of redress before the Court as to action by a State government when such action is forbidden by the 14th amendment.

The provisions of the bill are appalling to me. While the Congress, the executive department of the Federal Government and the governments of the several States are all enjoined with the duty to obey and enforce the Constitution of the United States, it has been to the Supreme Court of the United States that persons aggrieved have historically turned in dire necessity. The Court is designed by the Constitution as the final arbiter between the people and the executive department or the Congress or a State government. This has been the function of the Court through all the years since the time of John Marshall.

I respectfully submit that S. 2640 should not pass the Senate. If any action were to be taken in this area, I would favor a constitutional amendment forbidding Congress from limiting the right of appeal to the Supreme Court of the United States in cases involving rights claimed under the United States Constitution. See article by Mr. Justice Harold H. Burton, in the American Bar Journal for February 1955 (41 A. B. J. 121). The introduction of this bill evidences the need of such an amendment favored by Mr. Justice Burton.

Sincerely yours,

SCHUYLER W. JACKSON, *Dean.*

BOSTON UNIVERSITY SCHOOL OF LAW,
Boston, Mass., February 27, 1958.

STATEMENT ON S. 2640

The undersigned strongly oppose enactment of the above-entitled bill to limit the appellate jurisdiction of the Supreme Court in certain cases.

We oppose the bill for the following reasons:

1. Withdrawal of Supreme Court jurisdiction in the designated classes of cases would not alter the decisions of the Court, with which the author of the bill is obviously in disagreement. It would only serve to eliminate uniformity in the future determination of constitutional rights and the administration of Federal law in the designated classes of cases. The United States courts of appeal and the highest courts of the States would have the last word in the areas covered by this bill. That constitutional rights and other Federal law should vary from place to place, from State to State, is a most disturbing prospect. It could not but weaken our judicial system and respect for the law it administers.

2. This bill would deal a severe blow to the judicial independence which our governmental system needs and which has contributed to its strength. The existence of congressional power to regulate the appellate jurisdiction of the Supreme Court is salutary; it operates as a check upon the Court. However, congressional power should be indeed sparingly used. Above all, it should not

be used to punish the Court for particular decisions unpopular with Members of Congress. The present Supreme Court should be vigorously defended against attacks upon it such as this. That the political branches of government have difficulty in resisting the emotional excesses of a transient majority is due to the nature of their political responsibility. It is here that judicial independence becomes meaningful. That the Supreme Court has of late shown concern for the rights of minority groups and unpopular persons is as it should be.

The undersigned do not agree with all the Court's decisions, recent or otherwise. We may and do criticize some of the Court's reasoning. We are not always in agreement among ourselves with respect to the complex legal problems which continually face the Court. We are united in our opposition to this proposed tampering with the appellate jurisdiction of the Supreme Court. We consider this bill to be most unwise.

ELWOOD H. HETTRICK,
Dean.

ALBERT R. BEISEL, JR.,
Professor of Constitutional Law.

ROBERT B. KENT,
Professor of Constitutional Law.

LAW SCHOOL OF HARVARD UNIVERSITY,
Cambridge, Mass., February 19, 1938.

HON. THOMAS C. HENNINGES,
United States Senator,
The Committee on the Judiciary,
Senate Office Building, Washington, D. C.

DEAR SENATOR HENNINGES: Thank you for sending me your letter of February 7 and its enclosure, S. 2616, entitled "A bill to limit the appellate jurisdiction of the Supreme Court in certain cases." I have examined this bill with concern; to me it seems a measure highly undesirable for the welfare of constitutional government in the United States. I trust that the measure will not become law.

I do not doubt that the considerations that I am about to mention in this letter are entirely familiar to you and to the Judiciary Committee, but I outline them here to the end that you may see the reasons for my own conclusion.

I take it that the constitutional provision on which the bill rests is section 2 of article III, the second clause of which reads:

"In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

The most conspicuous instance of the exercise of ad hoc control by the Congress over the Supreme Court's appellate jurisdiction occurred in the legislation dealt with in *Ex parte McCardle* (6 Wall. 318 (1863); 7 Wall. 506 (1869)). Here the Congress withdrew from the Supreme Court jurisdiction to hear certain specified habeas corpus proceedings, in effect thereby preventing a decision in a case already argued, in which the Reconstruction Acts had been challenged. The power to limit the appellate jurisdiction has been discussed in other cases; there is a collection of references in the annotated Constitution, edited under the supervision of Professor Corwin, of Princeton, and printed as Senate Document 170 of the 82d Congress, 2d session, at pages 614 and 615.

My objection to the proposed legislation goes principally to its un wisdom. In our system of government the Supreme Court is the great conservative element which tends to damp out the more extreme swings of governmental action by the executive and legislative branches and by State governments, all of which are, quite properly, more immediately responsive to fluctuations of popular opinion than the Supreme Court. This constitutional function necessarily arouses opposition from time to time in the States and in the other two branches of the Federal Government. My mind goes back 21 years to the message of President Roosevelt proposing the legislation which its opponents came to call the court-packing bill. The measure was intended to provide the Court with judges who would reverse the attitude previously shown toward New Deal economic legislation. The Court's decisions about economic matters between 1934 and 1937 had sometimes been unwise. Certainly some popular legislation had been struck down by the Court, and these decisions had been widely disliked. Yet throughout the country the reaction against the court-packing bill was surprisingly strong, and demonstrated the wisdom of the people in respecting the Supreme Court

even when they disagreed with it, and valuing its independent function as a balance wheel in the national constitutional system. The presently proposed legislation would, I think, be apt to evoke a somewhat similar reaction.

This measure, even though it may fit within the literal limits of congressional power under article III, nevertheless seems to be contrary to the fundamental long-established theory of our constitutional system. As I write this letter I have before me Hamilton's 78th Federalist paper and I have been rereading what he says about the necessity for independent courts of justice in a limited Constitution, and the unique function of such courts in enforcing constitutional provisions. The effect of S. 2646 would be to withdraw from the Supreme Court jurisdiction in certain specific situations, so narrowly defined that the statute appears to refer to identifiable decisions which were unwelcome to the sponsors of the legislation. If our constitutional system is to continue its balanced and essentially conservative operation, the Supreme Court must largely be let alone. Legislation specifically directed at this or that judgment is an unfortunate precedent; such legislation could become habitual; today's majority is tomorrow's minority; the only way our constitutional system can work is for each of the great departments to show a large respect and tolerance for the other's performance of duties. The proposed legislation, even though it may be technically constitutional, runs counter to this spirit.

Furthermore I think the legislation would tend to produce irremediable confusion in the law of the United States concerning its important subject-matters—judicial review of congressional committee activity, of Federal employment, of State subversive activities legislation or executive action, of school board regulations in the field of subversion, and of bar admissions. S. 2646 does not withdraw jurisdiction over these matters from lower Federal courts or State courts; it merely prevents Supreme Court review of judgments on any such subject, handed down by the highest courts of a State or by lower Federal courts. The legislation would thus open the way to unresolved conflicts between Federal courts in different parts of the country; between the highest courts of the several States; and possible conflicts between Federal and State court decisions. The only escape from this confusion of judicial action would be to withdraw jurisdiction on these subjects from the lower Federal and State courts as well as the Supreme Court, a measure which applied to State courts would be of doubtful constitutionality, and which in any event would gravely alter the present balance of governmental powers, and leave confusion among the nonjudicial organs of Government.

It thus seems to me that the proposed legislation creates more problems in the operation of our constitutional system than it can possibly solve. I sincerely hope that the Committee on the Judiciary will disapprove the measure and that neither it, nor anything of its nature, will become law.

Perhaps you will bear with me a minute longer and let me quote some memorable words by Senator Beveridge, in an address he made to the American Bar Association in 1920. They have peculiar relevance to any proposal for fragmentation of our constitutional structure. He said,

"If liberty is worth keeping and free representative government worth saving, we must stand for all American fundamentals—not some, but all. All are woven into the great fabric of our national wellbeing. We cannot hold fast to some only, and abandon others that, for the moment, we find inconvenient. If one American fundamental is prostrated, others in the end will surely fall. The success or failure of the American theory of society and government, depends upon our fidelity to every one of those interdependent parts of that immortal charter of orderly freedom, the Constitution of the United States."

I appreciate your asking for my opinion on this matter. With my best wishes, I am

Sincerely yours,

ARTHUR E. SUTHERLAND.

UNIVERSITY OF MINNESOTA,
THE LAW SCHOOL,
Minneapolis, February 11, 1958.

SENATOR THOMAS C. HENNINGS,
United States Senate,
Washington, D. C.

DEAR SENATOR HENNINGS: S. 2646 seems to me both dangerous and irresponsible. It would shift the ultimate responsibility for important judicial business from the Supreme Court to the lower courts, and the lower courts have no

practical means of resolving differences among themselves, except through the unifying work that is done by the Supreme Court.

If sponsors of this measure succeed in destroying the power of the Supreme Court, their next step will be to destroy the power of the lower courts.

Destruction of the Judiciary is the first major step toward dictatorship. Everyone who is in favor of continuing our system of constitutional government should oppose this bill.

Sincerely yours,

KENNETH CULP DAVIS,
Professor of Constitutional Law.

ST. LOUIS UNIVERSITY,
SCHOOL OF LAW,
St. Louis, Mo., February 27, 1958.

Senator THOMAS C. HENNINGER, Jr.,
Committee on the Judiciary,
Washington, D. C.

SIR: In my opinion Senate bill 2040, which would limit the appellate jurisdiction of the Supreme Court, is a dangerous tinkering with a balance of governmental powers that has proved its effectiveness and desirability over a period of many decades.

Granting the constitutional power of the Congress to accomplish this dislocation of power, one still need have no reservations about the evil consequences of such an action.

In spirit, the proposal represents a partial but ominous challenge to the place which the Supreme Court has held in our history. It seeks to detract from the Court's historic role as protector of individual rights. To that extent it lays emphasis on legislative whim rather than on the due process which has always been the capstone of our liberties.

Further, there appears no sufficient reason for the major realignment which it proposes. If the present bill is aimed at upsetting particular decisions of the Supreme Court, it is sacrificing a traditional and sound structure of review for the momentary triumph of a single point of view. Even those who disagree with recent Supreme Court decisions must think the price of such a triumph prohibitive.

For these reasons, I am against passage of the bill.

Sincerely yours,

JOHN E. DUNNIFORD,
Assistant Professor of Law.

SCHOOL OF LAW,
THE UNIVERSITY OF KANSAS CITY,
Kansas City, Mo., February 19, 1958.

Hon. THOMAS C. HENNINGER,
Senate Office Building, Washington, D. C.

DEAR SENATOR HENNINGER: The possible danger to national security in the Supreme Court's excessive scrupulousness in security cases is completely overshadowed by the threat to the constitutional structure of our Government implicit in Senate bill 2040. The obvious purpose of the bill is to deprive the Supreme Court of part of its appellate jurisdiction because in the particular area it has rendered decisions which are displeasing to the proponents of the bill. If Congress takes this first step, there is no reason why it should hesitate to deprive the Court of jurisdiction whenever it does not like the trend of the decisions. Once the Supreme Court has been rendered innocuous, there is nothing to prevent the limitation of the jurisdiction of the lower Federal courts in constitutional cases, so that Congress will be conveniently free of constitutional restraint.

Even if the bill does not actually violate the Constitution, it is contrary to our constitutional traditions. I object to the bill and urge its defeat for the following reasons:

Firstly, it implies that a man may be deprived of his right to appeal to a higher court, a right which most of us have come to think is an inalienable right of every American.

Secondly, the bill, if enacted, will leave the State courts without Federal supervision in a segment of cases involving the laws and Constitution of the United States. This is manifestly a rejection of the policy established in the Judiciary

Act of 1780, and adhered to since. But more significantly, the State courts will be given authority to determine the application of the 14th amendment to the States activities. This States rights doctrine is absolutely subversive of the ideal that the 14th amendment shall afford to the individual as against his State the essential guarantees of the Federal Bill of Rights.

Finally, the bill conflicts with the spirit of article III of the United States Constitution. I do not think that the exceptions provision of section 2 was intended to justify exceptions and regulations enacted solely to prevent the Supreme Court's rendering undesired decisions, even if *Ex Parte McCardle*, upon which the sponsor of this bill undoubtedly relied, seems to say that this may be done. That decision must be read in the light of the Court's anxiety to avoid passing on political issues which might have had dangerous consequences for the Court.

Prof. John Scurlock of our law faculty concurs in these views.

Sincerely,

MARLIN M. VOIG, *Dean.*

WASHINGTON UNIVERSITY,
THE SCHOOL OF LAW,
St. Louis, February 11, 1958.

HON. THOMAS O. HENNINGS, JR.,
Committee on the Judiciary,
United States Senate, Washington, D. C.

DEAR SENATOR HENNINGS: This acknowledges your letter of February 7 inviting my opinion on Senate bill 2046.

Throughout the history of our country, from time to time there have been intemperate attacks on the Supreme Court of the United States, usually by persons who were unhappy with a particular decision. We are again in such a period.

Although it is the privilege of anyone to disagree with or to criticize a decision of the Supreme Court, I am very much concerned with the intemperate criticism of the Court as such. In my opinion, the Supreme Court of the United States is doing an admirable job of performing the high function with which it is charged by the Constitution. I feel that many of the criticisms of particular decisions are unwarranted and are based upon an erroneous notion of what the cases actually held. I do not feel that any legislation is necessary to curb the power of the Supreme Court. Consequently, I am opposed to Senate bill 2046 and similar legislation.

With kindest personal regards, I am,

Sincerely yours,

MILTON D. GREEN, *Dean.*

MONTANA STATE UNIVERSITY,
SCHOOL OF LAW,
Missoula, February 21, 1958.

HON. THOMAS O. HENNINGS, JR.,
Committee on the Judiciary,
United States Senate, Washington, D. C.

DEAR SENATOR HENNINGS: In reply to your request of February 7, I have circulated the Senate bill 2046 among our law faculty and I am stating below the considered opinion of the faculty which you may use as you desire. I join in this statement concerning the bill. The position of our law faculty is as follows:

This bill strikes at the Supreme Court of the United States because certain of its decisions do not meet the personal approval of the bill's sponsors, not by a reasoned and generalized delimitation of the Court's jurisdiction but rather by a piecemeal ouster of jurisdiction in a limited area of personal disagreement. Further, it places a vital area of personal liberties in a second-class position, subjecting it to the diverse opinions of lower Federal courts. Such legislation is exceedingly pernicious.

Very truly yours,

ROBERT E. SULLIVAN, *Dean.*

RUTGERS UNIVERSITY,
SCHOOL OF LAW,
Newark, N. J., February 12, 1958.

Hon. THOMAS C. HENNING, Jr.,
United States Senator,
Senate Office Building, Washington, D. C.

DEAR SENATOR HENNING: I would like to go on record as being in opposition to S. 2040, which I understand is being considered by the Senate Judiciary Committee. This bill would drastically limit the appellate jurisdiction of the United States Supreme Court and is obviously motivated by some of the recent controversial decisions of the Supreme Court in the area of civil liberties.

Although the Congress has the undoubted constitutional power to control the appellate jurisdiction of the Supreme Court, this particular bill completely violates the spirit of separation of powers which is such an important part of American constitutional law. The doctrine of judicial review, so clearly enunciated in *Marbury v. Madison*, ought to be preserved if we are going to protect civil liberties in a period of our country's history where the fear of subversion from without has resulted in the subversion of civil rights from within. It is of the utmost importance that the power of the United States Supreme Court to interpret the Constitution of the United States be unimpaired.

Very truly yours,

C. WILLARD HECKEL, Assistant Dean.

THE UNIVERSITY OF NEW MEXICO,
COLLEGE OF LAW,
Albuquerque, February 20, 1958.

Hon. THOMAS C. HENNING, Jr.,
United States Senate,
Washington, D. C.

DEAR SENATOR HENNING: I have your letter of February 7, 1958, with reference to the coming hearing on S. 2040. You may record me as being against this legislation. I thus instruct you after having submitted your letter and the bill to the members of our faculty. Although I have not spoken to all of them, I feel sure that they agree.

Sincerely,

A. L. GAUSEWITZ, Dean.

UNION UNIVERSITY,
ALBANY LAW SCHOOL,
Albany, N. Y., February 11, 1958.

Hon. THOMAS C. HENNING, Jr.,
United States Senate,
Washington, D. C.

DEAR SENATOR HENNING: I have your letter of February 7, 1958, enclosing a copy of S. 2040, under consideration by the Senate Judiciary Committee.

The proposals in the bill are startling. Under subparagraph (1) the Congress is made a court of first and last resort in contempt proceedings, the individual being denied access to the courts. This would appear to be an undue encroachment by the legislature upon the function of the judiciary, and it is our opinion that it would be unconstitutional.

The other subdivision give to the executive, including the administrative agencies, the States, and the named local bodies, administrative finality in the field of "subversive activities," again denying recourse to the courts. The philosophy of the bill appears to be that arbitrary and even autocratic determinations are justified in the area of subversive activities or national security. In other words, we shall have a rule of men and not of law, in these cases.

I presided over many hearings, and read many files, in this precise field, as chairman of the regional loyalty board for the second region (New York and New Jersey) under the former Executive order and I am not starry eyed, I believe, concerning the activities of subversive organizations. But I should insist that the individual affected be permitted a review of the determination of the original factfinder. Under our system the only place a second and impartial review may be had is in the courts.

Many thoughtful persons are uneasy over recent decisions of the United States Supreme Court, believing that members of the Court have misinterpreted the intent and purpose of Congress, have extended due process close to the point of attempting to regulate the judicial systems of the State, and have indulged in judicial legislation. In my opinion there is some validity to this criticism. But because there are differences of opinion among people of good will and honest intentions, restraint is called for on the part of the Court and the legislature.

I would suggest, if I may, that the approach might be an attempt to clarify existing legislation to meet so far as possible the judicial viewpoint and judicial objection, rather than to behold the rights and liberties of individuals with such a broadax as S. 2040.

Representative Keating discussed this problem in a lawyerlike and statesmanlike manner at the winter meeting of our alumni association in New York City on January 31 last. Copies of his address are available at his office, I believe.

Sincerely yours,

ANDREW V. CLEMENTS, *Dean.*

THE CORNELL LAW SCHOOL,
Ithaca, N. Y., February 28, 1958.

HON. THOMAS C. HENNING, JR.,
Committee on the Judiciary,
United States Senate, Washington, D. C.

DEAR SENATOR HENNING: I am glad to submit an opinion on S. 2040, "A bill to limit the appellate jurisdiction of the Supreme Court in certain cases." I regret that time does not permit me to prepare a lengthy commentary, and therefore, the following is simply a summary opinion stemming from my work with legal problems in private practice, in government and in teaching.

The proposal covers only five subjects in which the Court is not to be able to review the validity of legislative and administrative action. The subject selected, however, reveal the true purpose behind the bill. The sponsors clearly want to eliminate the power of the Court to halt unconstitutional actions in the named fields. It is frightening enough to contemplate the possible consequences to all of us if even in these few areas we no longer have the Court's protection. But would this be the last and only effort to open the door to unconstitutional actions by State and Federal executive legislative agencies?

If now we stop the Court from intervening between us and unconstitutional actions in the kind of cases covered by this bill, what would prevent the passage of another bill every year, each time taking away another area of protection in which the Court had recently trod on tender toes? We could expect that ultimately the entire range of subjects now under the Court's protection would be covered by this subversive kind of legislation.

The foregoing remarks are addressed to the general danger of limiting the function of the Supreme Court in protecting liberties assured by the Constitution. In addition, the bill would make it impossible to reconcile conflicting decisions of courts in various parts of the country. It is interesting that this danger was clearly foreseen by Justice Story, speaking for a unanimous Supreme Court in 1816, when he said, in *Martin v. Hunter's Lessee* (1 Wheat. 304):

"This is not all. A motive of another kind, perfectly compatible with the most sincere respect for State tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity, of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the Constitution. Judges of equal learning and integrity, in different States, might differently interpret a statute, or a treaty of the United States, or even the Constitution itself. If here were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the Constitution of the United States would be different in different States, and might, perhaps, never have precisely the same construction, obligatory, or efficacy, in any two States * * *

The proposed legislation would cause such a change in our constitutional system that only the strongest possible reasons for its passage should be given consideration. I know of no such reasons, and, therefore, I can only conclude that the legislation should be unequivocally rejected.

Sincerely yours,

MICHAEL H. CARDOSO.

ANKARA UNIVERSITY,
FACULTY OF LAW,
NEW YORK UNIVERSITY GROUP,
New York, N. Y., February 20, 1938.

HON. THOMAS C. HENNINGUS, JR.,
United States Senate, Washington, D. C.

DEAR SENATOR HENNINGUS: Your letter of February 7, addressed to the University of Colorado, reached me today here at the Ankara University of Law, where I am acting as codirector of a Legal Research Institute under New York University ICA sponsorship.

You enclosed a copy of Senate bill 2646 and invited my comments. It is a strange coincidence that this bill should reach me at a time when my American colleague and I, in our private discussions, have been comparing our American practices with Turkish practices in this very area. The reason for our special interest arises from recent events in Turkey and the fact that we are engaged in writing a summary or survey of American law, for translation into Turkish. In its introductory chapters the book will include an account of the development of the common law, and a description of American legal institutions, including our constitutional setup, the separation of powers, and our unique system of checks and balances.

In the introductory portion of the book we also discuss the features of our common-law system which distinguish it from the civil-law system which prevails here in Turkey. Among these distinguishing characteristics is the doctrine of the supremacy of the law, which has seen its greatest development in the United States. We have felt from the first, and our conviction has grown stronger as we have compared our laws and practices with those of Turkey, that the chief safeguard of the rights and liberties of Americans is this doctrine of supremacy of law, best evidenced by the authority which resides in our courts to declare invalid laws, and to prohibit administrative action, violative of the provisions of our National Constitution. Turkish courts do not have this authority. The legislature and the administrative officers are supreme. The dangers implicit in such a situation are obvious, but the fact that an attempt is being made to create a similar situation in the United States makes further comment necessary.

The bill which Senator Jenner has introduced, if it should become law, and be held constitutional (eventualities which I do not foresee), would constitute a threat to our American form of government unparalleled in my experience or recollection. I am completely at a loss to understand why Senator Jenner, of all people, would sponsor a measure calculated to impose upon our people a political theory which our forefathers so wisely rejected and which is so foreign to the genius of our political institutions.

It should be borne in mind that the struggle for freedom of the individual and of the press and of religion has been between those who advocate supremacy of the law and those who advocate supremacy of the state, whether the state be represented by King James I, the English Parliament, the Congress of the United States, or the modern individual heads of state.

It should not be forgotten that the struggle for supremacy of the law has been long and dearly won. It goes back to that Sunday morning conference between King James and the English judges which Dean Pound, in his *The Spirit of the Common Law*, calls "the glory of our legal history," when Coke, on behalf of the judges, defying the King, said that all cases should be decided not by the King but by the courts of justice according to the law and custom of the realm. Later we hear Coke declaring that "When an act of Parliament is against common right and reason . . . the common law will control it and adjudge it void." In his own country Coke did not prevail, but the principles for which he fought so valiantly led us in the United States, as Pound says, "to carry the supremacy of law to its logical limits, and indeed to go beyond such limits and practically adopt Coke's conception of a control of legislation upon fundamental principles of right and reason."

Another statement by Pound is so apt as almost to appear to be tailored for this occasion. He says: "There is a close parallel here in more senses than one. In the 17th century, it was progressive to insist upon the royal prerogative. Those who thought of the King as the guardian of social interests and wished to give him arbitrary power, that he might use it benevolently in the general interest, were enraged to see the sovereign tied down by antiquated legal bonds discovered by lawyers in such musty and dusty parchments as Magna Carta. To them, the will of the King was the criterion of law and it

was the duty of the courts, whenever the royal will for the time being and for the cause in hand was ascertained, to be governed accordingly, since the Judges were but the King's delegates to administer justice. In the 18th century, the center of political gravity had shifted to the legislature. That body now thought of itself as sovereign and conceived that, no matter what the terms of the fundamental law under which it sat, the courts had but to ascertain and give effect to its will. At the end of the 19th century the center of political gravity had shifted to the majority or more often the plurality of the electorate, voting at a given election, and those who thought of pluralities and militant minorities as the guardians of social interests and would give them arbitrary powers, that they might use them benevolently in the general interest, were enraged to see the sovereign tied down by what seemed to them dead precedents and antiquated legal bonds discovered by lawyers in the 18th century Bill of Rights. The Judges were but delegates of the people to do justice. Therefore, it was conceived, they were delegates of the majority or plurality that stood for the whole in wielding general governmental powers. Once more it was insisted that the will of the ruling organ of the State, even for the time being and the cause in hand, must be both the ultimate guide and the immediate source to which Judges should refer.

"Toward king, legislature, and plurality of the electorate, the common law has taken the same attitude. Within the limits in which the law recognizes them as supreme it has but to obey them. But it reminds them that they rule under God and the law. And when the fundamental law sets limits to their authority, or bids them proceed in a defined path, the common-law courts have consistently refused to give effect to their acts beyond those limits" (Hoscoe Pound, *The Spirit of the Common Law*, p. 63).

In Turkey we have seen how legislature and administrative authority, unfettered by any rules save those of their own making, operate in practice. In 1951, the Grand National Assembly passed a law (St. No. 6135, dated July 5, 1951, art. 3) which provided that no judicial or administrative authority (which, of course, included the courts) should hear any case brought against the person or agency which had removed any Government employee from office. This included university professors at the principal universities by reason of the fact that they are Government employees.

At a Turkish university there was a professor, reputed to be a good citizen and a highly competent teacher. He publicly criticized a rule adopted by the Grand National Assembly (perhaps of the same general nature as some of your Senate rules) on the ground that while it purported only to regulate procedures in the GNA it, in fact, limited the freedom of the press. For this statement he was dismissed from the university by one of the ministers of the Turkish Government, and unless the minister should see fit to reinstate him within 6 months of the time of his dismissal, he will be out of his job at the university and perhaps elsewhere. (See *Time* magazine for February 17.)

Here is the rub under the Turkish law mentioned above (and I think the same would be true, to a degree, in the United States if S. 2046 should become law). The professor, the citizen, had no recourse. There is no higher law, no supreme court, to which he can appeal. The state, here the GNA and a minister, has spoken. Judicial justice, administered by deliberate judicial tribunals according to fixed and enduring principles, have been replaced by executive "justice" administered by administrative officers. This is administrative absolutism. I am not saying that it is not without its points. Certainly many would defend it. None, however, could very well say that it is American or desirable in a country where freedom of the individual is regarded as our most valuable heritage. The world is full of administrative absolutism. One would hope that for a while at least our people may express their opinions with some feeling of security.

It is my considered judgment that the enactment of S. 2046 would be a long step in a direction which no thoughtful American should care to take.

The ideas expressed above are my own, and without any authorization from any source. I am speaking as an American citizen interested in preserving certain values which I consider good and desirable.

Sincerely yours,

EDWARD C. KING.

THE UNIVERSITY OF NEBRASKA,
COLLEGE OF LAW,
Lincoln, Nebr., February 12, 1958.

Senator THOMAS O. HENNING, Jr.,
United States Senate, Washington, D. C.

DEAR SENATOR HENNING: Thank you for calling my attention to S. 2040. This bill is a blatant bit of McCarthyism, an obvious attempt to punish the Supreme Court for a number of recent decisions protecting civil rights against invasion by overzealous Congressmen and other bigots. In sections (1) to (5) one can recognize the facts of a whole series of recent excellent Supreme Court decisions upholding the Bill of Rights. These facts alone would be enough to condemn the bill, but it goes further.

Removing the appellate jurisdiction of the Supreme Court in civil rights cases such as these would tend to throw the whole law on the subject into confusion, for it is a well-known fact that the decisions of the lower courts are and will continue to be in disagreement. To remove the guiding hand of the Supreme Court under these circumstances would be a tragedy.

Sincerely yours,

FREDERICK K. BEUTEL, *Professor of Law.*

DUKE UNIVERSITY,
SCHOOL OF LAW,
Durham, N. C., February 15, 1958.

Hon. THOMAS O. HENNING, Jr.,
United States Senate, Washington, D. C.

DEAR SENATOR HENNING: I have your letter of February 7 addressed to Dean J. A. McClain, Jr., inviting opinion with respect to S. 2040.

Upon receipt of your letter I caused the bill in question, S. 2040, to be circulated to all the members of the faculty of the Duke Law School, a group which represents many shades of political opinion and which reflects varying degrees of liberalism and conservatism. It may interest you to know that a poll taken of their opinion on S. 2040 shows every single member of the Duke law faculty to be opposed to the bill.

Hoping this information may be of use to you, I remain

Sincerely yours,

E. R. LATTY, *Acting Dean.*

COLLEGE OF LAW,
UNIVERSITY OF CINCINNATI,
Cincinnati, Ohio, February 27, 1958.

Hon. THOMAS O. HENNING, Jr.,
United States Senate Committee on the Judiciary,
Washington, D. C.

DEAR SENATOR HENNING: Thank you for your kind letter of February 7 enclosing a copy of bill S. 2040 and giving me an opportunity to comment thereon.

It appears to me that the bill is an expression of lack of confidence in the Supreme Court of the United States. In our society, issues must arise from time to time on which there is a strong division of opinion. Such issues must, of course, be resolved. Under our system of government, we have recognized the absolute necessity of one body as the final interpreter of our Federal law and since very early in our history that body has been the Supreme Court. In my opinion, opposition to the decisions reached by the Supreme Court on sensitive issues should not be expressed through applying a meat ax to our carefully constructed system of appellate Federal jurisdiction.

Very sincerely yours,

ROSCOE L. BARROW, *Dean.*

THE UNIVERSITY OF OKLAHOMA,
COLLEGE OF LAW,
Norman, Okla., February 11, 1958.

Hon. THOMAS C. HENNING, Jr.,
Committee on the Judiciary, United States Senate,
Washington, D. C.

DEAR SENATOR HENNING: Your letter of February 7 respecting S. 2640, 85th Congress, 1st session, addressed to Dean Sneed of this school, has been referred to me by Acting Dean Fraser, since I teach constitutional law here.

It seems to me that you are quite right in saying that this bill strikes at fundamentals of our governmental system. As I read the list of cases which are to be removed from the reviewing power of the Supreme Court, they embrace subjects as to which decisions recently have been rendered of which many people do not approve. I assume that the sponsor of the bill probably is among that number. With some of these decisions, I am in disagreement. However, if we are to take away jurisdiction from the Supreme Court every time we do not agree with its doctrine on the subject, we certainly are doing violence to the ideal of government under law which we prize so highly. In fact, should this proposal become law, I would not consider it an unjust comment that the Congress had indicated its desire that State and Federal action of the sort described should be freed of constitutional restraints.

In addition to the dubious character of the proposal from the standpoint of constitutional ethics, it should be noted that, as drafted, the measure would not destroy the jurisdiction of the lower Federal courts to deal with such issues. It therefore would not prevent judicial review of the questions involved. All it would do is to preclude the possibility of a final and authoritative determination of these issues by the Supreme Court. It would expose us to the possibility of variant rulings in different circuits or districts, an undesirable situation.

Insofar as the decisions at which the proposal seems to be aimed involve interpretation of congressional language, the real remedy for any judicial error which may have been made lies in corrective redrafting of the acts or resolutions. This is particularly true of the puzzling questions which arise concerning Federal preemption of State action in areas of authority common to the Nation and to the States. Mr. Benjamin Wham, of Chicago, and I made a suggestion for promoting clarity in that respect in an article in the February 1957 issue of the American Bar Association Journal at pages 131-134, 189-190. Our proposal has been approved by the American Bar Association, has been recommended to Congress for action, and I understand that steps are being taken to call it to the attention of the Committee on Rules of the Senate and the House of Representatives, respectively.

It seems to me that S. 2640 is a measure that should not be adopted, and that there are far better ways of accomplishing any proper purpose at which it is aimed.

Sincerely yours,

MAURICE H. MERRILL,
Research Professor of Law.

THE UNIVERSITY OF OKLAHOMA,
COLLEGE OF LAW,
Norman, Okla., February 12, 1958.

Hon. THOMAS C. HENNING, Jr.,
United States Senate, Senate Office Building,
Washington, D. C.

DEAR SENATOR HENNING: I am referring your letter in regard to Senate bill 2640 to Dr. Maurice H. Merrill, research professor of our faculty. Although I am opposed to this bill, I do not teach courses in the area in which it fails. Dr. Merrill does. Therefore, I believe that he would be able to write a better analysis of it.

Sincerely yours,

GEORGE B. FRASER, Acting Dean.

WILLAMETTE UNIVERSITY,
COLLEGE OF LAW,
Salem, Oreg., February 14, 1958.

Hon. THOMAS O. HENNING, Jr.,
United States Senate, Committee on the Judiciary,
Washington, D. C.

DEAR SENATOR HENNING: Thank you for your letter of February 7 concerning Senate bill 2040.

I have read the bill over and my reactions to it are as follows:

I am opposed to section (1) of the bill because I feel that occasionally congressional committee members have been unfair. The very nature of the power may lead at times to excesses. Where the rights of the citizen appearing as a witness before these committees are violated, the Supreme Court should have the jurisdiction to hear cases brought to it by appeal or writ of certiorari in the cases where there has been an abuse of investigative power.

The remainder of the bill I do not oppose because I feel that the Supreme Court could go too far in assuming powers traditionally exercised by the States.

Sincerely,

SEWARD REESE, Dean.

BERKELEY, CALIF., February 18, 1958.

Hon. THOMAS O. HENNING, Jr.,
United States Senate, Washington, D. C.

DEAR SENATOR: Your letter of February 7, 1958, with which you enclosed a copy of S. 2040, has been forwarded to me in California where I have been living since retirement at the law school of the University of Pennsylvania. Having devoted much of a professional lifetime to study of government and law under our Constitution, and having had something to do with security and subversive activities as a special assistant to the Attorney General of the United States, 1941-43, I find S. 2040 of especial interest. There is no time to analyze the bill as I would like, but let me comment briefly.

In the first place, any plausibility provided by entitling S. 2040 "A bill to limit the appellate jurisdiction of the Supreme Court in certain cases" impresses me as being utterly specious. Of course the Congress has power under the Constitution to make exceptions and regulations with respect to the Court's appellate jurisdiction (art. III, sec. 2, clause 2). But no Congress with any sense of responsibility, even in anger at something which the Court may have decided, is going to be tolerant of a frontal attack upon the entire plan and procedure of appellate jurisdiction which has been developed so painstakingly over the years in a series of major enactments beginning with the Judiciary Act of 1789. The Congress also has a literal power, I assume, to abolish all inferior Federal courts, but it is inconceivable that it would do so. The Congress is solely responsible for the raising of revenue and the making of appropriations; but again I think it simply inconceivable that it would strike at a coordinate department of the Government by refusing to provide funds. S. 2040 proposes no mere modification of the Court's appellate jurisdiction. It is a frontal attack upon the Court's unique responsibility for the administration of judicial power under our tripartite system of government.

In the second place, provisions of S. 2040 which purport to be no more than added limitations upon appellate jurisdiction are actually and in unavoidable effect proposals of revolutionary readjustment in the separation and balance of powers and of unprecedented restrictions upon due process under a government of laws and not of men. Judicial review of the functioning of legislative committees has been exceedingly cautious in this country and will, I anticipate, continue to be so; but the possibility has long since become an important feature of the scheme of checks and balances. It would seem utterly imprudent to eliminate even the possibility as proposed in the bill's clause (1). Do we wish seriously to cast our Congress in the role of a supreme soviet? Or our Executive, as proposed in clause (2), in the role of a sort of presidium in terms authorized to substitute the purge for orderly procedures? Of clause (3) I can only say that it appears to have been formulated in an amazing disregard of essential national supremacy in matters of national security. As to clause (4), I would anticipate that most of the bodies to which it is imprudently addressed would continue notwithstanding to administer in accord with our best educational traditions, but lapses would be invited and there would be those to take advantage of the invitation. The phrase "subversive activities in its teaching body" can be made to mean anything from

treason to mere policies or opinions with which an administering body may disagree. The results could easily be devastating. The whole bill, clauses (1) to (5) inclusive, appears to be aimed at an emasculation of the Bill of Rights in everything that pertains to "security" or "subversive activities." Are we in such dire straits in matters of security that our whole tradition of due process under a government of laws must be abandoned? I think not. On the contrary, I suggest that the tradition is source of our greatest strength.

It is gratifying to know that you will appear as a witness against this legislation. As presently presented, I find nothing of merit in it. On the contrary, I am constrained to regard it as an insidious and shocking attack upon principles long considered fundamental in our governmental system.

Sincerely yours,

EDWIN D. DICKINSON, *Professor of Law, Emeritus.*

UNIVERSITY OF PENNSYLVANIA,
THE LAW SCHOOL,
Philadelphia, February 19, 1958.

HON. THOMAS C. HENNINGER, JR.,
United States Senate, Washington, D. C.

MY DEAR SENATOR HENNINGER: I am grateful to you for calling to my attention, once again, what seems to be undesirable legislation. I very much appreciate your invitation to express my views with respect to this legislation (S. 2646, 85th Cong., 1st sess.). Dean Jefferson B. Fordham, my respected colleague here, is preparing to appear with a full statement in opposition to the legislation. I have discussed the proposals with Dean Fordham and with others and agree entirely with what Dean Fordham shall say in opposition to the legislation. I do not believe that I could bring forward any more cogent reasons than the ones which Dean Fordham, a recognized student of the legislative process, will develop.

I am certainly surprised that the action reporting the legislation favorably from the subcommittee should have been taken on the basis of such a "bobtailed" procedure. Surely any proposal which alters so seriously the working arrangement regarding appellate jurisdiction which was set up in the very earliest years of our history, should be studied much more deliberately and much more fully than apparently it has been.

Very truly yours,

COVEY T. OLIVER, *Professor of Law.*

UNIVERSITY OF PITTSBURGH,
THE SCHOOL OF LAW,
Pittsburgh, Pa., February 25, 1958.

THOMAS C. HENNINGER, JR.,
United States Senate, Washington, D. C.

DEAR SENATOR HENNINGER: This is in reply to your letter of February 7 addressed to my predecessor, Dean Larson, and relating to S. 2646. I have considered the subject matter of this bill so important that I have requested all the members of my full-time faculty to give it full consideration as a basis for providing you with a joint statement of their views.

Very briefly, it is our consensus that the proposed legislation is extremely objectionable in several fundamental respects. Recognizing, of course, the power of the Congress to deal with the jurisdiction of the Federal courts, we nevertheless feel that this proposal offends against basic constitutional principles in respect of individual rights, the distribution of power among the three branches of the National Government and that between the Federal Government and the States.

We believe that its violation of these principles is so plain as to make it not only unnecessary to analyze and criticize it in detail, but also to make it undesirable to do so lest in undertaking specific analytical consideration its glaring faults might seem in some sense condoned.

Very truly yours,

THOMAS M. COOLEY II, *Dean.*

CUMBERLAND UNIVERSITY
SCHOOL OF LAW,
Lebanon, Tenn., February 11, 1958.

Hon. THOMAS C. HENNING, Jr.,
United States Senate, Washington, D. C.

DEAR SENATOR HENNING: I have your letter of February 7, 1958, regarding Senate bill 2040.

I consider this a very unwise piece of legislation, for as you have so aptly stated "It would work a basic change in our governmental system." I believe this change to be ill advised per se, and further I think it would set a dangerous precedent for placement destruction of other fundamental concepts of our governmental system.

In my opinion, with reference to congressional hearings, I believe on numerous occasions the congressional committees have gone far beyond the bounds of democratic due process, and that therefore disagreement with both Congress and the Supreme Court can be found in this field.

Presumably if the decisions of the circuit courts of appeal do not please Congress, the next step would be a bill to withdraw jurisdiction in these matters from said courts. I fear this bill would be a threat to all courts on all matters to agree with and uphold the notions of Congress or else risk the loss of jurisdiction in such matters.

I have not attempted to deal with the constitutionality of the bill but leave that question to others who are more expert in the field.

In my opinion, the solution lies in more discrimination by the Judiciary Committee and the Senate in the confirmation of appointees to the Supreme Court. I believe a firm policy of insisting that appointments to the Court be from the Judiciary would go a long way toward solving the problem.

This bill deserves a full, deliberate hearing. It is a drastic piece of legislation and in my opinion should be defeated.

Yours very truly,

GRISIM H. WALKER, *Dean.*

SOUTHERN METHODIST UNIVERSITY
SCHOOL OF LAW,
Dallas, Tex., February 11, 1958.

Hon. THOMAS C. HENNING, Jr.,
United States Senate, Washington, D. C.

MY DEAR SENATOR HENNING: Receipt is acknowledged of yours of February 3 in which you enclosed copy of S. 2040. Without going into a detailed discussion of the bill and its various provisions, I am very much opposed to the passage of such an act which would limit the appellate jurisdiction of the Supreme Court in a review or consideration of any of the matters included in such proposed legislation. Many valid reasons might be assigned, including an abridgment or limitation of the right of judicial review and a prohibition against a right of review of the committees, agencies, or boards as described therein.

I might add that I read your letter and proposed legislation to our entire faculty (consisting of 21 members), and they unanimously voted against such proposed legislation.

With highest esteem and best wishes, I am

Very sincerely yours,

ROBERT G. STORRY, *Dean.*

THE UNIVERSITY OF TEXAS,
SCHOOL OF LAW,
Austin, February 11, 1958.

Hon. THOMAS C. HENNING, Jr.,
Senate Office Building, Washington, D. C.

DEAR SENATOR HENNING: Our dean, Kenneth Woodward, who is acting while Dean Keeton is on temporary leave, has shown me your letter of concern about S. 2040, and invited my comment.

I welcome the opportunity to express to you my feeling about this proposal to limit the appellate jurisdiction of the United States Supreme Court. As a professor of constitutional law for some years I have been a close student of the Court and of constitutional matters. I am the author of *The Supreme Court Speaks*, published in 1950, which is a historical study of the Court.

I am utterly astonished that a bill of this nature can receive any serious consideration at all in the Senate of the United States. It flies directly in the face of our great tradition of American liberty. It is particularly disturbing at the present time, because I would have thought that America is now ready to see the error of its ways of the past few years in stifling progress by overzealous security measures. The Russian scientific achievements have just revealed to us that we can never match the Russians if we ape their tactics by limiting our traditional liberty. We should have discovered that limiting freedom limits intellectual progress on all fronts, including those where progress is essential to national survival.

S. 2046 can have only one purpose, to place a limit upon the trend of recent Supreme Court decisions in the area of security measures. Yet the decisions involved are the very ones which have been pointing the way to preservation of those liberties that every American holds dear, and should be read by all as wise traditional decisions in a time when others were forgetting the lessons on freedom of our forefathers. We can never equal the Communists in coerced conformity. We can bent them only through the utilization of the one commodity they can never have—freedom. We have tended to lose sight of this in the past few years, but we cannot help but know it now.

Of course, vital national secrets must be safeguarded. And this principle has been recognized time and time again by the present Supreme Court. But beyond this area our people must be free to think and work and advance. This is positive security. It is now, and always has been, the greatest strength of our Nation. We began to fall behind only when we forgot this. It is impossible to find the words to express the extent to which bills like S. 2046 should be opposed. This, and any other bill which has the effect of impeding our national progress under the guise of being a valid security measure, would sow the seeds of national disaster.

May I offer you my sincere and heartfelt congratulations upon your stand concerning this proposed measure. I feel confident that your efforts will be successful. I cannot conceive that the Senate of the United States could pass such a pernicious measure.

Very truly yours,

JERRE S. WILLIAMS, *Professor of Law.*

UNIVERSITY OF UTAH,
COLLEGE OF LAW,

Salt Lake City, February 17, 1958.

Hon. THOMAS C. HENNING, Jr.,

United States Senate, Washington, D. C.

MY DEAR SENATOR HENNING: Thank you for calling my attention to Senate bill 2046, which would have the effect of limiting the appellate jurisdiction of the Supreme Court. In my opinion this measure should be vigorously opposed.

For one thing, it would undermine the authority of the Court as a guarantor of constitutional government, for it would deprive that body of jurisdiction in cases involving basic constitutional rights. This is particularly serious because the area of deprived jurisdiction is one in which constitutional prerogatives too frequently have been ignored.

There is also a substantial possibility that this measure would be unconstitutional. It seems likely that it would violate the due process clause of the fifth amendment because witnesses before congressional committees, alleged subversives and lawyers could not obtain a uniform adjudication of their political and civil rights before the highest Court in the land, while other categories of persons could. There thus is created a very arbitrary classification which would, I believe, do violence to the Constitution.

While this argument admittedly needs further research and elaboration. I raise the question because I think it needs consideration.

Respectfully yours,

DANIEL J. DYKSTRA, *Dean.*

COLLEGE OF WILLIAM AND MARY,
MARSHALL-WYTHE SCHOOL OF LAW,
Williamsburg, Va., February 14, 1958.

HON. THOMAS C. HENNINGS, Jr.,
United States Senate,
Committee on the Judiciary,
Washington, D. C.

DEAR SENATOR HENNINGS: Thank you for your letter with reference to S. 2046. I have read this proposed bill and have also submitted it to our Prof. James P. Whyte, professor of constitutional law. We are both opposed to the bill on the ground that it would be a long and undesirable step in the direction of a police state. We also have grave doubts as to its constitutionality and are pleased that you are planning on opposing it.

Sincerely yours,

(Signed) D. W. Woodbridge.
(Typed) DUDLEY W. WOODBRIDGE.

UNIVERSITY OF WASHINGTON,
SCHOOL OF LAW,
Seattle, February 19, 1958.

HON. THOMAS C. HENNINGS, Jr.,
United States Senate, Washington, D. C.

MY DEAR SENATOR HENNINGS: In your letter to me of February 7, 1958, you ask for comments upon S. 2046, introduced by Senator Jenner.

There is no doubt as to the Senator's source material for the persently proposed legislation; he might well have said, "The following cases decided by the Supreme Court of the United States are henceforth not to be law, and, furthermore, the Supreme Court will never again be able to decide any cases raising similar questions * * *." The list is easy to compile:

SUBDIVISION OF S. 2046

SUPREME COURT DECISION

- | | |
|---|---|
| (1) Contempt of Congress | <i>Watkins v. United States</i> (June 1957) |
| (2) Dismissal of Federal employees | <i>Bailley v. Richardson</i> (April 1951) |
| (3) State regulations concerning sub-versives | <i>Pennsylvania v. Nelson</i> (April 1956) |
| (4) School regulations concerning sub-versives | <i>Schooner v. Board of Education</i> (April 1956) |
| (5) State action concerning admission to practice law | (a) <i>Konigsberg v. State Bar of California</i> (May 1957)
(b) <i>Schwartz v. Board of Bar Examiners of New Mexico</i> (May 1957) |

The evil of this bill is not only that it thwarts judicial review in the particular fields specified but also that it could be the beginning of a complete emasculation of the court system. Today, Senator Jenner would deprive the Supreme of appellate jurisdiction in cases involving five specific subjects. A year from now he may well add to the list those subjects upon which the Supreme Court's decisions in the next 12 months have met with the Senator's disfavor.

This would certainly be, in effect, judicial decision by legislation, not as to the particular parties involved, to be sure, but at least as to all similar cases to arise in the future. Such legislation would serve to frustrate the function of the Court to the point of making it meaningless, depriving its decisions of value as precedents. This result, of course, is what Senator Jenner wants to achieve with respect to the six listed recent decisions. However, the price of his objective is that the Court would be unable to perform its function as an impartial tribunal if its members know that decisions must meet with approval of elements of Congress, the penalty of disapproval being that the Court's jurisdiction in those areas would be removed. While existing precedent indicates that Congress may possibly do this, I think so to deprive the Court of its independence would be contrary to the spirit of the Constitution, as indicated, among other places, in its provision giving members of the Court life tenure and protection against salary reductions.

A further evil of the proposed legislation is that by removing the appellate jurisdiction from the Supreme Court in these five fields of subject matter, the courts of appeal on the 10 circuits, to say nothing of the courts of the several States, would be left without a court of last resort to resolve conflicting decisions on Federal questions in these same fields. If these subjects were all of purely local law, the lack of a single judicial forum to resolve the conflicts would not be so bad, perhaps, but involved here are questions of national importance in sensitive fields of subject matter where the uniformity and the dignity of Supreme Court decision are highly desirable, if not indispensable.

One final point: The proposed bill deals with appellate review upon a subject matter basis, not upon a procedural basis. Heretofore, congressional action as to the appellate jurisdiction of the Supreme Court has been concerned with the mechanics of the operation of the judicial system, dealing with whether the claim of Federal right was upheld or denied by the State court, with whether there was to be a right of appeal or merely review by certiorari, and with whether injunctive relief against the enforcement of legislation has been sought. How different it is, and how inappropriate it is, that Congress should make appellate jurisdiction of the Supreme Court depend on the subject matter. Assuming, of course, as we do, that the subject matter is otherwise properly before the Court under the grant of judicial power under article III of the Constitution, I see no other basis for the proposed legislation than that we are to consider the Constitution amended so that the due process and equal protection clauses of the 5th and 14th amendments are not to apply where they are most needed.

Sincerely,

GEORGE NEFF STEVENS, *Dean*,
ROBERT I. FLETCHER, *Professor*.
CORNELIUS J. PECK, *Professor*.

THE UNIVERSITY OF WISCONSIN LAW SCHOOL,
Madison, February 17, 1958.

Senator THOMAS O. HENNINGS, Jr.,
Senate Office Building, Washington, D. C.

DEAR SENATOR HENNINGS: This is in reply to your letter of February 7 to John Ritchie, formerly dean of this law school, concerning the bill, S. 2646, to limit the appellate jurisdiction of the Supreme Court in certain cases. I agree that the question raised by the bill is serious, and that its enactment would be most unwise.

I have no doubt that the bill, if passed, would itself be constitutional. The appellate jurisdiction of the Supreme Court, under the Constitution is "with such exceptions, and under such regulations, as the Congress shall make." (Constitution United States art. III, sec. 2). If the bill should pass, therefore, the Supreme Court would no longer have appellate jurisdiction in the kinds of cases listed: that is to say, the decision of the highest court below the Supreme Court would be final.

There are in the United States today 59 such highest courts below the Supreme Court (40 State supreme courts plus the United States courts of appeals in 11 Federal circuits). Cases of the sorts listed in the bill might be presented for decision in any of these courts, and in whatever ones presented the decisions would be final. Final, but not uniform. For it is quite impossible to think that on close cases the judges of these 59 different courts would be likely to reach uniform results.

It is, of course, not uncommon in our Federal system to have different rules of law in different States on many subjects. Wisconsin may have a different policy from Indiana on many things without endangering the Union. But on the question of the rights and liberties of citizens under the Constitution of the United States there ought to be one rule. Certainly your constitutional rights or mine should not depend on whether the case in which they are involved happens to be for trial in New York or California or in some other State or in some other Federal circuit. Yet this is exactly what S. 2646 would bring about.

The vice of S. 2646 (without at all considering whether the recent decisions to which its authors object were right or wrong) is that it destroys the only chance we have of uniformity in the adjudication of the constitutional rights and liberties of citizens in all kinds of cases listed in the bill. Whatever we

may think about particular adjudications, surely we must all agree that some single and final unifying authority on the meaning of the Constitution is essential in our system. On the kinds of cases listed in this bill that single authority can only be the Supreme Court of the United States.

All this has been well understood for many years. The best statement of it that I know was written by Mr. Justice Story in an opinion of the Supreme Court in 1810. (*Martin v. Hunter's Lessee*, 1 Wheaton 304, 4 Lawyers Edition 97.) In that case the supreme court of Virginia had denied the power of the Supreme Court of the United States to review one of its decisions on a Federal question. The Supreme Court then reexamined its own jurisdiction to review State courts. Judge Story's opinion explains at considerable length why the Constitutional Convention and the First Congress had given the Supreme Court that power in constitutional cases. Among other things he said (1 Wheaton at p. 347, 4 L. Ed. at p. 108) :

"This is not all. A motive of another kind, perfectly compatible with the most sincere respect for State tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the Constitution. Judges of equal learning and integrity, in different States, might differently interpret a statute, or a treaty of the United States, or even the Constitution itself. If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the Constitution of the United States would be different in different States, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two States. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the Constitution. What, indeed, might then have been only prophecy, has now become fact; and the appellate jurisdiction must continue to be the only adequate remedy for such evils."

I am confident that the Judiciary Committee, and the Senate, will agree that this is still good sense.

Respectfully,

CHARLES BUNN, *Professor of Law.*

Senator HENNINGS. And there are a number of lawyers here.

Richard W. Hogue, Jr., chairman, committee on Federal legislation of the Association of the Bar of the City of New York.

Mr. Herman Phleger, whom I am sure the chairman knows and knows favorably as an able lawyer and scholar and who was counsel of the State Department for a number of years:

I believe that it would be prejudicial to the public interest to enact Senate bill S. 2040.

The object and effect of this proposed measure is to deprive the Supreme Court of its present jurisdiction in five important areas of constitutional law.

And our friend Herman Phleger goes on to discuss the matters.

This attack on the Court is not only damaging to its prestige and dignity, but if the bill were passed, it could not but cause a lessening of public esteem for the Congress.

For these reasons, it is urged that the Judiciary Committee do not favorably report this measure.

And then we have an article by Arthur Krock of the New York Times.

A letter from Berl, Potter & Anderson, formerly Ward & Gray, with whom the chairman, I am sure, is familiar.

I agree with you completely in opposing the enactment of Senate bill 2040 to limit the appellate division of the Supreme Court in certain cases. It seems to me that you have gone right to the heart of the matter when you pointed out at the hearings that the enactment of this bill would result in different constitutional interpretations in different parts of the country.

Piper and Marbury. The Chairman knows and will recall that the elder Marbury was at one time president of the American Bar Association. Mr. Marbury said:

In my opinion it is a very bad bill.

Mr. Paul F. Good, a general practitioner in Omaha, Nebr.:

I wish to express my concern over the provision of S. 2046 now pending before the Judiciary Committee of the United States Senate. It constitutes a radical departure from our American system of judicial review and protection of the rights of individuals.

He sent us a brief for our perusal and, I hope, our enlightenment.

McLane, Carlton, Graf, Green & Brown, Manchester, N. H.

McCarter, English & Studer, Newark, N. J.

Patterson, Belknap & Webb, 1 Wall Street, New York.

Winthrop, Stimson, Putnam & Roberts, 40 Wall Street, New York:

I am enclosing herewith a statement.

I am a member of the Bar of the Supreme Court of the United States and of the State of New York and I am a past president of the Association of the Bar of the City of New York. I want to record my sincere hope that S. 2046 which is a bill "to limit the appellate jurisdiction of the Supreme Court in certain cases," will never receive favorable action.

Kelley, Drye, Newhall & Maginnes, the Hanover Bank Building, 70 Broadway, New York:

If enacted, the bill would prevent the Supreme Court from reviewing lower court decisions on the validity (constitutional or otherwise) of State and Federal action in five specified fields.

The inevitable result would be uncertainty, and, even worse, disrespect for the courts and the Constitution. In turn, lower court decisions invalidating State and Federal action in these five fields would in time lose their sanction and effectiveness. We are bound to infer that these results of the bill were intended.

In other words, the bill is an oblique attempt to maim the principle of judicial review, the power of the Court to determine the constitutionality of any act of the legislature or the Executive or the States. Though this principle has been attacked by different people at different times it has on the whole worked very well.

I oppose S. 2046.

There is more to this letter.

I am confident that, particularly with the demonstration of its disruptiveness that I know you will make, the judiciary committee will vote it down.

Harris, Beach, Keating, Wilcox, Dale & Linowitz, representative lawyers throughout the country, Rochester, N. Y.

A letter from Hugh Calkins, Cleveland, Ohio:

I happen to feel that the recent decisions of the Supreme Court with regard to the Smith Act, the conduct of congressional investigations and the disclosure of witnesses in criminal prosecutions are sound. Even if I did not, however, I would feel strongly that the Supreme Court makes an important contribution to continuity and stability in the United States and its decisions, if erroneous, should be corrected by legislation and by the passage of time and not by narrowing its jurisdiction.

Paxton and Seasongood, Cincinnati, Ohio, in the same tenor:

The bill seems to be motivated by a dislike of some of the decisions of the United States Supreme Court in connection with cases involving happenings related to the matter sought to be taken away from the jurisdiction of the Court. In the long history of the Court there have frequently been strong feelings of opposition to many of its important decisions.

However, the Supreme Court of the United States is an essential in our plan of government. It is an institution and in the course of time the Justices whose opinions may not be liked cease to serve. The Court as such should not be circumscribed by attempts to limit its jurisdiction as the bill under discussion would do.

That is from Cincinnati, Ohio.

A letter from Portland, Oreg., in the same tenor.

A letter from Raymond Pitcairn, Philadelphia, Pa.:

I appreciate the opportunity to express my opinion on Senate bill 2646. * * * The Supreme Court has always stood and still stands as the bulwark of our personal liberties. This bill, if enacted, would jeopardize our great constitutional principle of judicial review and checks and balances. It should be killed.

Signed, Raymond Pitcairn. There is more of that.

Jerome K. Crossman, Dallas, Tex., in the same tenor:

I beg of you to do everything within your power to see that this bill be not passed.

Mr. Chairman, I am not going to burden the record by reading all of these, although I have asked that they be included in the record, but these are from representative lawyers to whom I had written and the response to me was really very amazing. Many of these busy lawyers took time to write briefs and to express themselves as they have.

I am delighted to know that you will vote in opposition to Senate bill 2646.

This comes all the way from Seattle, Wash.

This bill, if constitutional (which I doubt), would seriously endanger the present separation of power as between the three branches of our Government. * * *

Not enough people realize what a fine thing it is to have an independent judiciary which can redress the excesses caused by current waves of hysteria.

And so on.

Here are letters from Salt Lake City, Seattle, and Spokane.

(The documents referred to are as follows:)

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,
New York, N. Y., February 19, 1958.

Hon. THOMAS O. HENNINGS, JR.,
Senate Office Building, Washington, D. C.

MY DEAR SENATOR HENNINGS: Your letter addressed to Arthur L. Newman, Esq., has been turned over by Mr. Newman to me as I have succeeded him in the chairmanship of the committee on Federal legislation of the Association of the Bar of the City of New York.

I received your letter at a regular meeting of the committee held on February 11 at which your letter and the proposed legislation (S. 2646) were presented and discussed.

The purpose of the bill is to exclude from the appellate jurisdiction of the Supreme Court the power of judicial review of cases which fall within the area of recent decisions of the Supreme Court dealing with (1) hearings conducted by congressional committees, (2) elimination of employees from the executive branch of our Government for reasons of national security, (3) control by the States of subversive activities, (4) control by schools boards or similar bodies of subversive activities in its teaching body, and (5) admission of persons to the practice of law in any State. Disagreement with the following decisions in the foregoing fields, and possibly others, apparently has led to the introduction of the bill in question.

United States v. Watkins (354 U. S. 178 (1957)).

Quinn v. United States (349 U. S. 155 (1955)).

Emspak v. United States (349 U. S. 190 (1955)).

Bart v. United States (349 U. S. 210 (1955)).

Peters v. Hobby (349 U. S. 331 (1955)).

Cole v. Young (351 U. S. 536 (1956)).

Pennsylvania v. Nelson (350 U. S. 497).

Cf. Sucezy v. State of New Hampshire (354 U. S. 1 (1957)).

Stochover v. Goodrich (350 U. S. 551, (1953)).

Schware v. Board of Bar Examiners (353 U. S. 232 (1957)).

Konigsberg v. State Bar of California (353 U. S. 252 (1957)).

We do not undertake to express our views on any of these decisions.

The point is not whether a majority of a congressional committee or of the Congress or of the public agree or disagree with particular decisions. The point is that each decision was reached in the orderly process of judicial review and it is the view of our committee that that orderly process of appellate jurisdiction should not be disturbed or eliminated by legislation of the type here under consideration.

This type of legislation was anticipated by our association over 10 years ago when a special committee was appointed to consider measures to forestall future efforts to invade the independence of the United States Supreme Court and the lower United States courts by a President or Congress seeking to nullify or impair the function of the judicial power of the Government. Enclosed is a copy of the report of that special committee. The resolution appearing in the appendix (p. 5) was discussed and adopted (except for par. B 1) by the association at a stated meeting held on December 9, 1947. You will note that the particular proposal sponsored by the resolution which is relevant to S. 2040 was the amendment of the second (unnumbered) paragraph of article III, section 2 of the Constitution to provide that "In all cases arising under this Constitution the Supreme Court shall have appellate jurisdiction, both as to law and fact."

Senator John Marshall Butler, on February 10, 1953, during the 83d Congress, introduced Senate Joint Resolution 44 embodying the recommendations of the association as to the proposed constitutional amendments. Though no such amendments were proposed by Congress, the late former Justice Owen J. Roberts in an article in the American Bar Association Journal (35 A. B. A. J. 1 (1949)), emphasized as the most important aspect of the proposals that which would have defined the jurisdiction of the Supreme Court by constitutional amendment. Such an amendment would have effectively precluded the Congress from altering by legislation the jurisdiction of the Court with respect to constitutional questions.

The foregoing remarks are made merely to point out that the Association of the Bar of the City of New York has thus placed itself on record as favoring action which would, in principle, have precluded the possibility of legislation such as that embodied in S. 2040. The last statement is qualified by the words "in principle" because certain of the decisions of the Court previously referred to were not decided upon constitutional grounds. In this respect the jurisdiction of the Supreme Court might not have been affected by the bar association's proposal but would be affected by S. 2040.

The committee on Federal legislation of the association, after consideration of the bill and of your letter, voted unanimously to transmit to you by letter its expression of its opposition to the legislation. This letter has been cleared with every member of the committee who was absent from the meeting as well as with those who were present and it has their unanimous and unqualified approval.

Perhaps another comment is in order. The committee is at a loss to understand what the bill would accomplish. If the assumption is correct that its proponent is moved by disagreement with the cases cited above, it should be pointed out that had the bill been in effect prior to these decisions, in at least one of them the result would not have been altered. In the Nelson case, the decision of the State court was affirmed by the Supreme Court of the United States. There is no guaranty whatsoever that, if the bill were enacted, the lower courts, both State and Federal, would not reach the same results that the Supreme Court would reach if it had power to review. Indeed, the bill would foster diversity of decision in the lower Federal courts and in the courts of the 48 States—a result hardly to be desired and which can only be avoided by leaving the Supreme Court's jurisdiction unimpaired.

Sincerely,

RICHARD W. HOOUE, Jr.,
Chairman, Committee on Federal Legislation.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

SPECIAL COMMITTEE ON THE FEDERAL COURTS

REPORT SUBMITTED AT STATED MEETING ON DECEMBER 9, 1947

Our committee was appointed in November 1946 to consider possible measures to forestall future efforts to invade the independence of the United States Supreme Court and the lower United States courts by a President or Congress seeking to nullify or impair the power of the judicial branch of the Government. As there are many loopholes in the strict letter of the Constitution through which such a thrust might be made, the problem is whether some or all of those loopholes should be plugged up and, if so, how.

Another and a closely related function of the committee is to consider whether or not there should be suggested any other changes that it is thought would tend to increase confidence in the independence and efficiency of the Federal courts.

Our committee rendered an oral interim report at the stated meeting of the association held on February 11, 1947, and the annual report sets forth its progress up to May 1947.

In an appendix to this report our committee presents its conclusions and offers a resolution that, if adopted at this stated meeting, will confer upon those conclusions the approval of the association.

Our committee has studied the subject for a year and during that time has conferred, individually and as a group, with authorities best qualified to shed light upon the problems involved.

The conclusions that it has reached are embodied in the proposed resolution. In the first place, our committee is of the opinion that measures should be taken, by constitutional amendment and by congressional enactment, to put into legally binding form some of the protective traditions surrounding the Supreme Court and lower Federal courts or to remove possible temptations to encroach upon their independence. One way to ward off an attack upon the courts is to remove probable grounds of future reasonable criticism of their present structure and operation.

In the second place, our committee is convinced that, to be effective, whatever action is recommended by this association should, so far as possible, be sponsored by the American Bar Association in order to make the movement a national one.

The specific constitutional and statutory provisions contained in the proposed resolution speak for themselves but a few explanatory notes are appended to it.

The attitude of this association as expressed at the time of the Supreme Court-packing project of 1937 and the appointment of this special committee by the executive committee indicate that this association has been aware of the necessity of taking action to safeguard the Court at a time when its independence is not imminently threatened rather than at the time when the next attack is launched. Our committee has felt that it was part of its duty to give weight to the opinion held in some highly authoritative quarters that in this interlude of serenity the subject should not be stirred up. Our committee has concluded, however, that whatever risk there may be in arousing a discussion is much more than offset by the risk of providing no additional safeguards until it may be too late. Furthermore, our committee has confidence that, if proposals to protect the independence of the Supreme Court are carried into Congress and before the people under the leadership of the American Bar Association, the movement will be started cautiously under experienced leadership with all of the dangers carefully in mind.

It is hoped that the proposals themselves will be considered from a general point of view. No two lawyers would be likely to agree as to the exact measures or their exact phraseology. Even within the committee there had to be considerable give and take on the details and we are confident that the spirit that resulted in this unanimous report will be reflected in the attitude of the membership of this association as a whole.

In considering the problems and in drafting the proposals, not only have all political considerations been put aside but every effort has been made to allay any baseless suspicion that they have entered into the result. Our committee also has tried to avoid dispensable controversial matter and to avoid complexity.

Our committee asks you not to read the words of the resolution too mechanically. If success should be achieved and the ball should roll to its goal, it inevitably will undergo changes along the way. A good start already has been

made, thanks to the cooperation of Mr. John G. Buchanan, chairman, and the other members of the special committee on the Judiciary of the American Bar Association.

Our committee has been in continuous contact with the American Bar Association committee and these proposals that have been arrived at by our committee were presented, informally and unofficially, to the American Bar Association committee at a meeting held in Washington last June, with careful indication that the proposals had not yet been submitted to the membership of this association. At the annual meeting of the American Bar Association held in Cleveland this September, Mr. Buchanan, in presenting the report of the Judiciary committee to the house of delegates, spoke of the movement that we have started here and promised that his committee would report upon the subject to the house of delegates at its midwinter session. While neither this association nor your committee is seeking any credit and, on the contrary, is of the opinion that the movement should not be identified with any locality and particularly not with New York City, this association will be interested to know that it was the only one mentioned by Mr. Buchanan in his report and seems to be the only one that is taking an active part in this movement. This may partly be due to the fact that other local bar associations now know that the matter is being given earnest attention and is on the active agenda of the appropriate committee of the American Bar Association.

Mr. Franklin E. Parker, Jr., last year's chairman of the executive committee of this association, recently has been appointed as the member from this district of the Judiciary committee of the American Bar Association. He has expressed approval of these proposals and it is most fortunate to have him as liaison between this association and that committee.

Most cooperatively, Mr. Buchanan is deferring setting the date for the next meeting of his committee, whose members, coming from each Federal district, have to assemble from all over the country, until there has been an opportunity for this association to act upon the proposed resolution herewith being presented.

It will give the rolling ball a vigorous push if these proposals are now endorsed by the membership of this association.

Respectfully submitted.

SPECIAL COMMITTEE ON THE FEDERAL COURTS, EDWIN A. FALK, *Chairman*;
CHAUNCEY BELKNAP; WILLIAM C. CHANLER; WILLIAM DEAN EMBREE;
CAESAR NOBLETTI; GEORGE ROBERTS; HARRISON TWEED, *President, ex officio*;
PAUL B. DE WITT, *Executive Secretary, ex officio*.

NOVEMBER 28, 1947.

APPENDIX

Resolution for Submission to Stated Meeting

Resolved, That the special committee on the Federal courts recommends the adoption of the following resolution by the Association of the Bar of the City of New York:

Resolved, That the Association of the Bar of the City of New York sponsors the following measures:

(A) The amendment of the Constitution of the United States to provide that:

(1) The Supreme Court shall be composed of the Chief Justice of the United States and eight Associate Justices.

(2) The Chief Justice of the United States and each Associate Justice of the Supreme Court shall retire at the end of the term of the Court during which he shall attain the age of 75 years.

(3) Article III, section 2, of the Constitution shall be amended so that the second paragraph (unnumbered) shall read as follows:

"In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. *In all Cases arising under this Constitution the supreme Court shall have appellate Jurisdiction both as to Law and Fact.* In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." [New matter in italics.]

(4) No person hereafter appointed Chief Justice of the United States or Associate Justice of the Supreme Court shall be eligible to the office of President or Vice President.

(B) The enactment of a statutory provision to provide that:

(1) No Chief Justice of the United States nor any Associate Justice of the Supreme Court nor any Judge of any other court of the United States shall during his term of office hold any other governmental or public office or position."

NOTES

[The conventional capitalization of that period, which was used in the Constitution, has been followed in proposal A-3 because the new matter is to fit into an existing section. It has not been followed in the other proposals as it has not been followed in amendments and particularly the recent ones. An effort has been made to adhere, as far as practicable, to the terminology and phraseology of the Constitution.]

(2) The committee at first was inclined to add a provision that, upon such automatic retirement at the age of 75, the Justice should continue to receive the same salary that he was receiving immediately prior to such retirement, but there was recognized the possibility, however remote, that such appointments might be made of persons not much younger than 75 in order to give them the pension for the rest of their lives. The committee is of the opinion that Congress should not be prevented from limiting the pension to Justices who have served at least a certain number of years on the Supreme Court. It was decided, however, that this entire matter of pension may be dealt with more appropriately by legislation than by a constitutional amendment.

(3) The committee finally decided to use the phrase "In all cases arising under this Constitution" because the phrase already appears in the Constitution, but the committee had some slight misgivings because of the language in *Gully v. First National Bank in Meridian* (1938, 299 U. S. 109 at 112; 81 L. Ed. 70 at 72), which since has been cited with approval. It should be noted that the Gully case itself and some of the others that cite it dealt with removal of a case from a State court. The committee realizes that perhaps there would be less risk of misconstruction of the real intent if the phrase were cast as follows: "In all cases involving the construction or application of this Constitution." If it is thought best to eliminate all possible doubt, the phrase might be enlarged to read: "In all cases involving or claimed by any party thereto to involve the construction or application of this Constitution."

(4) It seems clear from the Constitution itself that the term "appointed" embraces both the nomination by the President and confirmation by the Senate.

STATEMENT BY HERMAN PHILEGER OF SAN FRANCISCO ON S. 2646

I believe that it would be prejudicial to the public interest to enact Senate bill S. 2646.

The object and effect of this proposed measure is to deprive the Supreme Court of its present jurisdiction in five important areas of constitutional law.

These areas are (1) the investigative functions of Congress, (2) the security program of the Federal executive branch, (3) antisubversive legislation of the States, (4) local regulations regarding subversive activities in school teaching, and (5) the admission of persons to practice law.

This measure would deprive persons asserting that their Federal constitutional rights had been violated by action in any of these fields of the opportunity to resort to the Supreme Court for their protection. At the same time the Supreme Court would be deprived of its right of review in cases involving the assertion of these constitutional rights.

Thus, these important questions would be left to the final decision of numerous courts in various parts of the country, which might differ widely in their interpretation of the law and their finding of the facts, in similar or identical cases. Thus, uniformity of decision in these important fields of constitutional law would be lost.

It seems obvious that the advocates of the bill are motivated by their disagreement with the decisions of the Supreme Court in these fields. The remedy for any error in the Supreme Court is not to deprive it of jurisdiction.

This attack on the Court is not only damaging to its prestige and dignity, but if the bill were passed, it could not but cause a lessening of public esteem for the Congress.

For these reasons, it is urged that the Judiciary Committee do not favorably report this measure.

[From the N. Y. Times, February 6, 1958]

IN THE NATION—EFFORT TO LIMIT "IMPORTED" JUDICIAL POWER

(By Arthur Krock)

WASHINGTON, February 5.—When Senator Hennings of Missouri moved this week to defer action by the Judiciary Committee on the bill to eliminate five legal areas from those in which the Supreme Court has the last word, he could not have known that almost simultaneously one of the most respected of judicial voices would be raised in his support. But it happened that Judge Learned

Hand did this last night in the first of three Oliver Wendell Holmes lectures at the Harvard Law School.

After only 1 day of hearings, a judiciary subcommittee had favorably reported to the full Senator Jenner's committee S. 2646 which would forbid the high Court to pass on the validity of any congressional committee activity, any executive security measures, any State or educational body's antisubversive regulation and any State regulation of admissions to the bar. In addition to making (and winning) his point that the gravity of the proposal requires much more study before action of any kind should even be considered by the parent committee group, Hennings submitted to his colleagues the reasons for his view that its ultimate action should be unfavorable. Among these reasons, he said, was that, if the lower courts are given final jurisdiction in the five areas, "the Constitution would mean one thing in one part of the country and something else in another."

This was the point strongly made by Judge Hand in justifying as "necessary" the final power of the Supreme Court to exercise what lawyers prefer to call "judicial review" but what, with few exceptions, is actually judicial supremacy over the other two Federal departments. With the candor usual in him but rare among other members of the judiciary, Judge Hand conceded that this power was "imported" into the Constitution and is neither granted nor implied in the text.

TO AVOID COLLAPSE

"When the Constitution emerged from the Convention in September 1787," he told his Harvard Law School audience, "the structure of the proposed government, if one looked to the text, gave no ground for inferring that the decisions of the Supreme Court . . . were to be authoritative upon the executive and the legislature. Each of the three 'departments' was an agency of a sovereign, the 'People of the United States.' Each was responsible to that sovereign, but not to one another; indeed, their 'separation' was still regarded as a condition of free government, whatever we may think of that notion now."

Had judicial supremacy been proposed to the Convention, he said, there is no telling what the vote would have been. And the "arguments deducing the [Supreme] Court's authority from the structure of the new government, or from the implications of any government, were not valid in spite of the deservedly revered names of their authors" (John Marshall in particular). But, he continued:

. . . It was probable, if indeed it was not certain, that without some arbiter whose decision should be final the whole system would have collapsed, for it was extremely unlikely that the executive or the legislature, having once decided, would yield to the contrary holding of another "department," even of the courts. . . . By the independence of their tenure [the courts] were least likely to be influenced by diverting pressure. It was not a lawless act to import into the Constitution such a grant of power.

That contention invites the reply that the "lawful" method of importing the power was to acquire it by the consent of the people as an amendment to the Constitution. But in a period when denunciation is the lot of those who have attacked certain Supreme Court decisions as invasions of the explicit constitutional provinces assigned to Congress and the Executive, it is at any rate refreshing to have the concession of an eminent jurist that judicial supremacy was "engrafted upon the text" of the charter and has no direct warrant there.

Some of these decisions—and not only the one which declared that enforced racial segregation in the public school system, which the same Court long upheld as valid, violates the 14th amendment—provided the impetus for S. 2646. As Senator Hennings pointed out, this measure would not per se affect these decisions, but it would "create great temptations for the lower courts" to disregard them by denying to the Supreme Court future jurisdiction in the legal areas the decisions occupy.

The right of Congress to alter or reduce the high Court's jurisdiction is well established in law and legislative action, though with some of the findings of the current Supreme Court in mind no one can be sure this also would not be subject to adverse "review." Hennings gave the committee the history of legislative efforts in this respect, but effectively noted that only once has Congress approved such a measure (in 1867, amid the emotions of reconstruction and over President Johnson's veto). This took from the Supreme Court its jurisdiction to pass on denials of writs of habeas corpus by lower tribunals.

LAW OFFICES, BERL POTTER & ANDERSON,
(WARD & GRAY)

Wilmington, Del., February 19, 1958.

Re Senate bill 2046.

HON. THOMAS C. HENNING, JR.,
United States Senate, Washington, D. C.

DEAR SENATOR HENNING: I agree with you completely in opposing the enactment of Senate bill 2046 to limit the appellate division of the Supreme Court in certain cases. It seems to me that you have gone right to the heart of the matter when you pointed out at the hearings that the enactment of this bill would result in different constitutional interpretations in different parts of the country.

Although I know that many people have criticized the doctrine of judicial review under our system of government which provides for the separation of powers between the legislative, executive, and judicial branches, it is my opinion that in a nation as large and complex as ours no satisfactory substitute has ever been suggested for the system by which the Supreme Court ultimately determines the constitutional rights of all citizens.

From the days of Chief Justice Marshall forward there has been criticism of the various decisions of the Supreme Court, but this is not surprising for I am certain that no arm of government or judicial body can ever secure 100-percent approval of any of its actions. In my opinion the enactment of Senate bill 2046 would not really solve any of the problems which may exist in attempting to control subversive activities and at the same time protect the individual freedoms which are guaranteed under our Constitution.

In case you have not already seen it, I am enclosing Arthur Krock's column from the New York Times on February 6, 1958, which I believe is a good exposition on this subject.

Very truly yours,

WILLIAM POOLE.

STATEMENT OF JOSEPH B. GUMMING, AUGUSTA, GA.

The enactment of this bill into law will destroy that one, and sometimes only, hope of an individual for protection in the freedoms which are guaranteed to him in the Bill of Rights in the Constitution. When passions, fears, and prejudices of the day are being reflected in the investigation of a congressional committee or an administrative board, the necessity for this protection is as great as when the passions of an enraged mob terrify or overwhelm the law-enforcing officers of the community. The only recourse available to a person subjected to persecution for not conforming to prevailing views is an impartial judiciary. If the judiciary is forbidden to give the relief necessary at such times, then we are imitating the evil practices of authoritarian governments in denying to the individual the protection of his liberties. When this country adopts similar methods of security, it thereby reduces its citizens from free-thinking, independent, self-reliant members of a democracy to cowering, fear-haunted subjects of an all-powerful state, and one of the greatest glories of our boasted freedom-loving civilization will have faded.

We have only to give a brief glance at our history, from the vicious alien and sedition laws of 160 years ago to similar ones introduced and enacted during the two World Wars of this country to see how easily actual or fancied dangers can create hysteria and panic, and whether it results in legislation or mere petty persecution at the community level, the freedom of some nonconforming individual is in danger. His independence is in jeopardy and there is the cry that his failure to conform constitutes a danger to the country. But the Bill of Rights will shield him.

It is only by reason of these constitutional guarantees and their protection by an independent and fearless judiciary that the fundamental liberties of the individual can be preserved. We do not want the Supreme Court to degenerate into a Pontius Pilate, yielding to the demands of a passion-driven mob. This bill would furnish the basin of water in which it could wash its hands and individual freedom be crucified.

It is quite obvious that the genesis of this bill is disapproval of a number of decisions of the United States Supreme Court, especially those in which the rights of the individual were upheld in the face of an aroused and angry public opinion, reflecting a strong disapproval of the person who claimed such rights and what he stood for. How frightening to those Americans who believe in

the strength and validity of our institutions when they see our responsible elected officials becoming so disturbed over unpopular decisions that they seek some palliative, some cynically inspired mechanical expedient, to restrict the Court's jurisdiction in certain isolated, specified types of cases. The fundamental principle that the Court's jurisdiction should protect all men in all their liberties is ignored. Such protection is indivisible; this bill would make it partial. How dangerous a precedent for the legislative branch—despite the constitutional barrier of the doctrine of the separation of the three departments—to react to a transient unpopularity of a judicial decision by attempting to curb the power of the Court for that type of case. There has been nothing like it since Procrustes cut off the head or feet of his guests if they were too tall to lie straight in his bed.

If the decisions of the Court go too far in protecting the rights of the individual, let the proponents of this bill be bold and strike at the root, not just trim the branches. Let them attempt to withdraw from the Court the power to review any case involving constitutional rights. Why restrict such limitation to what are narrowly referred to as "subversive activities" or "national security"? The deprivation of the rights of the least citizen affects national security. Can the Nation be said to be secure should the rights of any citizen be insecure? This bill seeks to impair one of our most valuable institutions: the right to have judicial review of an attack on a citizen's constitutional freedoms. If this institution is to be tampered with, let it be done honestly and destroyed outright, not in this piecemeal manner under the guise of rooting out Communists. The destruction of this bulwark will be as complete if effected by attrition as by sudden demolition. If we want to preserve this essential protection of our freedoms, this first act of attrition must be defeated. If it should succeed, it might assist, as its supporters contend, in locating persons who are today enemies of the country, but tomorrow it could be used to persecute others who merely dissent from popular opinions and are falsely charged with being enemies of the Union.

Any artificial and irrelevant obstacle in the path of the right of appeal can ultimately become a stumbling block for all appellants, not merely those particular persons whose right of appeal it was intended to deny. The doctrine of judicial review is America's greatest contribution to the policy of western civilization. By its use this country has been able to preserve blood-bought liberties for each of its citizens. Should this protection now be withdrawn from certain citizens because of the nature of the charge against them? If so, this would be an abandonment of another birthright—the presumption of innocence. Or should it be withdrawn because of the tribunal in which the attack is made? If so, what will become of our vaunted impartiality before the law? Those who fear the impartial use of this doctrine have little faith in the strength of our institutions and in the permanence of the American constitutional system. Such timid and frightened people would seek to destroy one of the strongest foundations of the structure of our Government by the enactment of such restrictive legislation as is contained in this bill. At best, it will give only partial and minor assistance to those seeking to discover our hidden enemies, but it would wreak immeasurable and permanent harm to our established method for the protection of the individual. Such persons would throw the baby out with the bath. For the sake of some ephemeral advantage in a temporary problem of the Government, they would strike down the aegis under which American liberties have flourished and have become the hope of the world.

JOSEPH B. CUMMING.

LAW OFFICES OF PIPER & MURRAY,
Baltimore, Md., February 12, 1958.

HON. THOMAS C. HENNINGS, Jr.,
Committee on the Judiciary,
United States Senate, Washington, D. C.

DEAR SENATOR HENNINGS: As requested by you I have examined S. 2046. In my opinion it is a very bad bill.

The effect of the bill is to give to inferior tribunals the power to make final decisions on some of the most important questions which come before our courts. The decisions of these lower courts cannot establish any controlling precedent nor will they be binding on other courts of coordinate jurisdiction. In case of a conflict of opinions, which may well arise in cases of this character,

confusion will be created where it is most important to have the law definitely settled.

But surely the main objection to the bill lies in the fact that it does violence to the basic principle of an independent judiciary. For this reason the bill deserves to be classified with the court-packing bill which failed of passage during President Roosevelt's second administration. To use the power to limit jurisdiction in order to reach a desired result in a particular class of cases is no less reprehensible than to use the power to determine the size of the court for such a purpose.

It is true that there is a precedent for legislation of this character. During Reconstruction days Congress desiring to prevent the Supreme Court from invalidating a particular piece of legislation, exercised its power to limit the appellate jurisdiction of the Court so as to prevent consideration of a particular appeal. However, this exercise by Congress of its constitutional power has always been regarded as indefensible and explainable only in terms of the passions aroused by civil warfare.

I sincerely trust that this bill will receive an unfavorable report.

Sincerely yours,

W. L. MARRHURY.

STATEMENT OF PAUL F. GOOD

I am a lawyer in the general practice in the city of Omaha, Nebr. I am a member of the firm of Monsky, Grodinsky, Good & Cohen. I was admitted to the Nebraska bar in 1910, and practiced in Lincoln, Nebr., until 1917, since which date I have practiced in Omaha. I am a member of the bar of the United States District Court for the District of Nebraska and of the United States Court of Appeals for the Eighth Circuit. I have been a member of the bar of the United States Supreme Court since 1933. I have appeared in that Court for clients in several cases, the most important of them being the case of *State of Nebraska v. State of Wyoming* (325 U. S. 580, 89 L. Ed. 1815), in which I appeared on behalf of the complainant. I held the office of attorney general of the State of Nebraska from January 1933 to January 1935. I am a member of many organizations including the American Legion.

I wish to express my concern over the provisions of S. 2640 now pending before the Judiciary Committee of the United States Senate. It constitutes a radical departure from our American system of judicial review and protection of the rights of individuals.

Subparagraphs (1) and (2) would seem to relate principally to appeals or writs of certiorari from Federal courts, while the remainder of the bill relates to appeals and writs from the State courts, although this is not exclusive, and it is conceivable that a controversy covered by subsection (4) might be originally tried in a Federal court. In any case, however, persons involved in controversies of particular classes are singled out, so that their rights may not be protected by the Supreme Court. For example, if this bill becomes law, a person accused of the crime of contempt of Congress would be tried in the United States District Court and would have a right of appeal to the court of appeals of the appropriate circuit. He could not, however, apply to the United States Supreme Court for certiorari. If, however, he were accused of another crime in violation of the United States laws, such as a contempt of court denounced by United States Code, title 18, section 402, he would have the full right of appeal of certiorari in the Supreme Court after his case had been heard and considered in the district court and court of appeals.

One of the most valuable features of Supreme Court jurisdiction is the establishment of uniformity as among the various circuits. If two or more circuits have taken conflicting views as to some rule of law, the decision in each circuit is binding on the district courts within the circuit. Thus, in Nebraska a certain decision of the Eighth Circuit might be the rule which the United States District Court must follow. In the adjoining State of Kansas, the decisions of the Tenth Circuit are controlling. If the Eighth Circuit decisions are in conflict with those of the Tenth Circuit, the rule to be applied would depend on the accident of whether the controversy were to be tried in the United States District Court in Nebraska or in the United States District Court in Kansas, unless and until the conflict is resolved by a decision of the United States Supreme Court.

Controversies which are described in subdivisions (1) and (2) of S. 2640 are essentially matters of nationwide concern where justice requires that the

same rule should be applied regardless of the geographical location of the court hearing the case.

Equally of nationwide importance are all questions relating to the validity of State and local laws and regulations under the Constitution of the United States, or a treaty or law of the United States. This is the chief and most usual ground of jurisdiction of the Supreme Court by appeal or certiorari from the supreme court of a State under United States Code, title 28, section 1257.

S. 2040 proposed in subdivisions (3), (4), and (5) to make exceptions to the jurisdiction conferred by section 1257 in certain classes of cases. In such cases, therefore, the State supreme court decision as to the meaning of the Constitution of the United States would be final and conclusive, however much it might conflict with the decisions of other State supreme courts or with the decisions of the United States Supreme Court. It is conceivable that a certain portion of the Constitution of the United States would have a different meaning in each of the 48 States and still a different meaning in the District of Columbia, so far as concerns the subject matter of subdivisions (3), (4), and (5) of S. 2040.

Thus, to suppose an extreme case, a State might enact a statute compelling any person accused of subversive activities within that State to testify against himself under penalty of imprisonment. The State statute might provide that in the case of a person accused of subversive activities within that State he could not have the benefit of legal counsel at his trial. The highest court of that State might hold that such a statute did not conflict with the United States Constitution and sustain a conviction under it. In another State, perhaps an adjoining State, a similar statute might be held to be in violation of the Constitution of the United States and void. Under S. 2040 the State supreme court decision would be final, without the possibility of appeal to the United States Supreme Court. Thus, the meaning of the United States Constitution would depend on geography and would change as one crossed a State boundary.

One of the chief purposes of our Constitution was to provide an effective union of the States, and this can, of course, be accomplished only if the Constitution has the same meaning and application throughout the United States. If a decision of a State supreme court could effectively set aside a portion of the Constitution in particular cases, to that extent, the Union would be impaired.

The case of *Martin v. Hunter's Lessee* (1 Wheaton (14 U. S.) 304, 4 L. Ed. 97), decided 142 years ago in 1816, throws an interesting light on what is now section 1257, title 28, United States Code, which in effect would be amended by S. 2040. In this case the opinion was by Mr. Justice Story, one of the most highly respected of our early Justices. It was unanimously concurred in by the other Justices including Chief Justice Marshall. The Court of Appeals of Virginia had refused to obey a mandate of the United States Supreme Court in a case involving the construction of a treaty made by the United States with Great Britain. The opinion is too long to quote in full, but I would suggest that it be put into the record of this hearing as an explanation of the necessity of Supreme Court appellate jurisdiction in relation to State court decisions involving the Constitution. In this opinion, the Court, speaking through Mr. Justice Story, discussed various reasons and motives for granting such appellate jurisdiction and then came to another motive which the opinion discusses in the following language (14 U. S. 347-348, 4 L. Ed. 108):

"That motive is the importance, and even necessity for uniformity of decisions throughout the whole United States, upon all subjects within the purview of the Constitution. Judges of equal learning and integrity, in different States, might differently interpret a statute, or a treaty of the United States, or even the Constitution itself. If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the Constitution of the United States would be different in different States, and might, perhaps, never have precisely the same construction, obligation or efficacy in any two States. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the Constitution. What, indeed, might then have been only prophecy, has now become fact; and the appellate jurisdiction must continue to be the only adequate remedy for such evils."

This, I believe, demonstrates that the proposals in S. 2040 constitute a radical departure from the principles on which the Federal Union is founded and would impair the effectiveness of that Union. It would also run counter to the present trend toward uniformity of law in the United States. This trend is exemplified

in the Federal court system by the adoption of the Federal Rules of Civil Procedure in 1938. This resulted in the substitution of a uniform system of procedure in all United States district courts, for the former somewhat chaotic and diverse procedural rules.

Similarly in the field of State law, the movement for uniform State laws has resulted in a greater or less degree of uniformity among the States in matters such as negotiable instruments, sales of personal property, partnership, etc. The Negotiable Instruments Act is an example, and since 1897 when it was first enacted in a few States, it is now in effect in every State and Territory of the United States. Thirty-two of such uniform acts are in effect in four or more States, and the movement is growing in connection with further enactments.

The present proposal should, I think, be defeated.

PAUL F. GOOD.

McLANE, CARLETON, GRAF, GREENE & BROWN,
Manchester, N. H., February 11, 1958.

HON. THOMAS C. HENNING, JR.,
United States Senate Office Building,
Washington, D. C.

DEAR SENATOR HENNING: I have your letter of February 7 advising me of the present status of S. 2646 before the Senate Judiciary Committee. I had not realized that Senator Jenner's bill had been reported back to the full committee by the Subcommittee on Internal Security and I am glad to know that the bill has been returned to the subcommittee for further hearings.

I am entirely opposed to the bill in its underlying reasoning. It seems to me to be another attack quite in the tradition of those who have sought to vent their disappointment of Supreme Court decisions. It should receive the same well deserved fate as efforts to pack the Supreme Court back in the thirties.

Granting that all lawyers and students of constitutional law will from time to time find reason to criticize individual decisions of the Supreme Court and even a considerable line of cases, still it is no satisfactory remedy to parcel out the sovereign power of the Nation among committees of the Congress, officers and agencies of the executive, and to assign to the individual States powers not reserved in the Constitution.

As a lawyer of forty-odd years practice, and a former president of the New Hampshire Bar Association, I am persuaded that this bill if it should become law would lead to chaos and confusion in the administration of Government affairs.

Yours sincerely,

JOHN R. McLANE.

McCARTER, ENGLISH & STUDER,
COUNSELLORS AT LAW,
Newark, N. J., February 20, 1958.

HON. THOMAS C. HENNING, JR.,
United States Senate,
Washington, D. C.

DEAR SENATOR HENNING: At your request, I have examined the text of S. 2646 which I understand will be considered shortly by the Judiciary Committee of the Senate.

In my opinion, S. 2646 is so utterly lacking in merit that it deserves to be summarily rejected. If enacted, the bill would deprive persons of redress against the very same kind of arbitrary power which is the distinctive characteristic of totalitarian governments, including the Communist Government of Soviet Russia. I do not see how anyone who is intelligently and sincerely opposed to communism can possibly favor S. 2646.

Sincerely yours,

CONOVER ENGLISH.

PATTERSON, BELKNAP & WEND,
New York, N. Y., February 27, 1938.

HON. THOMAS C. HENNING, JR.,
United States Senate,
Washington, D. C.

DEAR MR. HENNING: Thank you for your letter of February 7, requesting my views on S. 2646 relating to appellate jurisdiction of the Supreme Court. I strongly feel that this proposed legislation is unwise and dangerous, and I welcome the opportunity to express my opinion in regard to it.

As has been said by Mr. Justice Black, "courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued." Any effective attempt by a faction temporarily in control of Congress to abridge those liberties must envisage an undermining of the courts, and the simplest, most direct method of attack lies in limiting their jurisdiction. Once armed with the precedent that the enactment of this bill would establish, it is possible that future legislators could destroy our carefully constructed system of checks and balances by turning the judicial arm of the Government into a political football.

The decisions of the Court in matters of great public interest over the past century and a half have seldom been popular with every segment of the populace at any one time, but the beneficial effect of the Court's restraining influence cannot, on balance, be gainsaid. Surely, a moment's reflection by supporters of this bill would demonstrate to them its dangers if they thought of it in terms of President Roosevelt's proposed "Court reform" of the 1930's.

Following the Civil War, the fear of the radicals that the Supreme Court would impede their bitter "reconstruction" of a prostrate South led them to enact an act similar to the bill presently pending before your committee. President Johnson vetoed that act (which was later passed over his veto) with a message that applies equally well today:

"Thus far during the existence of the Government, the Supreme Court of the United States has been viewed by the people as the true expounder of their Constitution, and in the most violent party conflicts, its judgments and decrees have always been sought and deferred to with confidence and respect. In public estimation, it combines judicial wisdom and impartiality in a greater degree than any other authority known to the Constitution; and any act which may be construed into, or mistaken for, an attempt to prevent or evade its decisions on a question which affects the liberty of the citizens and agitates the country cannot fail to be attended with unpropitious consequences. It will be justly held by a large portion of the people as an admission of the unconstitutionality of the act on which its judgment may be forbidden or forestalled, and may interfere with that willing acquiescence in its provisions which is necessary for the harmonious and efficient execution of any law."

Assuming that the proposed bill is constitutional (see *Martin v. Hunter*, 1 Wheat. 304, 332-33 U. S. 1810), the result of its enactment would nevertheless be the weakening in practice of the checks and balances theory of our Government. I am therefore opposed to the proposed bill.

Sincerely yours,

JOHN V. DUNCAN.

LAW OFFICES OF
WINTHROP, STIMSON, PUTMAN & ROBERTS,
New York, N. Y., February 20, 1938.

HON. THOMAS C. HENNING, JR.,
United States Senate,
Washington, D. C.

MY DEAR SENATOR HENNING: I have your letter of February 7 and I am enclosing herewith a statement on the subject of S. 2646 which I should be very glad to have you use in anyway you see fit.

I appreciate your calling this to my attention.

Yours sincerely,

ALLEN T. KLOTS.

STATEMENT ON S. 2040

To the United States Senate Committee on the Judiciary:

I am a member of the bar of the Supreme Court of the United States and of the State of New York and I am a past president of the association of the bar of the city of New York. I want to record my sincere hope that S. 2040, which is a bill "To limit the appellate jurisdiction of the Supreme Court in certain cases," will never receive favorable action.

The area in which this bill seeks to limit the jurisdiction of the Supreme Court involves some of the most sacred guarantees of our free society—the field of individual rights protected by the Bill of Rights as included in our Constitution. It involves particularly one of the most precious rights of all, namely, that no one shall be deprived of life, liberty, or property without due process of law. There should certainly be preserved to the highest Court of the land the jurisdiction to defend and preserve these rights.

Without the nationwide authority which only this Court possesses, there is no assurance that these rights and guarantees will be uniformly protected and interpreted. The thought that a man should receive one kind of justice in one part of our country and a different kind of justice in another is surely intolerable. Uniformity and homogeneity in the administration of justice throughout the land is certainly one of the vital attributes of a single, undivided nation.

The Supreme Court is one of the great institutions of this democracy. The prestige in which it has traditionally been held and the determination with which our people have upheld its right to defend the Constitution from all attacks have enabled this democracy, perhaps more than any other feature of our society, to survive and prosper, where so many of the democracies in history have perished or lost their identities. It would be the utmost folly for us, merely because some, perhaps many, of us disagree with certain of its recent decisions, to lose our heads and strip this tribunal of an essential part of its authority.

Respectfully submitted.

ALLEN T. KLOTS.

KELLEY, DRYE, NEWHALL & MAGINNES,
(RATHBONE, PERRY, KELLEY & DRYE).
New York, N. Y., February 27, 1938.

HON. THOMAS O. HENNINGS, JR.,
Senate Office Building, Washington, D. C.

MY DEAR SENATOR HENNINGS: Thank you for your recent letter, enclosing a copy of S. 2040 and requesting opinions on this bill. I appreciate the opportunity of expressing my views.

If enacted, the bill would prevent the Supreme Court from reviewing lower court decisions on the validity (constitutional or otherwise) of State and Federal action in five specified fields.

The prevention of review by some one court of last resort would allow to stand the decisions of inferior courts in these constitutional fields, including the courts of appeal for the 10 circuits and for the District of Columbia and the courts of the 48 States. This would lead, as we know from experience, to conflict among the decisions—the same question would be answered differently in different courts—and the outcome in any particular case would depend not on the merits but on geography.

The inevitable result would be uncertainty and, even worse, disrespect for the courts and the Constitution. In turn, lower court decisions invalidating State and Federal action in the five fields would in time lose their sanction and effectiveness. We are bound to infer that these results of the bill were intended.

In other words, the bill is an oblique attempt to maim the principle of judicial review—the power of the courts to determine the constitutionality of any act of the legislature or the Executive or the States. Though this principle has been attacked by different people at different times, it has on the whole worked very well.

The particular fields dealt with by the bill show that its purpose is to reverse the effect of particular Supreme Court decisions. (I happen to agree with most of them, but I would write this same letter even if I did not.) When people disagree with a Court decision, however, there are certainly remedial measures they can propose short of turning our judicial system into a shambles.

I oppose S. 2646. And I am confident that, particularly with the demonstration of its disruptiveness that I know you will make, the Judiciary Committee will vote it down.

Sincerely yours,

THEODORE PEARSON.

LAW OFFICES OF

HARRIS, BEACH, KEATING, WILCOX, DALE & LINOWITZ,
Rochester, N. Y., February 28, 1958.

Senator THOMAS C. HENNINGS, Jr.,
United States Senate, Senate Office Building,
Washington, D. C.

DEAR SENATOR HENNINGS: I appreciate very much your thoughtful suggestion of February 7 that I might want to comment on Senate bill 2646 which is being returned to the Senate Judiciary Committee for full consideration.

It seems to me that there are two basic issues with respect to the bill. First, is legislation of this type constitutional, and second, if it is constitutional, is it desirable?

With respect to the first, I would assume that there is little question as to the constitutionality of such a measure. Article 3 of the Constitution provides that the appellate jurisdiction of the Supreme Court shall be affected by such exceptions and regulations as the Congress may determine. Congress clearly has the right to remove appellate jurisdiction from the Supreme Court in certain specified areas, and this has been well established since *Ex parte McCordle* (7 Wallace 506 (1859)).

In that case the Court held constitutional military reconstruction acts which undertake to remove from the appellate jurisdiction of the Supreme Court matters affecting the grant of habeas corpus to a prisoner held by military courts.

Despite the fact that such limitations on the appellate jurisdiction of the Supreme Court are legal and constitutional, I have no recollection of any such effort to encroach upon the appellate jurisdiction of the Supreme Court since the Civil War days. It is my judgment that Congress has shown wisdom in restraining its inclinations to do so, and the present bill indicates why this is so.

As I read S. 2646, it would select the security criterion as one which justifies exemption from the usual course of Supreme Court reviewing. Moreover, it selects several ad hoc administrative areas in which some recent decisions have reaffirmed constitutional guaranties. Since this limited administrative sphere is exempted from review, it would naturally tend to invite litigation with respect to the proper definition of the areas which are covered.

Apart from this, there would seem to be certain significant technical gaps. For example, since section 1252 of the present Judiciary Code permits direct appeals from district courts which have held a statute unconstitutional, it would seem to me that there would subsist some right of appeal to the Supreme Court even in the fields specifically delineated by the proposed bill. The test of whether a case did or did not reach the Supreme Court might, therefore, depend to a great extent on the tactical skill of the litigant in presenting the issue before the forum which would assure him of ultimate right to Supreme Court appeal.

It seems to me that the bill is an example of legislation by indignation. Senator Jenner is obviously disturbed at some of the recent Supreme Court decisions. This would, however, hardly seem to justify resorting to the legislative process as a visceral tool.

Sincerely,

SOL M. LINOWITZ.

CLEVELAND, OHIO,
February 25, 1958.

HON. THOMAS C. HENNINGS, Jr.,
United States Senate, Washington, D. C.

DEAR SENATOR HENNINGS: Thank you for sending me a copy of Senator Jenner's proposal to limit the jurisdiction of the United States Supreme Court. I am happy to join with what I hope will be an overwhelming expression of opinion from American lawyers that adoption of Senator Jenner's proposal would be most unwise.

I happen to feel that the recent decisions of the Supreme Court with regard to the Smith Act, the conduct of congressional investigations, and the disclosure of witnesses in criminal prosecutions are sound. Even if I did not, however, I would feel strongly that the Supreme Court makes an important contribution to continuity and stability in the United States and that its decisions, if erroneous, should be corrected by legislation and by the passage of time and not by narrowing its jurisdiction.

I should think that conservatives such as Senator Jenner would be particularly interested in preserving the jurisdiction of the Supreme Court, which in another day may be a real protection against an attempt by Congress fundamentally to depart from our traditional constitutional practices.

Very truly yours,

HUGH CALKINS.

LAW OFFICES, PAXTON & SEASONGOOD,
Cincinnati, Ohio, February 11, 1958.

Hon. THOMAS C. HENNINGS, Jr.,
United States Senate, Washington, D. C.

DEAR SENATOR HENNINGS: By letter of February 7, 1958, you have furnished me with a copy of and have asked my views, pro and con, respecting S. 2040, a bill to limit the appellate jurisdiction of the Supreme Court in certain cases. This proposed bill was, you inform me, returned by the Senate Judiciary Committee, after consideration, to the Subcommittee on Internal Security. It is my view that an enactment of the proposed bill would be ill-advised and unfortunate in trying to take away from the Supreme Court jurisdiction in the kind of cases mentioned in the bill, which jurisdiction the Supreme Court has had throughout its existence. Review by the Supreme Court in cases of the kind that would be taken from its jurisdiction by the proposed bill is most essential from every point of view, including the necessity of having a final decision that means the same treatment everywhere in the United States of such cases. If jurisdiction in such cases ended with decisions of the courts of appeals of 10 various circuits, these may differ so that the law on a matter of national concern might be different depending on the locality in which the matter leading to the cases occurred. It would be most regrettable if, in affairs of national concern, the same matter might be permissible in large sections of the United States and impermissible or illegal in other sections.

The bill seems to be motivated by a dislike of some of the decisions of the United States Supreme Court in connection with cases involving happenings related to the matter sought to be taken away from the jurisdiction of the court. In the long history of the Court, there have frequently been strong feelings of opposition to many of its most important decisions. However, the Supreme Court of the United States is an essential in our plan of government. It is an institution and in the course of time the Justices whose opinions may not be liked cease to serve. The Court as such should not be circumscribed by attempts to limit its jurisdiction as the bill under discussion would do.

Respectfully,

MURRAY SEASONGOOD.

WILLIAM L. JOSSLIN,
ATTORNEY AND COUNSELOR AT LAW,
Portland, Oreg., February 10, 1958.

Re: S. 2040.

Hon. THOMAS C. HENNINGS, Jr.,
United States Senator,
Senate Office Building, Washington, D. C.

DEAR SENATOR HENNINGS: Thanks for your letter of February 7, 1958, calling my attention to the above bill to deprive the Supreme Court of its jurisdiction in cases involving witnesses charged with contempt of Congress, Federal employees, and schoolteachers accused of subversive activities, persons charged under a State subversive activities statute, and persons excluded from the practice of law within a State.

This is an extremely dangerous bill, striking as it does at some of the most fundamental of the civil rights guaranteed by our Constitution. If adopted, this bill would be a long step in the direction of a police state. I am strongly opposed to S. 2040, not only for its own intrinsic demerits but because it may prove to be a wedge in opening the door wider for further persecution of the more liberal elements in the country.

I have not had an opportunity to give this bill the full study of its constitutional aspects that it should have, but I have a strong feeling that it is unconstitutional. I gravely doubt that the judicial power of the United States, which by article III of our Federal Constitution, is vested in the Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish, may be so restricted by congressional enactment within the field of cases covered by section 2 of article III, or otherwise provided by amendments.

S. 2646 would subject a citizen without effective recourse to the most oppressive type of regulation and thought control, with their corollaries of guilt by association, trial by gossip uttered by "faceless witnesses," and the other techniques which have been developed in recent years to destroy the reputation of citizens without respect to the time-tested procedures for establishing the truth or falsity of charges.

Of course, no one objects to a governmental agency taking appropriate and intelligent measures to deal with traitors and spies, but the average such agency is not at all equipped to deal with such problems effectively. In my opinion the control of subversion should be left very largely in the hands of such agencies as the Federal Bureau of Investigation and other bodies especially trained to deal with such elements, subject to the existing constitutional protections.

In view of the sad history of the recent past involving the wholesale condemnation of large masses of Government employees, all but an infinitesimal portion of whom were found to be devoted and patriotic citizens, indicates that the accused need more protection, rather than less.

I am sending copies of this letter to Oregon's Senators, Hon. Wayne Morse, and Hon. Richard L. Neuberger, as I know both of them would be very much concerned about this bill.

Sincerely,

WILLIAM L. JOSSLIN.

RAYMOND PITCAIRN,
ATTORNEY AT LAW,
Philadelphia, Pa., February 10, 1958.

HON. THOMAS C. HENNING, JR.,
*United States Senate, Committee on the Judiciary,
Senate Office Building,
Washington, D. C.*

DEAR SENATOR HENNING: I appreciate the opportunity to express my opinion on Senate bill 2646. This bill, in my view, is unwise and extremely dangerous. It is in the same category and just as subversive as President Roosevelt's ill-conceived "Court packing" scheme.

By its attack on the historic jurisdiction of our Supreme Court, S. 2646 strikes at the very heart of our Federal system. The enforcement of government under law will be made impossible if the umpire is to the disqualified every time a decision is rendered with which Congress disagrees. It would, indeed, be a destructive precedent.

By giving the several circuit courts ultimate authority in great fields of individual rights, the bill would lessen the dignity and authority of the Supreme Court in every field and would produce the absurd result that our law on fundamental liberties would vary from circuit to circuit with no final arbiter.

The Supreme Court has always stood and still stands as the bulwark of our personal liberties. This bill, if enacted, would jeopardize our great constitutional principle of judicial review and checks and balances. It should be killed.

Very truly yours,

RAYMOND PITCAIRN.

JEROME K. CROSSMAN,
ATTORNEY AT LAW,
Dallas, Tex., February 11, 1958.

Re: S. 2646

Hon. THOMAS C. HENNING, Jr.,
United States Senate,
Washington, D. C.

MY DEAR SENATOR HENNING: It is inconceivable to me that any responsible party would even seriously consider affirmative action on S. 2646.

Limitation of time does not permit a briefing of this proposed bill, but the faults inherent in the proposal are so obvious that "he who runs can read." This would indeed be legislation for a special group, and contrary to all of our traditions of freedom. It would seem to be that the bill would better be entitled "Emasculation of the Supreme Court of the United States." This looks like an attempt to drive an entering wedge with the object in view, through this and similar attempts later, to certainly destroy the authority of the Supreme Court of the United States.

I beg of you to do everything within your power to see that this bill be not passed.

Sincerely,

JEROME K. CROSSMAN.

LAW OFFICES,
LITTLE, LESOURD, PALMER, SCOTT & SLEMMONS,
Seattle, Wash., February 10, 1958.

Senator THOMAS C. HENNING, Jr.,
Senate Office Building,
Washington, D. C.

DEAR SENATOR HENNING: I have your letter of February 7.

I am delighted to know that you will vote in opposition to Senate bill 2646. This bill, if constitutional (which I doubt), would seriously endanger the present separation of power as between the three branches of our Government. I compliment you on your strong stand and wish you all the success in the world.

Not enough people realize what a fine thing it is to have an independent judiciary which can redress the excesses caused by current waves of hysteria, aided and abetted by such excesses as McCarthyism.

Very truly yours,

HERBERT S. LITTLE.

FABIAN, CLENDENIN, MOFFAT & MAREY,
ATTORNEYS AND COUNSELORS AT LAW,
Salt Lake City, Utah, February 11, 1958.

Hon. THOMAS C. HENNING, Jr.,
Senate Office Building,
Washington, D. C.

DEAR SENATOR HENNING: I am grateful to you for calling my attention to S. 2646 presently pending before the United States Senate.

The purpose to be served by the proposed bill is not set forth. It would seem that the proponents of the bill object to having the actions of committees of the United States Congress and certain rulings of inferior courts reviewed by the United States Supreme Court, for a reason which is not apparent in the legislation.

Having some familiarity with the decisions of the United States Supreme Court in which the action of some congressional committees have been found to infringe upon the rights of the individuals and in other cases have found certain Executive orders and State statutes to have likewise infringed upon the rights of the individual, it would appear that the proponents of the bill feel that the question of the infringement, imposed by the State statutes and congressional committees upon our civil rights, should not be reviewed by the Supreme Court. I herewith wish to go on record as being opposed to any such bill.

In my opinion such legislation would be a material departure from the Bill of Rights as conceived by the drafters of the Constitution.

Sincerely yours,

D. HOWE MOFFAT.

SEATTLE, WASH., February 13, 1958.

HON. THOMAS C. HENNING, JR.,
*United States Senate,
 Senate Office Building, Washington, D. C.*

DEAR MR. HENNING: Thank you for your letter of February 7 and for the opportunity it presents to express my sentiments on Senate bill S. 2040.

Enclosed is a short statement which you may use as you see fit.

I am sometimes confused with my father, who was national commander of the American Legion in 1939 and Republican nominee for the Senate in 1940.

Although he undoubtedly shares my sentiments, I have not had an opportunity to discuss the matter with him or ask him to join me in subscribing to a statement.

Be assured of our well wishes for your commendable efforts.

Most sincerely yours,

STEPHEN F. CHADWICK, JR.

STATEMENT OF STEPHEN F. CHADWICK, JR., ON S. 2040

It is inevitable that from time to time our awareness of an issue presented to an appellate tribunal would incline us to a decision contrary to the of the Court. However, we can seldom say that our inclination is based on so broad an understanding as that of the Court after the full presentation made, of necessity, in the suit before it.

Now it is proposed by Senate bill S. 2040, introduced by Mr. Jenner in the 85th Congress, that the jurisdiction of the Supreme Court be reduced so that it may not review:

- (a) Congressional contempt proceedings;
- (b) Most Federal employment security cases;
- (c) Cases involving State regulation of subversive activities;
- (d) Cases concerning subversive activities in teaching bodies; and
- (e) Cases involving admission to practice of the law.

It must be presumed that this change would not be proposed were it not believed by its sponsor that the Supreme Court's review of cases of this sort has been unhealthy in effect, or will be so, or both.

The Communist Party, long regarded as the core of subversion in the United States, has been on a steady decline in recent years. So, it is apparently not such a comfort to subversion that the civil liberties of a subversive may be protected by review in the Supreme Court, as to encourage it.

Perhaps, on the other hand, valuable encouragement is given free expression when the protection of the uniform interpretation of laws is afforded those who may be unjustly charged with subversion. In ratifying the 14th amendment the States did not find the amendment objectionable because it did not except State laws relating to subversion.

What novel national danger now requires that our citizens be denied the protection of Supreme Court review, and application of the 14th amendment where that body finds it appropriate, in cases involving as ill defined a subject matter as subversion?

One man's patriotism is often another's subversion. With life tenure, a broad background in national affairs and the temperament and acumen which members of the Supreme Court possess, that body can best ultimately judge the sufficiency of local definitions of subversion to the United States, to dispassionately determine whether an antisubversive law or school board regulation may abridge the privileges or immunities of citizens of the United States, or whether a person has been deprived of life, liberty, or property without due process of law in a contempt proceeding, Federal employee security case, or before a school board.

The dangers which S. 2040 seeks to avoid are insignificant beside those it might enhance. There is no basis for now reducing the jurisdiction of the Supreme Court.

STEPHEN F. CHADWICK, JR.

GRAVES, KIZER & GAISER,
 Spokane, Wash., February 11, 1958.

HON. THOMAS C. HENNING, JR.,
United States Senate, Washington, D. C.

DEAR SENATOR: Senate bill 2040, to limit the appellate jurisdiction of the Supreme Court in certain cases, has been given a careful study by me, as a lawyer of more than half a century of practice of my profession, active in

appellate practice before our State supreme court, the United States courts of appeal, and the Supreme Court of the United States.

The purpose of the bill is manifest. It proposes to widen the territory in which McCarthyism may again flourish, unmolested by observance of the civil rights of those whom it elects to prosecute.

It is well established that many of the investigations, here sought to be withdrawn from review by the Supreme Court, often carried on by a single member of a so-called Un-American Activities Committee of a State or the Nation, have gone far beyond the scope of legitimate legislative inquiry, where the legislator has sought to become a law-enforcement or trial agency, thus usurping functions of the executive and judicial departments of the Government. In so doing, the familiar safeguards of the accused, the right to be confronted with the witnesses accusing him, the right to trial by jury, the right to be represented by counsel, and to cross-examine the witnesses, have been flagrantly disregarded.

In commenting on such an investigation, in *Watkins v. U. S.* (354 U. S. 178), the Supreme Court said:

"Investigations conducted solely for the personal aggrandizement of the investigator, or to 'punish' those investigated, are indefensible."

These are the words of judicious and judicial restraint. Much stronger language would be justified in a number of the cases where the United States Supreme Court has been obliged to come to the rescue of a citizen whose civil rights have been arbitrarily denied him.

This act is manifestly designed to punish the United States Supreme Court for its justifiable protection of the civil rights of those accused. If passed, it would be the first time in the history of that great Court when so important a segment of its jurisdiction has been sought to be withdrawn, out of motives of revenge, inspired by angry men, feeling themselves rebuked by it.

It would be far more becoming to a great body, such as the United States Senate is, if its ablest Members were to express the great admiration so widely felt among the lawyers of this country for the courage and great ability of the Supreme Court in vindicating the civil rights of our citizens, in a series of opinions that are landmarks in our jurisprudence, bound to earn the gratitude and applause of generations to come, when the fevered fears of this postwar period shall have disappeared.

Furthermore, freed from a court of last resort, different United States courts of appeal and the 48 State supreme courts, on great constitutional issues touching the rights of the citizen would be free, each to develop its own view, and the resulting conflicts could not be reconciled as they now are by the United States Supreme Court. Thus, the passage of this act would inevitably lead to confusion and uncertainty in the law, to a gravely harmful extent.

It is inconceivable to me that our Congress could ever be brought to enact legislation so fraught with evils to the citizen and grave uncertainty in the law.

Respectfully,

BENJAMIN H. KIZER.

Senator HENNINGS. Now, in conclusion, I will get to my own statement again, Mr. Chairman. You have been very indulgent.

Senator BUTLER. It has been a pleasure to hear the Senator.

Senator HENNINGS. Mr. Chairman, I will conclude in just a moment.

Mr. Chairman, as you know, the question before us is of tremendous importance. But it is impossible for the subcommittee to hear from more than a few of the lawyers throughout the country who could shed light on this subject. That is why I wrote these various lawyers, and very few of them do, I know, and I assure the chairman that we did not undertake to persuade them to express one opinion or another. If we had, I am sure they wouldn't yield to such persuasion.

That covers the deans and outstanding lawyers from coast to coast. I would also like to ask, if I have not already done so, Mr. Chairman, permission to have printed in the record of the hearing at this point a list of these outstanding attorneys.

Senator BUTLER. It will be so ordered.

Senator HENNINGS. Thank you, sir.

In my letter, Mr. Chairman, I solicited the opinions of these men pro or con, and I would like to have permission of the subcommittee to have my letter, and the replies thereto printed in the record of the hearing at the close of my testimony.

Senator BUTLER. So ordered.

(The documents referred to are as follows:)

On February 3, the Senate Judiciary Committee considered S. 2648, which had been favorably reported to it by the Subcommittee on Internal Security, and a copy of which is enclosed. In my view, this bill presents a most serious issue, since, if enacted, it would work a basic change in our governmental system.

It was brought out at the meeting that the bill had been reported after the briefest possible hearings; only the bill's sponsor, Senator Jenner, and one staff member were heard as witnesses in favor of the bill; no adverse witnesses were heard. In view of this situation, it was decided to return the bill to the subcommittee for further hearings.

I shall appear as a witness against this legislation. I also believe that there would be a large number of distinguished lawyers and other citizens who would wish to appear as witnesses. However, as the hearings shall take place in the next few weeks, and as there will be a limit to the number who can testify in person, it occurred to me that it might be helpful to solicit the written opinions of a large number of "absent witnesses." It is in this connection that I am circulating this request for opinions on this bill. I shall ask that your views (pro or con) be printed as part of the record of the hearings, which are scheduled to begin in the next few days.

As the bill is to be returned again to the full Judiciary Committee very soon, your reply will be needed promptly if it is to be of greatest use. If possible, I would like to have it in hand by March 1.

Sincerely yours,

THOMAS C. HENNINGS, JR.,
United States Senate.

NOTRE DAME LAW SCHOOL
Notre Dame, Ind., February 25, 1958.

HON. THOMAS C. HENNINGS, JR.,
United States Senator,
Washington, D. C.

MY DEAR SENATOR: Thank you very much for your letter of February 7. The problems that you bring to my attention undoubtedly present, as you rightfully say, most serious issues. The suggested solutions cannot be either summarily rejected or accepted. They merit most attentive consideration.

Obviously, constitutionally, Congress has the power to limit the appellate jurisdiction of the Supreme Court, and has exercised its authority in the past. The Court never denied the congressional powers and declined to deliver its opinion even when the statute depriving it of its jurisdiction was enacted after the hearings in the case were had; see the famous case of *Ex parte McCordle*, (7 Wall. 506 (1868)). Therefore, the problem presents no legal issues, but just questions which should be answered in the light of considerations of public policy.

Probably, the first observation which will come to the mind of most Americans on any proposal to limit the appellate jurisdiction of the Supreme Court, will be that in a country governed by a "rule of law" as many questions as possible should be answered, in the last instance, by a judicial body. Unless the Supreme Court declines to take jurisdiction on the ground that the issue submitted to it is political in nature and not justiciable, it should have the final word in the matter, being the highest tribunal of the Nation. Only considerations of gravest importance could be sufficient to change this state of things. And, clearly, once the Supreme Court delivers its opinion in a matter submitted to it, its judgment constitutes a part of the law of this country which must be respected, even if it is criticized; and of course, the right to criticize any of the three branches of Government is a necessary attribute of citizens in every democratic country. It is really sad that after some recent decisions of the Court voices were heard to disregard them or to impeach the Justices. On that point, please see the enclosed copies of my exchange of letters with the Georgia Commission on Education. Kindly consider them as a part of the present letter.

On the other hand, some decisions of the Court were puzzling and merited a wide disapproval in the country. Unquestionably, the Justices of the Court in good faith try to apply the constitutional rules, as they understand them, to all cases submitted to it. But, as has been frequently said, the Constitution is what the Supreme Court says it is. Vague clauses such as the due-process clause or the commerce clause are too indefinite to provide any guidance to the Court in a concrete situation. The Court can give any meaning it wishes to most constitutional provisions. It endeavors to grant the same protection to those accused of crimes and subversive activities as to any other citizen. The Court should be praised for its objectiveness. But didn't it go too far in some instances? Does not the way the Court understands some constitutional guarantees to the citizens result in danger to the security of the Nation? By a stroke of a pen, the Court can annul security laws of Pennsylvania, and, in effect, of 41 other States; *Pennsylvania v. Nelson* (350 U. S. 497 (1956)); it can order the executive branch of the Government to retain the services of a person whose loyalty is subject to doubt; it can rule that believers in theories dangerous to the security of the country must be admitted to the practice of law along with others; but are such decisions to the advantage of the Nation?

After all, the legal rules of every community have the purpose of maintaining peace and order, contributing to the well-being of the citizens, and protecting society against internal and external danger. The soundness of the application of law in a way contrary to these principles is, to say the least, questionable. It is the tendency of the Supreme Court as well as of many other courts to apply sometimes strict rules of law—as they understand them—to different situations irrespective of reasons of public policy, of the possible consequences of the decision, and of the very place that legal rules have in the life of the Nation. "The misuse of logic or philosophy begins when its method and its ends are treated as supreme and final;" Cardozo, *The Nature of the Judicial Process* 46 (1921). The dry, mechanical, and legalistic approach of the Court may result in serious danger to the country. The situation is still worse when the legal rules that support the Court's decisions are so vague that they can hardly be treated as having any meaning at all.

Emergency situations require the taking of special measures, apt to come with new and vital problems. The question as to how to deal with the situation created by a civil war could hardly be answered by consulting the Constitution which did not provide anything on the point. Still, the Supreme Court had to apply the basic law of the country to decide issues arising in connection with the reconstruction of the country after the disaster—in circumstances never contemplated by the framers. The only possible solution, which Congress decided to adopt, was to deprive the Court of its appellate jurisdiction in cases provided for by legislation. And Lincoln went as far as to disobey writs of the Chief Justice of the Court.

It seems that the Nation is again in an unusual situation. With the whole free world, it is facing a mortal danger. And, as the leader of the free nations, it has special responsibilities to all humanity. Can it preserve its own independence and that of the others if it does not fight the danger at any step and stage of its apparition? Should it connive at subversive persons being permitted to teach and poison the souls of the American youth only because some requirements of due process, as understood by its Supreme Court, have not been met? Should it suffer disloyal employees, potential traitors and spies, work for the Government? Surely, nobody can be forced to incriminate himself. Nobody can be punished for invoking the fifth amendment. But does the Constitution really require that those who use this amendment as a shield be given the same confidence as citizens who do not have anything to hide and can frankly answer any question they are asked to reply to? Does the Constitution actually forbid to draw inferences from the fact that someone is looking for the protection of the amendment? To me, such persons automatically disqualify themselves from holding any position of trust and confidence.

In order to convict an accused in a criminal case, his guilt must be established beyond reasonable doubt. Does it follow that the same requirement of due process is applicable to persons who are granted the privilege to work for the Government? to teach the young generation? to practice law and help to administer justice?

Maybe, it is better to dismiss a criminal case against a hundred criminals who committed a felony than to convict one innocent person. But it seems to me that it is vital to the Nation that a hundred of suspects be barred from occupying some positions rather than one subversive be permitted to continue to

work on a job involving the security of the Nation. We can take no slightest risk any longer. We were much too lenient until now, and we and our allies permitted "leaks" which resulted in spectacular achievements of our enemies.

The emergency situation which the free world faces can hardly be reckoned with by the Supreme Court in its decisions. It just tries to apply the Constitution, written nearly 2 centuries ago, as it understands its mandates. Unquestionably, some of the recent decisions of the Court would be unthinkable in any other country in the world, even those granting their courts the power of judicial review. And still, some other nations also believe in the rule of law.

The Court is unable to deal with the situation. Therefore, it seems to me that it may be proper to do something about it. I see some merit in the proposed legislation. As abhorrent as the idea of limiting the jurisdiction of the supreme judicial body of the United States is, maybe it would permit the Nation to be governed by measures required by the circumstances, not by legal dogmas, real or imaginary, which prove unworkable in some situations presented.

As you asked me to do so, I pointed out the pros and the cons of the bill introduced in Congress, as I see them. Reluctantly, I must conclude that to me, the pros have it.

Maybe I should not engage in prophecies, but I am tempted to say that I do not believe that the bill has a chance of being adopted. The majority of the Nation, as I see it, strongly dissents from the opinions of the Supreme Court in question. However, the suggested legislation is a drastic measure, and the Americans are rarely prone to take drastic steps. They suffer rather than take energetic action against such a phenomenon as e. g. the wave of vandalism. Although the Chicago Tribune usually reflects the views of the minor segment of the American public opinion, it seems that its editorial of February 24, which you will find enclosed, presents the typical approach to the problem.

If possible, I would be much obliged to you for sending me the views expressed in the hearings when they are printed. I would also appreciate very much receiving opinions on the question of passports, which, as you wrote me, were supposed to be printed. Both problems are most interesting to me. Thank you very much.

Very sincerely yours,

W. J. WAGNER,
Associate Professor of Law.

GEORGIA COMMISSION ON EDUCATION,
717 One Peachtree Boulevard, Atlanta, Ga.

DEAR SIRS: I just received a copy of A Resolution Requesting Impeachment of Six Members of the United States Supreme Court. I wonder why you waste your time, energy, and money in distributing such stuff. I may just repeat the comment of a member of your legislature: you are making yourselves "ridiculous before the world," as well as his question: what better way could you serve the Communist press than to adopt such a resolution as this?

I can add another question: Are you guys serious?

Truly yours,

W. J. WAGNER,
Associate Professor of Law.

THE GEORGIA COMMISSION ON EDUCATION,
Atlanta, April 9, 1957.

HON. W. J. WAGNER,
*Associate Professor of Law, Notre Dame Law School,
Notre Dame, Ind.*

DEAR PROFESSOR WAGNER: Having spent 4 years attending the University of Notre Dame I was somewhat amazed by your reaction to the resolution requesting impeachment of six members of the United States Supreme Court. While I was attending that university I always observed an attitude of serious consideration of divergent views.

I hope that your letter was a result of reading the resolution and a serious consideration of its contents. The traditions of your law school could hardly characterize as a waste any document which so clearly brings to the attention of its readers the serious threat to constitutional government.

When you have seriously reviewed this resolution I would appreciate your comments.

Sincerely yours,

T. V. WILLIAMS, Jr., '50.

APRIL 18, 1957.

Mr. T. V. WILLIAMS, Jr.,

*Executive Secretary, the Georgia Commission on Education,
717 One Peachtree Building, Atlanta, Ga.*

DEAR MR. WILLIAMS: Thank you for your letter of April 9. It appears that you endorse, in good faith, the resolution of Georgia. You are undoubtedly right in saying that every view is entitled to serious consideration. By the same token, if after such a consideration the view under examination appears to merit strong disapproval, such disapproval may be openly expressed.

Your resolution is based on two types of decisions and orders of the Supreme Court and its members. The first one includes the handling of cases against Communists; the other one, the desegregation decisions. The analysis and rebuttal of all allegations and omissions of your resolution would be a job overstepping the limits of a letter. Let me point out two outstanding misleading statements or omissions. First, if you are able to be objective, you will recognize that the NAACP is not a Communist-front organization. On the contrary, your methods of treating the Negroes, based on bias and discrimination, bring about dissatisfaction with the American system, under which such things are possible, turn the minds of some people toward communism, and serve as an ideal tool for anti-American propaganda all over the world.

Second, from the resolution it appears that the Supreme Court, or the majority of its members, treated the Communists with a particular sympathy and leniency and granted them a special protection unwarranted by the Constitution. In fact, the Court gives the same treatment to all people, whatever their political and religious opinions are, and to criminals as well as to saints. See, e. g., many cases involving the Jehovah's Witnesses, or the famous *Terminiello* case (337 U. S. 1 (1949)), in which the same constitutional protection was given, under most revolting circumstances, to a person believing in ideas diametrically opposed to the Communist ones.

The pride of this country is that everyone is granted the same legal treatment, and the constitutional liberties and guarantees extend to everyone. The duty of the Supreme Court is to apply the due-process clause, the free-speech clause, and the equal-protection-of-the-laws clause indiscriminately, even as to Communists. Any other approach would put an end to the American constitutional system.

This does not mean that you have to agree with every opinion of the Supreme Court. Your understanding as to how the Constitution should be applied in a particular case can be different from that of the Court. But, after all, there must be a body which has the duty to decide the problem in the last instance. This body, in the American system, wrongly or justly, is the Supreme Court. Your resolution seems to say that the final word belongs to the States. Of course, this would be the end of the Union, and would bring back the situation in this country to the one existing some 180 years ago. The Supreme Court does not usurp any power. You usurp it, contending that you rather than the Supreme Court have the right to determine what State act is constitutional, and what is not.

Of course, you do not know me personally. If you did, you would know that I spent most of my free time, in the last 20 years, in fighting against communism. But in this fight, we must not use means adopted by communism. We have to abide by the rules of fairness and due process. If you believe that the American constitutional system is bad, you are free to advance the idea of a constitutional amendment by repealing the due-process clause, the equal-protection clause, or the power of judicial review. However, requesting impeachment of the Justices of the Court, just because they fulfill their constitutional functions, can hardly be considered serious.

As far as the desegregation opinions of the Supreme Court are concerned, your stand is still worse. To the enormous majority of the American Nation, it is hardly conceivable how these decisions could go another way. Your treatment of the Negroes is a disgrace to the United States. After bias and discrimination is outrooted, which I hope will happen before long, future generations will be ashamed of your ideas as much as we are ashamed today of the fact that legal disputes were solved by ordeals, that "witches" were burned,

and that there was slavery in this as well as in many other countries. Racism of Hitler's style, incompatible with Christianity and modern civilization, disappeared from the surface of the earth some 12 years ago. Yours is doomed to follow. The sooner it happens, the better.

Should you engage in some traveling abroad, you would be much impressed by the disastrous effect that the Negro question in the South has on the American effort to win friends all over the world and oppose the expansion of communism. The United States faces the most terrible danger in its history. It needs support from other nations. It should be the leader of the free world in its struggle against Asiatic barbarism and totalitarianism. If it stands for freedom and equality, why does it permit a part of its population to be discriminated against? How can you expect the Africans and the Asiatics to believe in the American ideals if they are violated, every day, in the South of the country? To win the cold war and gain understanding in other countries, the United States spends millions of dollars, publishes hundreds of pamphlets and papers, maintains the United States Information Agency, the Voice of America, sends outstanding persons on good-will tours, etc. All of the efforts and money have less effect than one news item from the South: A Till case, some anti-Negro riots, an exclusion of a colored student from a university, a persistent segregation in buses in spite of the Supreme Court rulings, a dismissal from job of a doctor who had lunch with a Negro nurse in a restaurant. You do not imagine what is the effect of such news all around the world. The Communists leap at such news, exaggerate the facts, repeat them all over, comment on them, ruin the friendly sentiment toward the United States. You furnish the best propaganda items to the foes of the country. Not the Supreme Court, but you give aid and comfort to the enemies of the United States, whether you intend it or not. Recently, one of my acquaintances from India, who was a good friend of the United States visited this country. Because of his dark complexion, he was ejected a few times, in the South, from some places reserved for the whites. You may guess whether upon his leaving the United States he was still attached to the United States, and whether he will make a good propaganda when he returns to India.

You are not bound to entertain relations, in your private life, with either Negroes or Mexicans or Germans or Poles or Jews or English or the red-haired, or those who are over 60 or more than 6 feet tall. But in public life, politics, schools, trains, etc., you cannot constitutionally deny anyone equal rights.

Your attitude toward the Supreme Court brings the United States inestimable damage, here and abroad. It also teaches the young generation disrespect for the supreme authorities of this country, defiance to well-established legal principles. It breeds hatred and lawlessness.

Undoubtedly, you have preconceived ideas, and no matter what I tell you, you will believe in everything you were told by your friends from the Georgia Commission on Education and some other outstanding citizens of your State. It is sad that you and some other people, undoubtedly good patriots, and acting in good faith, instead of helping the United States in concentrating on fighting communism, the worst enemy this country and the free world ever had, involuntarily help its enemies in this struggle. Georgia is not one of the richest States. Instead of using its financial resources for the welfare of its population, you engage in a most expensive and hopeless campaign, trying to defend an indefensible cause. I repeat, you are wasting your time, energy, and money in this anti-American activity. May God remove blindness from your minds. Needless to add, the general reaction to your resolution is the same as mine. But everyone considers it a waste of time to argue with you and simply throws your resolution into a wastebasket with a shrug of the shoulder. Maybe I was the only one to care to write you.

Sincerely yours,

W. J. WAGNER,
Associate Professor of Law.

STATE UNIVERSITY OF SOUTH DAKOTA,
SCHOOL OF LAW,
Vermillion, February 13, 1958.

Hon. THOMAS C. HENNINGS, JR.,
United States Senator, Washington, D. C.

DEAR SIR: In reply to your request that I express my views, pro or con, about the pending Senate bill S. 2640, I am happy to state them as follows:

As I see it the overall purpose of this bill is, frankly, to register a vote of "no confidence" in the determinations by the presently constituted Supreme

Court of questions involving security or subversion matters. This for the reason that their decisions to date evidence a lack of objectivity and a failure to apply or recognize hitherto established legal principles and rules of law in their solution of these problems—the Court seems to be carried on a wave of emotionalism to determine all these questions in one way only. The bill seems designed to register a vigorous protest against the Court's actions in this limited area. With that objective I am in full agreement. While there are other areas in which valid criticism of the Court could and should be made, viz, as to its continuous judicial legislation, as well as its constant encroachment upon the powers of the States, yet this would not appear to be a proper method of registering such protests.

I would view this bill as a perfectly constitutional exercise of the power expressly given the Congress in article 3, section 2, of the Constitution. I would predict, however, that if enacted it would nevertheless be declared unconstitutional by the presently constituted Court at its first opportunity. I think it should still be enacted, that it would serve as a strong protest and would therefore be worth while.

Very truly yours,

KENNETH F. SIMPSON, *Dean*.

BAYLOR UNIVERSITY,
SCHOOL OF LAW,
Waco, Tex., February 10, 1958.

HON. THOMAS C. HENNINGS, Jr.,
United States Senate, Washington, D. C.

DEAR SENATOR HENNINGS: In response to your letter of February 7 and after reading S. 2646, I cannot agree that it "would work a basic change in our governmental system." On the contrary it appears to me that it might do much to preserve our governmental system. If at a future time we have a Supreme Court less prone to radical judicial legislation, Congress can always restore the present appellate jurisdiction of the Supreme Court.

One of the benefits of having 48 States is that it allows the necessary variation in governmental institutions and in legislation to meet the differing needs of the individual States. On the same basis giving finality to the decisions of the regional Federal courts of appeal will allow some variation on the controversial matters contained in the bill. While national uniformity and consistency of law in some matters are to be desired, in others regional variations might well produce better results. This bill seems to be an excellent compromise between the demand for 48 separate solutions by the States and the demand for one national solution.

Incidentally, I hope that you will not look upon the response you get from the law school teachers as representative of the legal profession of the Nation. Let me assure you that the law teachers on the whole are far more liberal than the average practicing lawyer. There are many law teachers not primarily concerned with remaking our society, but unfortunately the leftist group is by far the more vocal and vociferous.

Very truly yours,

ABNER V. MCCALL, *Dean*.

UNIVERSITY OF MICHIGAN LAW SCHOOL,
Ann Arbor, Mich., February 17, 1958.

COMMITTEE ON THE JUDICIARY,
United States Senate, Washington, D. C.

GENTLEMEN: This letter is a statement of Dean E. Blythe Stason and Prof. Charles W. Joiner, of the University of Michigan Law School, in opposition to S. 2646.

S. 2646 is an intrusion on a court system carefully conceived and designed to protect both the Government and the individual, to see that the "rule of law" is fairly applied, and to prevent the usurpation of Government power by groups or individuals in Government or by others who resist valid governmental action. It is a dangerous bill. It should be rejected.

The bill is a bald attempt to deprive the Supreme Court of jurisdiction in five situations in which the Court has recently rendered opinions, namely, in (1) cases involving contempt of Congress, (2) cases involving the executive security program, (3) cases involving subversion against the States, (4) cases involving subversion activities of teachers, (5) cases involving admission to the practice

of law. Whether or not one agrees with the correctness of these recent opinions, the remedy suggested by the bill is one that will produce disastrous results.

Our Supreme Court is and always has been the court of last resort on matters of constitutional law. It is the embodiment of ultimate judicial power. Under its direction great constitutional principles have been nurtured and developed that protect individuals from the encroachment of Government and aid Government to protect all of us against the wrongful acts of others. To deprive the Court of its power in any of these respects will upset a carefully conceived balance of power. It will be an invitation to all disgruntled litigants to petition Congress for equivalent relief in the future.

The ultimate effect of such a bill would be to create a multihheaded court system operating without direction or guidance in fields of constitutional law of importance to the liberty of individuals as well as to the exercise of proper governmental power. This must not come to pass. We urge you to reject this bill.

Respectfully submitted.

E. BLYTHE STABON,
CHARLES W. JOINER.

BAYLOR UNIVERSITY SCHOOL OF LAW,
Waco, Tex., February 11, 1958.

HON. THOMAS C. HENNINGS, JR.,
United States Senate, Washington, D. C.

DEAR SENATOR HENNINGS: Pursuant to your request in your letter of February 7, Dean McCall has requested that I submit my views on S. 2646 to you.

Your letter states that S. 2646 would "work a basic change in our governmental system." This reflects an assumption on your part that the United States Supreme Court must be the sole interpreter of the Constitution. This concept appears nowhere in the Constitution; on the contrary the Constitution makes the judicial power in appellate cases subject to "exceptions" and "regulations" by the Congress. Our governmental system is one of checks and balances, and this is one of the checks on the Supreme Court.

The Congress has its own duty to interpret the Constitution. So do State legislatures, State and Federal courts, school boards, and the executive branch of the United States. When a court shows itself to be bent on arrogating legislative powers to itself, I can see no objection to the act of the legislative body in limiting the powers of the Court.

Judicial review would not be abandoned by adoption of S. 2646 and I cannot see any great loss to our governmental system in the mere fact that these cases could not reach the Supreme Court.

Very truly yours,

A. S. MCSWAIN, JR., Professor.

NOTRE DAME LAW SCHOOL,
Notre Dame, Ind., February 27, 1958.

HON. THOMAS C. HENNINGS, JR.,
Committee on the Judiciary,
United States Senate, Washington, D. C.

DEAR SENATOR HENNINGS: Dean O'Meara and Professor Wagner of this law school have informed me that you have requested an expression of the views of persons interested for and against the Jenner bill, which would restrict the jurisdiction of the Supreme Court in certain specified types of cases.

Proponents of the legislation all appear to be strongly opposed to a number of recent decisions of the Court. They don't like the way things are going; so they want to change the rules. Opponents of the legislation number many persons who disapprove of a number of the Court's recent decisions because they believe the so-called remedy is worse than the disease.

I believe that the Jenner bill should be rejected. It seems to me that the house of delegates of the American Bar Association is on sound ground in expressing opposition to the proposed legislation. I would just like to add, however, that I think that in most of the cases which have aroused Senator Jenner and his followers the Court reached the right result. The Court's position on civil liberties is more in accord with traditional American views than is that of Senator Jenner.

For your information I am sending herewith a reprint of an article from the Buffalo Law Review in which I attempted to state what the Court actually decided in the cases that have occasioned the instant controversy.

Sincerely yours,

ROGERS PAUL, PETERS, *Professor of Law.*

YALE UNIVERSITY,
SCHOOL OF LAW,
New Haven, Conn., February 25, 1958.

Senator THOMAS C. HENNINGS, Jr.,
*United States Senate,
Committee on the Judiciary, Washington, D. C.*

DEAR SENATOR HENNINGS: First, let me say that I am delighted to know that you are so actively opposing Senator Jenner's preposterous bill. I am delighted to lend what little support my name is worth to your effort.

S. 2040 is, of course, directed specifically against 5 or 6 Supreme Court decisions handed down last spring. The attitude which must have prompted the sponsorship of this bill reminds me of the small boy who loses a game and yells "Foul," and then wants to change the rules so that he can win next time, maybe.

Unless my memory is quite wrong, Senator Jenner and those who are now allied with him were outraged when the late President Roosevelt proposed his so-called Court-packing plan; at that time the Court was on their side and the separation of powers within the Federal Government had to be kept inviolate. It would be amusing, if it were not so sad, to see the same gentlemen taking precisely the opposite tack when they happen not to like a few of the Court's recent decisions.

Of course, Congress has complete power to restrict the Court's appellate jurisdiction—and has exercised this power a couple of times in the past. But unfortunately, the holding of power and its wise exercise are not synonymous. I suggest that, when your subcommittee reconvenes, you bring to the hearings a little book by John Lord O'Brian entitled "National Security and Individual Freedom." Mr. O'Brian, as you know, is a distinguished elder statesman of the bar; indeed, he was once a candidate for the United States Senate from New York on the Republican ticket; his words might give Senator Jenner and his partners considerable pause.

I further suggest that you ask Senator Jenner whether he has ever read the remarks of James Madison—often called the Father of the Constitution—when Madison introduced the Bill of Rights in the First Congress of the United States. Those remarks make rather clear that Madison would not only have approved the Supreme Court rulings against which S. 2040 is directed but that he also believed such pronouncements to be an essential, if not the most essential, duty of the judicial branch of our Government. With such sentiments, I thoroughly agree—and again, I congratulate you for going to the Court's defense.

Maybe these words and references will be of some small help to you. I certainly hope so. Regardless, I send you all best wishes and my full personal support in the fight you are making.

Most sincerely,

FRED ROPELL.

DETROIT COLLEGE OF LAW,
Detroit, Mich., February 19, 1958.

Hon. THOMAS C. HENNINGS, Jr.,
United States Senate, Senate Office Building, Washington, D. C.

DEAR SENATOR: In my opinion, S. 2040 should be reported unfavorably by the Committee on the Judiciary. I consider it extremely ill-advised and a danger to the effective functioning of our rule of law, and most unfortunate retrogression in our inevitable attempts to intelligently resolve the problem of federalism in this land.

To deny to the United States Supreme Court power to pass upon the constitutionality of frequently irrational and often parochial (as Holmes well noted) attempts of local governmental bodies to advance the commonweal, while imperiling fundamental liberties enshrined in the Constitution, is to tragically retrogress to the situation anterior to the 14th amendment.

Furthermore, as *Hines v. Davidowitz* well illustrates, the State rule may well clash with the expression of the very Congress that the Senator would protect, and the local attempt to cope with the national problem would have to be invalidated by some juridical body under any intelligent resolution of the problem.

Lastly, respect for the Congress and the Executive is nowise diminished by continuing the present power of the United States Supreme Court in reviewing contempt by the former and eliminations from employment by the latter. For too long have we indulged in a shabby jurisprudence of appellation denominating Federal employment a "privilege." Respect for the dignity of our public servants makes it imperative that we recognize and block out more fully their constitutional rights in this situation, and that such rights be protected by highest judicial tribunal our society has created.

You are to be commended again for your effective statesmanship in the interests of the entire Nation. Please add my regards to John Raeburn Green and Charles Slayman, when next you see them.

Cordially yours,

G. T. ANTIFEAU.

DETROIT COLLEGE OF LAW,
Detroit, Mich., February 19, 1958.

Hon. THOMAS S. HENNINGS, Jr.,
United States Senate, Senate Office Building, Washington, D. C.

DEAR SENATOR HENNINGS: Thank you very much for your invitation to express an opinion in respect to S. 2646.

To put it bluntly, I think such legislation is vicious and should be overwhelmingly defeated. Simply because some people do not agree with the decisions of the Supreme Court is no reason for hamstringing its authority.

Moreover, I would sooner entrust our freedoms to an overly liberal Supreme Court than to the reactionary gentlemen who are seeking to curb its authority.

Cordially yours,

CHARLES KING, Dean.

UNIVERSITY OF KENTUCKY,
COLLEGE OF LAW,
Lexington, Ky., February 20, 1958.

Hon. THOMAS C. HENNINGS, Jr.,
United States Senate,
Washington, D. C.

DEAR SENATOR HENNINGS: I am replying to your letter of February 7 addressed to former Dean Elvis J. Stahr, Jr., whom I succeeded as dean last July.

Prof. Paul Oberst, the member of our faculty who works in the field of constitutional law, and I agree with your position on S. 2646. The following paragraph, prepared by Professor Oberst, states our reaction very briefly.

The liberties of American citizens have been made secure under the Constitution through two unique American contributions to the art of government—the doctrine of separation of powers and judicial review of legislative and administrative action. This bill destroys these safeguards in part, by exercise of the power of Congress to make limitations on the appellate jurisdiction of the Supreme Court. The purpose of the bill is to change by act of Congress the Supreme Court's interpretation of the Constitution in certain cases at the last term of the Court. Such an attempt to reinstate lower court decisions reversed by the Supreme Court is a venture worthy of considerably less respect than the Court-reorganization bill of 1937. If the bill succeeds, it will leave individual liberty to be defined largely by Congress, Federal administrators, State legislatures and administrators, and local school boards. It might better be entitled "a bill to encourage legislative and administrative absolutism in certain cases."

We urge you to unremitting effort to defeat it.

Sincerely yours,

W. L. MATTHEWS, Jr., Dean.

Senator HENNINGS. I think the record should be complete. I think we are entitled to see what I said as well as what they said to me. So far I have received 73 replies to the request for views. Of this number only 4 of the 73 were favorable for the bill.

Mr. Chairman, I want to thank you—there are no other members of the subcommittee here. I will thank the chairman.

Senator BUTLER. I want to thank the Senator.

Senator HENNINGS. I want to thank the chairman indeed for his graciousness and kindness in listening to me this morning.

Senator BUTLER. It is always a pleasure to have your views on any constitutional question.

There is one thing that comes to my mind on which I should like to solicit the Senator's opinion. I have been particularly concerned with the status of a lawyer within his own State practicing before the courts of his own State. I have always felt that when a man was admitted to the bar, for instance, when I was admitted to the bar in the State of Maryland, to practice before the courts of that State, that I became an officer of that court and I had a peculiar relationship—

Senator HENNINGS. You are indeed.

Senator BUTLER. Existing between me and that court that was of little or no concern to the Federal judiciary as distinguished from the State judiciary. And I was a little bit amazed when the Supreme Court took jurisdiction in the *Konigsberg* case and refused to let a State, a sovereign State of the United States, say who should practice law and who should stand in this fiduciary and confidential relationship as between it and its own courts. Having that in mind and trying to avoid as far as possible any confusion that may result from the method of approach of S. 2646, I filed a separate bill yesterday.

Senator HENNINGS. I read the Senator's bill in the Record this morning.

Senator BUTLER. You have read my bill? It has only one purpose.

Senator HENNINGS. I don't mean to anticipate you.

Senator BUTLER. It would withdraw from all Federal courts the right to interfere with my relationship and that of other attorneys to the courts created by the State of Maryland, in which the State of Maryland has given me and them the privilege to practice.

Now, if the Federal courts want to admit a person, that is up to the Federal courts; but the State itself has the right to say who shall practice law before its courts. Therefore, my bill would take away from the lower Federal courts, or the inferior Federal courts, as they are referred to in the Constitution of the United States, all jurisdiction in such cases and would deny or withdraw from the Supreme Court of the United States the right to hear any appeal from any State court covering that one field of endeavor.

Perhaps the Senator has an opinion on that. I know he believes there are some areas where the State should be supreme and should have its rights and should not be interfered with by the Federal Government. I think the Founding Fathers probably put section 2 of article III in the Constitution to prevent a judicial oligarchy such as some people now claim the Supreme Court is doing.

I feel that certainly a bill of the kind I propose has merit. I don't see how any group which cherishes the right of the State to have some of the governing of its own affairs could be opposed to it.

I believe the Supreme Court has overstepped its bounds in this particular area.

Senator HENNINGS. May I inquire whether the Senator refers to matters of subversion only?

Senator BUTLER. My bill provides that—

Senator HENNINGS. I went over the Record this morning, before I left home, but I didn't study the bill.

Senator BUTLER. May I read it?

Whereas the right of persons to practice law before State courts is peculiarly a matter of State concern: Now, therefore—

and so forth.

Now the limitation of the bill is this:

Notwithstanding any other provision of law, no court of the United States shall have jurisdiction to entertain any suit in which any party thereto seeks an injunction or any other remedy against the operation and enforcement of any State statute, rule of any State court, rule of law, or any regulation or any bylaw of any board, commission, or other body acting under the authority of the constitution of any State which denies the privilege of practicing law before the courts of such State to any person because of subversion, criminal, or corrupt activities on the part of such person.

Conceivably there are cases where a lawyer will be brought before the State grievance committee for mishandling of funds, in which he refuses to answer.

He says his answers may incriminate him. That man, in my opinion—if that board rules him unfit to practice before the courts of his own State—

Senator HENNINGS. You are a member of the bar, are you not?

Senator BUTLER. Yes. And, I think the Supreme Court has overstepped its bounds in these respects.

Senator HENNINGS. Well, in reply to my distinguished friend, I would like to say that I would like to have an opportunity to study—

Senator BUTLER. I don't expect the Senator to commit himself—

Senator HENNINGS. I am sure of that.

Senator BUTLER. I think any American should be ready, willing, and able to accept the rule of the court of last resort of his State on any matter where this type of special relationship exists. There is a fiduciary relation.

Well, now, I have testified rather than the Senator and I beg his pardon.

Senator HENNINGS. You have enlightened me. I appreciate it.

Senator BUTLER. Well, I want to say this to the Senator. I have great admiration for him.

Senator HENNINGS. Thank you very much.

Senator BUTLER. I am not for confusion. I am not for the creation of barriers to the legal concept as we all know it. But there are many people in this country today that believe that the Supreme Court of the United States, rightly or wrongly, is creating a judicial oligarchy. The Congress will fail in its responsibility to the people if it doesn't take cognizance.

Senator HENNINGS. I think today, as the distinguished Senator from Maryland knows, is the day that we are to memorialize our former great Presidents, Theodore and Franklin Roosevelt. We know that there was a little plan offered to create a judicial oligarchy perhaps at one time there, the so-called Court-packing plan. I think that most lawyers in both the House and Senate at that time were opposed to it, and it died a-borning, so to speak.

Senator BUTLER. I am not one for destroying the Supreme Court of the United States, and, also, I am not one for shirking my obligations as a United States Senator.

Senator HENNINGS. The Senator never has, and I might say that any legislation introduced by him would be the product of careful thought and consideration, and I would like an opportunity to—

Senator BUTLER. I certainly think that is acceptable.

Senator HENNINGS. To do the same to the Senator's bill.

Senator BUTLER. The subcommittee of the committee of which you are a member is very happy to have you here.

Senator HENNINGS. Thank you very much.

Senator BUTLER. Has the Senator concluded his testimony?

Senator HENNINGS. I have, Mr. Chairman.

Senator BUTLER. Fine.

Mr. OBER, will you please resume?

Thank you again, Senator.

Mr. OBER, when you yielded to the Senator, you were giving your background.

Mr. OBER. I just started with a few minutes. Shall I start over?

Senator BUTLER. Yes; I wish you would.

Senator HENNINGS. I would like to thank Mr. Ober again for his courtesy. I shall stay as long as I can. I have a little meeting in a short time, but I should like to hear as much of Mr. Ober's statement as I can.

Mr. OBER. I have just a short statement for background purposes.

I first became interested in the general field of subversion during the First World War, when, in addition to being a line officer, I had some duties as a counterespionage officer.

In the Second World War I was one of the advisers to Governor Lane's Commission on Emergency War Powers in the State of Maryland.

In 1948, I wrote an article, or rather, I addressed the Maryland Bar Association on the decisions of the Supreme Court—that is, the Stone court—as of that time, which caused me some concern. You will recall that there was a minority of Chief Justice Stone and Justices Roberts and Reed, who usually dissented at that period in many of those cases. I was concerned at that time. After making a speech, I was appointed by the Governor as chairman of a State commission to draft a law, which was known colloquially as the Ober Act, although it was a product of a commission, which law was sustained as to its loyalty features by the Supreme Court of the United States. The criminal act of subversion would naturally be affected by the Nelson case as long as that case stands.

Senator BUTLER. Mr. Ober, the reporter is having a little difficulty hearing you.

Mr. OBER. I am very sorry.

The statute was also put up by a referendum to the voters of Maryland, and was approved by a majority of almost 3 to 1.

Almost 10 years later—last year—I was again concerned with the change from the majority that had prevailed in the Vinson court, and so I wrote an article which was published in the January issue of the American Bar Association Journal, copies of which I sent to all of the members of the committee, and which I had to revise as a

result of the decisions last June, in which I undertook to cover the area in which Congress had attempted to legislate and the Executive had attempted to prescribe certain procedures by Executive orders, and the result of the decisions of the Supreme Court in this particular field.

Senator BUTLER. Would you like that to be made a part of the record of this hearing? The article you published?

Mr. OBER. I think if the chairman thinks it is proper, I would be glad to have it.

Mr. SOURWINE. Mr. Chairman, that article has already been put into the record in anticipation of Mr. Ober's statement, and to meet our deadline for getting this put into print, it was put in the other day.¹

Senator BUTLER. I see.

Mr. OBER. I had the pleasure of hearing Senator Hennings. In many respects, I do not disagree with the results of his testimony. In advocating separation of the S. 2646 into different parts and the treatment of it in different manners—that is, in some manners by amending in some areas, by amending statutes and restricting the drastic approach of abolishing jurisdiction to one narrow or two very narrow fields, I don't want to be misunderstood, in that I would like to say that I do disagree with the decisions of the Supreme Court in all five areas, which are the subject matter of the bill.

Let me say also that I do agree that Congress has the power under the Constitution to make exceptions to the appellate jurisdiction of the Supreme Court. In fact, it is specifically so stated, as well as to regulate the same. I think it is a power that should be very sparingly exercised, but I should like at this point, and while the Senator is here, to also point out that under our Federal system of government, there is a responsibility on Congress which is particularly strong in the field of defense and security. The President is the Commander in Chief, Congress has power to legislate in all matters pertaining to defense. In my book subversion is a method of military aggression which has been successfully used by Russia in many countries. Therefore, I think that Congress can properly consider all the matters having to do with national defense and there is a danger that, in having so much confidence in the Supreme Court, the Congress shall abdicate its own function, which is to preserve the Union even when it comes in conflict with decisions of the Supreme Court.

For 20 years, Congress and the Executives have attempted to legislate and to take all these steps to prevent subversion and in my judgment, they have been largely frustrated by these recent decisions of the Supreme Court.

Now, I am not going to go—I have put in my statement a suggestion as to what I think the underlying difficulty is of the majority——

Senator BUTLER. Mr. Ober, would it please you if we put your statement in and made it a part of the record, and then you can talk extemporaneously?

Mr. OBER. I think that is better, rather than have me read the statement.

Senator BUTLER. Your statement will be made a part of the record.

¹ See appendix II.

(The statement referred to is as follows:)

GENERAL DISCUSSION OF THE BILL.

In advocating a separation of S. 2040 into different parts, and different treatment of the several parts, and limiting the drastic action therein to a narrow field, I should like to preface my remarks by stating:

1. I agree that Congress has the power under the Constitution to make exceptions to the appellate jurisdiction of the Supreme Court.

2. That the recent decisions in the five areas covered by S. 2040 are unjustifiable and that Congress can and should take all appropriate measures to reverse the same. Underlying these decisions of the new majority of the Court, there is, I submit, a lack of recognition on the part of some of the Justices of the facts so eloquently explained by the Vinson court, that the Communist Party is not merely another political party, but is an internal conspiratorial movement directed by Russia in which she has been notably successful in subverting other governments. Therefore, Congress, which has the awesome public responsibility for the defense and security of the country, can and should prevent the repeated efforts by Congress, the Executive and the State governments from being nullified by the present majority of the Supreme Court.

3. That the congressional power includes remedies other than the power to abolish the appellate jurisdiction of the Supreme Court which may be helpful in some areas, such as the power to pass statutes which may reverse some of the decisions; the power to create courts and to advise and consent to the appointment of the judges thereof.

4. That the application of the drastic remedy of abolishing jurisdiction in all five areas covered by S. 2040 is not advisable for the following reasons, among others—

(a) By combining five objectives it consolidates the opposition of all those who would oppose any particular section, and in some areas there is a good deal of opposition. I am concerned that the combination of five objectives in one bill and the use of the drastic remedy of abolition of appellate jurisdiction of the Supreme Court to all areas, when the need as to some is not as clear as in the case of others, may lead to the defeat of the whole program.

(b) That the effectiveness of abolishing an appeal to the Supreme Court is doubtful because of the power of the lower Federal courts to intervene. The result of different views of different lower courts suggests that more should be done than merely to abolish appellate jurisdiction in most areas covered by S. 2040.

(c) That the reason for congressional action in the five classes covered by S. 2040 are totally different—

(1) Section 1, to reverse *Watkins*, relates to a matter in which Congress is coequal with the judiciary and should not be hampered in its primary exclusive power to legislate. Congress could hear contempt cases itself.

(2) The second section, on loyalty, is mostly within the province of executive action, except to the extent that Congress has passed statutes in aid of the executive. Here the court is in conflict with the executive.

(3) The third section, reversing the *Nelson* case, has to do with the Federal-State relationship, where the jurisdiction to preserve State and Federal Governments from subversion is concurrent.

(4) and (5) *Slochower* and *Koningsberg*, on the other hand, are in the area where States should have exclusive power under our Federal system to determine who should be denied the privilege of State employment or of practicing law before State courts because of subversive activities, and I would add, corrupt or criminal activities. In this area, so peculiarly a matter of State concern, there is a much stronger reason for making the decisions of the State supreme courts final as to these privileges which are granted by the State governments.

My point under this heading is that the 5 objectives cover 4 different constitutional questions, namely: (1) Congressional power to legislate; (2) Federal executive power to employ; (3) concurrent Federal-State power to protect against a criminal conspiracy against both governments; and (4) the power of the States under our Federal system to select their own employees; and (5) to determine who shall be permitted to practice before the State courts for certain reasons.

(d) That the drastic approach of S. 2046 indiscriminately in all five areas is bound to encounter the opposition of many conservative lawyers, including many who disagree with the decisions giving rise to the bill. This would be because of its sweeping character and the general reluctance of the bar to interfere too broadly with the jurisdiction of the Court because of some unjustified decision, a feeling which found expression in the constitutional amendment recently proposed to freeze the jurisdiction of the Court. I submit therefore, it would be the part of wisdom to restrict, in the first instance anyhow the extreme remedy to a narrow field where there would be relatively little objection, and to attempt to cover other areas by different methods so far as possible. I am greatly concerned that too broad a bill will also encounter a great deal of public opposition, which may delay or defeat the important objective of reversing the decisions of the Court in this particular field as promptly as possible.

CONSIDERATION OF THE FIVE SEPARATE SECTIONS

In order to be more specific, I will now take up the five sections of S. 2046 separately, and by way of illustration suggest possible ways of handling the question presented.

Section 1. Watkins

The Watkins case, which gives rise to the first section, seems to imperil the power of Congress to investigate, which is so essential to its exclusive legislative power. The language of the majority opinion of five written by the Chief Justice is sweeping. It requires more certainty in the charter of a committee which has been repeatedly supported by Congress for two decades, and more certainty than has been customarily required for the protection of witnesses in investigations not directed at the Communist conspiracy. It seems lacking in realism in requiring the laying of a foundation in such detail in order to permit the witness himself to determine questions of pertinency. It would, as the dissent points out, and as experience has proved, largely delay and defeat congressional investigations. Much of the opinion of the majority indicates a belief that the Communist Party is but a political party and not, as Congress, the executive, and the Court itself a few years previously in the Dennis case, had concluded a criminal conspiracy aimed at overthrowing the Government. There seems no appreciation by the majority of the danger to our national security, nor the necessity of permitting investigations as to the extent of Communist infiltration into labor, one of the usual targets of his conspiratorial movement. Nevertheless, I do not think it necessary at this time to include this in S. 2046 because—

(1) In spite of the reference to the first amendment and the sweeping language of the Court, the decision itself may be narrowly restricted to the due process requirements under a statute enacted by Congress (2 U. S. C. 102), which is subject to amendment by the Congress.

(2) There has been widespread, if largely unfounded, newspaper criticism of the action of some House committees. Much of this has been corrected, but it will take some time to erase the adverse public criticism, and I think it would be premature to include the first section of the bill before other remedies are tried.

(3) The remedy would not take care of the conflicting decisions of lower Federal courts.

Therefore, I submit the following, which might be considered:

1. Amendment of section 102, title 2, United States Code, which is the real ratio decidendi of the decision. It is quite clear from the majority opinion and Justice Frankfurter's concurrence that the Court has not yet, at least, attempted to abolish congressional power to punish for contempt, but has held that when Congress uses the Federal judiciary as an affirmative agency, then it is subject to restrictions under which courts function.

Consideration might be given to the reframing of section 102 so as to emphasize the power of the committee to determine pertinency and placing the burden on the witness, to avoid the burdensome proof of pertinency of questions to the witness not required in any other proceeding. Surely there should be a presumption in favor of congressional committees.

2. The careful reframing of authorizing resolutions in the field of communism directed toward—

(a) Emphasizing the dangers and the conclusion, reached by all branches of government, that communism is a criminal conspiracy.

(b) Recalling its conspiratorial character, and hence difficulty of determining extent of infiltration in various areas; importance of testimony as to past as well as to present; and impossibility of determining in advance the ramifications of the conspiracy and the limitation of investigation.

(c) Confining the investigation specifically to espionage and communism and omitting references to un-American activities and other broad phrases.

(d) Squarely vesting in the committee the discretion to determine pertinency and incorporating, if necessary, any congressional rules for the protection of witnesses.

3. The establishment of a new court of appeals, with exclusive jurisdiction over contempt cases before Congress and perhaps appeals from the Subversive Activities Control Board. Such a court would have, it is submitted, these advantages--

(a) Concentration in one Federal court of all such cases.

(b) If the Senate exercises its constitutional right to advise as well as to consent to the appointment of the judges thereof, the appointees would undoubtedly be sympathetic to the orthodox view expressed in numerous decisions in the past, that Congress to carry out its exclusive responsibility of legislation must have the power to investigate.

(c) That decisions would be made immediately by a court devoting itself exclusively to these matters. The delay of years in the appeals in contempt convictions and from the Subversive Activities Control Board completely destroys the effectiveness of any final decision. Congress should have immediate decisions, and by that I mean within a few weeks, on any contempt case or as to requiring the witness to testify.

(d) On the question of an appeal, I would provide for a Court of 4 or 5. The Court, for example, if composed of five members, could sit in banc for the purpose of hearing appeals under a 30-day type of appeal procedure. All proper safeguards could be afforded without having cases delayed by congested dockets and the slow procedures in the Federal courts, which are wholly inappropriate to the requirements for punishment of contempt of Congress.

Section 2. (Cole loyalty)

I agree that the decisions in the Peters and Cole cases and others seem to indicate a different approach in the loyalty field, by a majority of the new Court, from the forthright and more realistic approach of the Vinson Court in the Adler and other cases. Certainly employment is a privilege and not a right; the objective of loyalty procedure should be to discharge security risks with as little damage as reasonably possible to individuals, but such proceedings are not criminal proceedings and all of the judicial procedures are not applicable. The Court has, I submit, ignored the fundamental differences between the two types of procedures and trespassed upon the constitutional power of the Executive. But in this field also, I believe drastic action is premature because--

(1) It is a delicate area, still fluid, in which there is much honest difference of opinion as to the appropriate procedures which have not yet been resolved by either the Executive or Congress. The President's orders, the Summary Suspension Act, the various programs of the Atomic Energy Commission, Defense Department and Coast Guard have made much headway. Here again, much remains to be done, such as the tightening of procedures in the manner suggested, for example, by the Wright Commission.

(2) The abolition of appeal by the Supreme Court would not avoid diverse and often adverse decisions by some of the lower Federal courts.

Thus, while the subject is primarily within the province of the Executive, I submit that Congress can best assist by reviewing its own statutes, such as the Summary Suspension Act, perhaps reversing the Cole case, by permitting summary dismissal of any employee on grounds of disloyalty. The dissent in that case seems to me to correctly leave such matters to the Executive to make such exceptions as he may deem desirable, rather than to require an affirmative finding of sensitivity of a position. But this, according to the majority interpretation, was due to the statute which is amendable. This is not a complete answer. However, I think this should be attempted and the Executive given an opportunity to act on the Wright Commission report before the drastic remedy of S. 2646 is applied.

(3) Consideration, I submit, should also be given in this field to the establishment of an administrative court of appeals, in which would be centered jurisdiction over all appeals from administrative bodies or district

courts involving discharges on grounds of disloyalty. The necessity of an administrative court of appeals, specializing in the field having supervision over discharges in an organization of 7 million employees as to whom there are half a dozen different administrative procedures applicable, would seem to be apparent. Again, I submit that such a court could be staffed with judges sympathetic to the orthodox view expressed by the President, as well as by the Supreme Court, in the Adler case, that employment is a privilege and not a right, and further that such judges would not be confused by the unrelated criminal jurisdiction where they are required to apply the extreme, and at times doctrinaire, application of the Bill of Rights. The object of a security program is the protection of the Government and not the conviction of criminals, and I doubt the wisdom of placing jurisdiction therein in judges who are predominantly engaged in the field of the criminal law.

I would not suppose that it would be wise to combine this Court with a court having jurisdiction over congressional contempts, though it is certainly a possibility, as is the question of which court should have jurisdiction over appeals from the Subversive Activities Control Board. There are many precedents for special courts. The spectacle of reinstatement of employees years later, with payment of back pay, seems to me to demand a special court in justice to employees as well as to the Government. If such a court were combined with a court as to appeals from congressional contempt cases, at least priority could be given to the former class of cases so as to not delay the legislative process. I would think that the volume of litigation in the loyalty fields would, however, make it unwise to combine such an administrative court with a congressional contempt court, which would really be an adjunct to Congress and have nothing to do with the Executive. If such courts are appropriately staffed and wisely administered, I would doubt that it would ever be necessary to consider the restriction of the right to appeal to the Supreme Court. I should like to see the courts kept separate, for if a further appeal were to be given in the case of a court having jurisdiction over contempts of Congress, it might well be that Congress would want to reserve the right of appeal to the House or Senate, which presents different constitutional problems from appeals in loyalty cases. But, as stated, I would not think it wise to at present limit the right of appeal until these preliminary measures were first taken.

Section 3. Nelson

As I have pointed out in an article in the January 1958 American Bar Association Journal, copies of which I have sent to all members of the committee, in my discussion of the Nelson case, commencing on page 80, this decision brings the majority of the Court into conflict with—

(1) Congress, which had explicitly provided that nothing in this title, which includes the Smith Act, was intended to take away the powers of the States—which therefore continued to have power to protect themselves against subversion;

(2) The Executive, which officially denied the judicial ex cathedra pronouncement that State and Federal legislation would conflict;

(3) The States, by taking away their power of self-preservation—their most important police power. The decision was an extraordinary one because in a field of national security which the Court in other areas has conceded to be a matter in which the political branches of the Government have a responsibility and access to information which the Court cannot possibly have. But here again, there seems little doubt that the decision can be corrected by adding a section to the Code, as provided by S. 654, clearly stating that the congressional acts on sedition should not prevent the enforcement of State acts. S. 654 has been approved by this committee a year and a half ago, has been endorsed by the Association of Attorneys General, American Bar Association, and many bodies, and there is no substantial objection to it. It seems to me of the utmost importance that this bill should be passed separately and promptly. I earnestly urge, therefore, that whether or not any reference to this subject is included in S. 2646—and I don't think that it is necessary at this time at any rate—a least S. 654 should be promptly reported to the Senate.

Sections (4) and (5). Stochower and Königsberg

In this area I agree with the general approach of S. 2646. Here we are dealing with a very narrow field—that is, with State employees and the qualifications

of lawyers to practice before State courts. Certainly, in a federal republic, a State which is responsible for its own government must have the right to decline employment or to remove from employment persons engaged in subversive activities. So also as to lawyers. Employment is not a matter of a Federal right, nor is the privilege of practicing law before a State court. These are privileges granted by State governments and matters peculiarly of State concern. This is not such a controversial matter in an unsettled area as are congressional contempt and loyalty cases. The appellate jurisdiction of the Supreme Court in limited fields has often been curtailed. It is certainly not very drastic to assume that State supreme courts can properly protect State employees and attorneys denied the privilege of State employment or practicing law before State courts because of disloyalty. Surely no one would downgrade the highest courts of our States to a point where they are not deemed competent to pass upon matters so peculiarly of State concern. The subject matter is a privilege granted by the State itself—and not a right. I respectfully suggest that in principle sections 4 and 5 are sound. I think section 4 should be broadened to include all State employees, to avoid any opposition from the teachers on the theory that they are being singled out, and to include criminal and corrupt activities as well as subversive activities in those as to which State court decisions should be final. There are other minor suggestions which I have incorporated in a suggested amendment which I will give the secretary of the committee.

I have said nothing about Sweezy, involving the investigative power of States, for the reason that if the right to pass criminal statutes is granted under S. 654, and the exclusive power of State courts over discharge of employees for subversive activities is granted, no further specific action would be necessary to reverse that case.

CONCLUSION

In conclusion, may I repeat that, in common I believe with the vast majority of the bar, I have been shocked by the recent decisions of the Supreme Court in the five areas which are the subject of S. 2040, as well as by the Yates case and others. I believe that the Congress could and should, in the first instance, by statute remove the basis for such decisions so far as possible, for in some areas they rest upon a construction of prior statutes of Congress. I would not think it wise to drastically limit the appellate jurisdiction of the Supreme Court in the first instance, until less drastic measures have been taken, except in the very limited field of State employment and the qualifications for practicing law before State courts. In the latter there is no reason to permit appeals from the highest courts of the States over the denial of privileges granted by the State because of criminal, corrupt, or subversive activities.

Mr. OBER. Also, I should like to add that the abolition of the jurisdiction of the Supreme Court in a very narrow area, such as that referred to by Senator Butler, would be helpful but in most areas covered by the bill under consideration there is an ample power to change the decisions by amending the underlying statutes or by other means.

Now, let me say briefly that the reason I am against the application of the drastic remedy of this bill to all 5 areas is, first, because if you combine 5 objectives it consolidates the opposition of all who oppose any particular objection—section.

I am concerned that if you combine all five of these objectives, Mr. Chairman, the result may be that nothing will be accomplished because of the opposition, and honest opposition, particularly in certain areas.

Second, I doubt the effectiveness of abolishing the appellate jurisdiction of the Supreme Court where you don't do anything about the jurisdiction of the lower courts, because it would result in diverse decisions, a situation which wouldn't happen in the case of limited fields such as the *Konigsberg*.

Third, the reasons for legislation or congressional action in the five different areas are totally different.

In the case of Watkins, the first section, it is a matter as to Congress being coequal with the judiciary and that it shouldn't be hampered in its exclusive function of legislation, and hence in its necessary investigatory powers. Now, that is a question of congressional power.

The second section, on loyalty, is a matter that is mostly within the executive field, except to the extent that Congress has aided the executive in the passage of certain statutes, so the conflict there is between the court and the executive.

The third section, having to do with the Nelson case, has to do with the Federal-State relationship. There the jurisdiction is to preserve both State and Federal Governments and there the jurisdiction is and should be concurrent.

In the fourth and fifth areas, the Slochower and Konigsberg areas, you get into a totally different situation, because there you are talking about privileges granted by the State governments. Matters in which the State should have exclusive power under a Federal republic system; that is, to determine who should have the privilege of working for the State or the privilege of practicing law in the State courts. For practical purposes, and to avoid constitutional problems, I would confine any such legislation to areas where there was a denial of employment on account of corrupt or criminal or subversive activity.

But here, you have got a matter that is peculiarly a matter of State concern. Now, of course, my point under this last heading is that S. 2646 attempts to take 5 different constitutional problems and solve them all in 1 drastic manner.

Fourth, as has been seen by the letters that were read by the Senator from Missouri, the drastic approach, when it is applied to all five areas, does encounter the opposition of many conservative members of the bar and there was recently proposed an amendment which would freeze the jurisdiction which looks in exactly the opposite direction.

Senator BUTLER. The witness will remember that I was the sponsor of that Resolution.

Mr. OBER. The witness does so remember.

Senator BUTLER. And I now reluctantly say that I was forced in good conscience to introduce the bill that I introduced yesterday on the sole ground that the Supreme Court has gone into a field that it has no business going into. None whatever.

Mr. OBER. Now, let me, then, after saying that I oppose the inclusion of all 5 areas in 1 bill, attempt to make some constructive suggestions as to how some of these matters could be handled without abolishing the jurisdiction of the Court.

Now, take the first section, Watkins. That does seem to imperil the power of Congress to investigate, which is absolutely essential to the exclusive legislative power which is vested in Congress. If you take the language of Chief Justice Warren, it is certainly very sweeping. It does require more certainty in the charter of the committee, and that committee, by the way, has been supported by two decades repeatedly by Congress under that charter. It certainly requires more certainty than is required, has been required, in the resolutions appointing other committees, and certainly requires so much detail in laying down foundations in questioning witnesses as

to pertinency, that, as a matter of practical operation, it practically hamstring investigations, because you spend all of your time explaining matters to the witness.

I think that the Watkins decision would largely delay and, in some instances, defeat congressional investigations. Some of the underlying thought in that, I suggest, does indicate that the Court has gotten away from the opinion clearly expressed in the Dennis case a few years ago, that the Communist Party is not a political party, but is a conspiracy attempting to overthrow the Government by force and by violence.

Now, I think after careful reading of the case, it will be seen that that is not an unfair statement of the opinion of the majority.

I do not think that the Court in the Watkins case paid sufficient attention to the points so clearly brought out by Justice Jackson in the Dennis case of the importance of avoiding or preventing the infiltrating of Communists into the labor movement, which is one of the prime targets, and that was the subject matter of the inquiry in the Watkins case.

Now, in spite of the reference to the first amendment by Chief Justice Warren, and the very sweeping language, let's bear in mind that the decision itself is restricted, as the majority says and as Justice Frankfurter says, to the due-process requirements under a statute which this Congress enacted, namely, United States Code, title 2, section 192.

Of course, Congress having enacted the statute which is the subject matter of the decision, Congress can change that statute. Congress has changed many times statutes where the Court has interpreted them in a way that they didn't like. That is a constant process of legislation. There is no disrespect to the Court in doing it.

Secondly, there have been—I am afraid there would be a great deal of criticism if this drastic remedy was used in this particular field, because we have to admit that there has been criticism—I think unfair criticism in most instances—of actions of the House committee in some cases. Nevertheless, it is going to take some time, in spite of new rules, which I understand have been adopted, to get away from that criticism and I don't think the climate at this time permits the adoption of such a drastic remedy in this field, the Watkins field.

Then, of course, again, let me say it wouldn't take care of conflicting decisions in lower courts.

Now, to come to what I think might be some constructive suggestions as to—let me say parenthetically that I don't like to testify against certain sections, when I agree with the objectives, without suggesting some other way around them. So let me suggest, merely for consideration, and this has not been worked out in any definitive way, that there are a number of avenues of approach.

In the first place, I think the amendment of section 192 to the United States Code, which was the ratio decidendi of the decision, might be helpful. There is no doubt in the world that the majority, as well as Justice Frankfurter, show that the Court was depending upon that statute amended by Congress, and that they weren't abolishing in sweeping language the power of Congress to investigate and to punish for contempt. In fact, Congress has the power to do so, itself. So I suspect that it would be possible to amend section 192 so as to em-

phasize the power of the committee to determine the question of pertinency, and to place, like in all other judicial proceedings, the burden on the witness to avoid, to say that it was not pertinent. The form of the language of the statute led partly to the decision. It is only in part, but it did in part contribute to the decision by requiring pertinency and by not emphasizing that the body to determine that was the committee itself.

Then I think that a very large part of the Watkins decision, or the basis for it, can be removed by carefully reframing the authorizing resolutions in the field of communism. I respectfully suggest that in reframing them, and in view of the language in the Watkins case and the way that the Court reasoned, it would be well to emphasize the dangers and the conclusion reached by all branches of the Government—including the Court, itself, in the Dennis case, by the way—that communism is a criminal conspiracy, reciting its conspiratorial character and the difficulty of determining the extent of its infiltration in various areas and the importance of testimony as to past events—that was brought out in one of the Supreme Court decisions—as well as to present the impossibility of determining in advance the ramifications of the conspiracy, and hence the proper limits to be placed on an investigation.

Of course, as you investigate in any legal proceeding, as you cross examine, new fields develop and you can't determine always in advance, but I think that ought to be set forth in the resolutions. Then, more importantly, I think that the time has come when such resolutions can be specifically confined to espionage and communism and that it would be wise to omit references to un-American activities and other broad phrases, because that was a part of the reasoning of the Court in the Watkins case in holding that the charter was too broad.

Now, I have, thirdly, another suggestion as to the Watkins case. This is novel, but it seems to me that consideration might be given to the establishment of a new court of appeals with exclusive jurisdiction in contempt cases before Congress, possibly including also the appeals from the Subversive Activities Control Board.

Now, those—the reason I am saying this is because this investigative process, if I understand it correctly, is essential to legislation. Delays in getting witnesses to answer have the same result as getting no answer at all. It defeats all investigation. What good does it do to have a contempt case come up through the long process of the district courts, the circuit court of appeals, and the Supreme Court of the United States, and 4 or 5 years later you get a result?

This requires, in my judgment, if Congress is being hampered, a Court which will concentrate and give immediate decisions on these contempt cases. It would have this advantage. It would concentrate in one Federal court all cases. It couldn't be scattered into the several different Federal courts. If the Congress exercises its right to advise, as well as to consent to appointments, presumably there would be appointed judges who were in sympathy with the orthodox views expressed in numerous decisions in the past, that Congress has the exclusive power of legislation and does require the power to investigate.

Another advantage it would have, would be the immediate decision by such a Court. Now, my picture of that Court is an adjunct to Congress. Congress is in a dilemma. It hasn't the time to have its

own committees go into it, nor to have a trial for contempt before the bar of the House or the Senate. But it certainly is important enough, in my judgment, to have a Court which will not be clogged by the thousands of things in other Federal courts which will delay results so that it won't do Congress the slightest bit of good, because Congress will have adjourned long before they ever set a contempt case up.

Now, of course: on the form of the court. If you wanted to, it would be possible to have a court of 4 or 5, and have a provision for sitting in banc for appeals from that Court, but to have the whole thing so the first decision would be almost immediately and the second decision could be brought down within a compass of, say, 30 days, so it would do some real good to Congress to have contempt proceedings.

Well, so much for the Watkins case. I merely suggest that I don't think the drastic remedies are necessary. I merely suggest that other remedies are possible and should be tried before any effort is made to abolish the appellate jurisdiction of the Supreme Court.

Secondly, take the loyalty field, notably the Cole case. Again, I am in agreement that the Peters and Cole cases were not justified, because I think they indicate a quite different approach by the majority of the present Court in the loyalty field from the majority in the Vinson Court as expressed in the Adler and other cases.

Certainly, employment is a privilege and not a right. Mr. Justice Frankfurter made that perfectly clear in the Adler case. The objective of loyalty procedures should be to discharge security risks with as little damage as is reasonably possible to individuals. But such proceedings are not criminal proceedings and judicial proceedings are not wholly applicable. I strongly submit that the Court has ignored, in these recent decisions, the fundamental differences between the two types of procedures and trespassed upon the constitutional responsibilities of the Executive in this field.

The Executive, after all, has the responsibility of executing the laws and appointing employees. But again, without elaborating too much, I think that drastic action is premature, because the field is fluid. Neither of the President's orders have been finally worked out. They have been constantly changed. There are a number of different procedures in the 4 or 5 acts of Congress, the Summary Suspension Act, the Atomic Energy Act, the Coast Guard Act.

Here again, there is a great deal that has to be done, and it isn't time to use drastic procedures.

For example, I submit that a great deal could be done, or at least the President can do it in line with the reports of the Rights Commission, which was appointed by the President and which made a thorough study of this whole problem. So, I submit that so far as Congress is concerned, this is largely an Executive matter, that so far as Congress is concerned, it can best assist the Executive by reviewing its own statutes in the field.

Especially I have in mind the Summary Suspension Act. The Summary Suspension Act and the language in that act was the basis for the Cole case which has been criticized.

Personally, I agree with the dissent in that case: that the question of whether a position is sensitive should be left to Executive discretion. That is a matter for the Executive, and should not be a matter for the Court.

Now, of course, obviously, if the Congress should so believe, in other words, that the President was right in saying that he wanted all employees of the Government to be subject to summary dismissal on the basis of disloyalty, then all Congress has to do is to amend the Summary Suspension Act in order to avoid the basis for the decision of the Supreme Court.

Now, I don't like to be in the position of suggesting to the courts, but here again, I think the time has come, out of justice to employees, as well as to the Government who employs them, to seriously consider the establishment of an administrative court. It is certainly not fair to employees and not fair to the Government to have these loyalty cases, especially, dragging on for years and years with the employee under a cloud and the Government, if he is reinstated, required to pay for several years back pay for services not rendered.

You have got 7 million employees. In other countries, you have lots of administrative courts. There is no reason, except historical, why questions of this sort should come up through a procedure in courts like district courts that have to do largely with criminal matters, and especially with phases of Federal jurisdiction that have been vested in them at various times, because here again, you get terrific delays.

Now, I wouldn't combine that with the court which I would like to see established as an adjunct to Congress, but of course, that is a perfectly feasible thing to do.

The question of whether you put appeals from the Subversive Control Act in one court or the other is not very important. But just look at that situation where it has been 4 years since the question came up as to whether the Communist Party itself is subversive. Think of the delays, the unnecessary delays in the long Federal procedure in Federal courts whose dockets are so thoroughly clogged up.

Take the case of some of these employees. Actually, it has been some 4 or 5 years back pay and so forth. It is not fair to anybody. So I suggest that in the loyalty field, consideration should be given to working out a quicker judicial procedure. But here again, I am not suggesting any abolition of the appellate jurisdiction of the Supreme Court.

Now, as to this third section, which is the Nelson case, of course, I have discussed that at some length in my article which I had in the American Bar Association Journal, copies of which I sent to the members of the committee. Commencing on page 86, I pointed out that that decision of the Supreme Court brought the majority of the Court into conflict with Congress which had explicitly provided that nothing on the title, which included the Smith Act, was intended to take away the power of the States, which, therefore, Congress had the right to think continued to have power to protect themselves against subversion.

Secondly, with the executive, which through the Department of Justice, in their brief, officially denied that there was any interference between the State and Federal legislation.

Thirdly, with the States, by taking away from them their power of self-preservation, their most important police power, and something that is essential to a Federal system of government. It goes much deeper than ordinary police powers. It is the power of self-preservation.

I won't elaborate on what I said in my article on that, but I explained it there in more detail.

Here again, I think that there is little doubt that this decision can be corrected by adding a section to the code as provided by S. 654, clearly stating that the congressional acts on sedition should not prevent the enforcement of the State acts.

Now, S. 654, as I understand it, was approved by this committee a year and a half ago. It has been endorsed by the Department of Justice, the Association of State Attorney Generals, I believe by the American Bar Association, and many other bodies. As far as I know, there is no substantial objection to it, nor should there be any objection of a State taking such measures as we did in Maryland and as has been done in some 40 or 45 other States to protect themselves against subversion or overthrow.

I therefore strongly urge that this bill, S. 654, be passed separately and promptly, and that this should not be included at this time in S. 2640, because I don't think it is necessary to use a drastic remedy in order to change a decision which, certainly in the ratio decidendi, was the result of a statute of Congress, interpretation of the statute of Congress, although the language of it did go pretty far.

Now, Mr. Chairman, I turn to the question which I heard you discussing with Senator Hennings a short time ago.

Here I have approached it somewhat differently from you, Mr. Chairman. I refer now to sections 4 and 5, Slochower and Konigsberg. You have filed a bill confined to Konigsberg. I had approached it from the standpoint of Slochower and Konigsberg both being in precisely the same area. Logically, I think I am correct. It may be that you, however, are right in confining it to a single field to avoid any possibility of extraneous issues, but I should like to present it from what I think is a logical standpoint. Here we are dealing with an extremely narrow field; that is with State employees and the qualifications of lawyers to practice before State courts. Certainly in a federal republic, a state which is responsible for its own government must have the right to decline employment or to move from employment persons engaged in subversive activities. So also as to lawyers.

Senator HENNINGS. Mr. Ober, I don't mean to be discourteous. The Governor of my State is waiting for me in my office.

Senator BUTLER. We are sorry you have to leave, and give my respects to the Governor.

Senator HENNINGS. I am sorry I have to leave, and we appreciate your preparation and the obvious thought you have given to this matter. I shall read everything you have to say in the record. I am very sorry I have to leave. Thank you.

Mr. OBER. Thank you, Senator.

Now, in this field, there are three things I want to point out. First, we are dealing with a privilege and not a right, and that is a tremendous difference. We are not dealing with constitutional rights. There is no right of public employment, as Mr. Justice Frankfurter so plainly said.

Secondly, we are not in a field such as those referred to by Senator Hennings in his testimony which preceded mine, which requires uniformity. Here we are dealing with State governments and matters of concern to respective State governments. That is, whom they shall

employ. One State government might want to lay down one standard, and one another set of standards. They have a perfect right to do it.

Thirdly, we are dealing with privileges that are granted by the State government and not the Federal Government. This has nothing to do with questions of Federal rights. That is true both as to employment and as to the right to practice law. They are privileges granted to State governments, and they are matters peculiarly of State concern. This is not a controversial matter in an unsettled area, as are these congressional contempt cases, and the loyalty cases.

Now, the appellate jurisdiction of the Federal Supreme Court has very often been curtailed. I understood Senator Hennings to emphasize the *McCardle* case, and I thought he rather implied that that was the only case where the jurisdiction had been limited. In Corwin's *Constitution of the United States of America*, revised in 1952 and published by the authority of the Senate, there is a discussion of the *McCardle* case on pages 614 and 615. Professor Corwin says—

the power of Congress to make exceptions to the Courts' appellate jurisdiction has thus become in effect a plenary power to bestow, withhold, and withdraw appellate jurisdiction even to the point of its abolition.

The language of the Constitution is entirely clear on this point, because in article 3, section 2, there is a perfectly clear and definite distinction made between original and appellate jurisdiction. In the constitutional convention, the Founding Fathers thought it was only necessary to give original jurisdiction to the Supreme Court in cases affecting ambassadors, other public ministers, and consuls and those in which States shall be a party. That was because of the importance of foreign relations and the adjustment of the relations between the sovereign States. So they went on to say—

In all other cases before-mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

Now, Mr. Chairman, there is an express mandate or grant of power to the Congress itself. I think that there is great danger that the way this bill came up, there should be a conclusion on this point. The Supreme Court is not sacrosanct as to its jurisdiction. The Constitution, itself, imposes a responsibility in that field on Congress. Ever since 1789, that has been adjudicatory fact.

Senator BUTLER. May I ask you a question, Mr. Ober? This just occurred to me while you were testifying.

Could the Supreme Court, in cases involving State employees, and in cases of attorneys practicing before State courts, say that a State in fact being a party, they would have original jurisdiction in such cases, and it would do no good to take away their appellate jurisdiction?

Mr. OBER. I don't think so.

Mr. SOURWINE. Does original jurisdiction embody appellate jurisdiction necessarily, or are they two separate things?

Mr. OBER. They are two separate things, or at least have always been considered so. That was held, Mr. Sourwine—of course, you have got the *McCardle* case, but there are a number of other cases, I started to say, cited in Corwin in the book I have just referred to

on pages 614 and 615, in which the principle of the McCardle case has been upheld. Mr. Corwin says this:

Although the McCardle case goes to the ultimate in sustaining congressional power over the court's appellate jurisdiction and although it was born of the stresses and tensions of the reconstruction period, it has been frequently reaffirmed and approved.

True, the McCardle case was over a reconstruction act, but there are many other decisions that have nothing to do with any emotional crisis or period of war. For example, Professor Corwin cites—and I haven't studied these cases—at least six Supreme Court cases, including cases decided commencing in 1869. The last case he cites is 1934, for this principle that there can be an exception made to the appellate jurisdiction of the Court.

Mr. SOURWINE. Do you think it would be helpful if the committee printed in the appendix of these hearings the text you are speaking of from the Constitution Annotated?

Mr. OBER. Yes.

Senator BUTLER. It will be so ordered. That is pages 614 and 615 of the Constitution Annotated.

Mr. SOURWINE. Mr. Corwin's article from the Constitution Annotated.

Mr. OBER. Yes; that would be pages 614 and 615.

(The material referred to will be found in appendix II of the record.)

Mr. OBER. Of course, what concerns me, Mr. Chairman, is that the decisions of the Supreme Court are not sacrosanct. There is a danger of thinking that the jurisdiction is frozen, when it is not a frozen jurisdiction. The Founding Fathers were right not to make it a frozen jurisdiction, and there is no better illustration than the *Konigsberg* case. Certainly there is no possible reason why anybody should object to leaving to State courts of appeal—the highest courts of the State—the decision of who shall have the privilege of practicing before those courts. That is a matter that is inevitably a State matter. The various statutes authorizing appeals ending with the Supreme Court. There has always been a difference as to appeals from Federal courts and from State courts.

In Federal courts, it is a broader power, because you get there a question of statutory construction, and so forth. In State courts, it is a much narrower field.

Now, Mr. Chairman, as long as I have not disagreed with your approach but have suggested a somewhat broader bill than the bill that you filed this morning, perhaps it would be in order if I asked that this rough draft of a bill covering both sections 4 and 5 and changing the approach from the approach in 4 and 5, could be put in the record merely for information.

Senator BUTLER. It will be made a part of the record.

(The document referred to is as follows:)

A BILL To limit the jurisdiction of the Federal courts in certain cases involving State employees and the right to practice before State courts

Whereas, the privilege of employment under State authority or of practicing law before State courts and the denial thereof because of criminal, corrupt or subversive activities are matters of special concern of the respective State governments.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) part IV of title 28 of the United States Code is amended by adding at the end thereof the following new chapter:

CHAPTER 90—LIMITATION ON POWERS OF FEDERAL COURT WITH RESPECT TO CERTAIN STATE MATTERS

SEC. 1000. Limitations on Federal Jurisdiction over the denial by States of the privileges of State employment or of the practicing of law before State courts because of criminal, corrupt or subversive activities or failure to cooperate in investigations thereof.

Notwithstanding any provisions of the United States Code contained in this title or elsewhere, no Federal court shall have jurisdiction to entertain any suit for an injunction or for any other remedy against the operation or enforcement of any State statute, rule of court or rule of law, or of any regulation or bylaw of any board or commission or other body acting under the constitutional statutory or delegated State authority which denies the privilege of employment under the authority of the State, its political subdivisions and their respective board commissions and other authorities or the privilege of practicing law before the State courts, to any person because of subversive, criminal or corrupt activities, or because of refusal to answer questions before any State court, legislative or executive investigating body, or refusal to cooperate with the same in investigations relating thereto by appropriate State authorities; nor shall the Supreme Court have jurisdiction to review, either by appeal, writ of certiorari or otherwise, the decisions of any State courts where there is drawn in question the validity of any such State statute, rule of court, rule of law, regulation or bylaw, or of any action taken thereunder.

Mr. OBER. Now, Mr. Chairman, in commenting on that, you will notice in the preamble I have emphasized that employment and practicing law is a privilege and not a right. That, to me, seems to be important. It is a part of the reason which should sustain the bill and should obtain support, and that is fairly and squarely recognized.

The next part of it, the only substantial difference between this bill and your bill is that I have included employment by a State as well as practice of law. Simply because, logically, it falls in the same area. It may very well be that it would be better to leave it out if there is any danger that any extraneous questions should come into the matter.

What I have tried to confine it to is purely a privilege granted by the State, and States should be allowed to have their own standards, both of employment and their own standards for admission to the bar. Logically, I think it falls in the same field. It may be that the committee would be willing to accept that as well as the narrower area that you have included in your bill.

I think that the language is very much the same, except that I have tried in the preamble to elaborate on what I discussed with you at one time before.

Now, Mr. Chairman, I am almost through. I have said nothing very specifically about Sweezy.

Sweezy was, of course, the case that denied power to the attorney general of New Hampshire to investigate subversive activities. The reason I haven't is, first, because I believe that if S. 651 is passed, that is, the right of States to protect themselves against subversion, the right of self-preservation, then, as ancillary to that they will have the right to investigation. Also, if a restricted bill, such as I have suggested, is passed, that is to say, including Slochower as well as including Konigsberg, investigations are necessarily a part of the process of determining whether employees should be discharged. Investigations into corruption, subversion, or anything else. Therefore,

I didn't think anything separate was required as to *Sweezy*, although I think the case, the decision, was unjustified.

Now, I should like in conclusion to say that I feel very strongly that the Supreme Court has made a serious mistake in its decisions on communism. That is to say, the *Nelson* case, commencing in 1957 and the recent case last June, particularly. Congress and the executive have, for almost 20 years, attempted to legislate and to take all necessary steps to prevent the internal subversion of the Government, which, to my mind, is just as important as external aggression. The national defense is spending billions of dollars every year. Russia has conquered large parts of the world and there is no gainsaying it, by internal subversion. Right today they are attempting it plainly in Syria and the Middle East, and there is no doubt, as testified to repeatedly by Mr. Hoover, that there is a definite movement in this country. I think the Supreme Court has made a mistake in frustrating the efforts of Congress and the executive because the power and the responsibility for defense of this country, and the access to the information on which decisions can be made, is vested by the Constitution of the United States in Congress and the executive. I think that these five areas, and also the *Yates* case, which can be readily cured—not readily cured, but can be partially cured—by an amendment to the Smith Act on the definition of the word “organization,” are all cases where Congress has the responsibility and should act.

We are not dealing here with doctrinaire questions. We are dealing with the most fundamental questions that are presented to the Congress of the United States, the preservation of this country.

I think it is wrong to pay too much attention to the theoretical arguments of the rights of individuals, which completely ignore, Mr. Chairman, the overriding power and the right of the Government to protect itself, for unless the Government, itself, is preserved, these so-called individual rights are utterly meaningless.

Senator BUTLER. Well, in other words, Mr. Ober, some 45 or 46 States of the Union as you have recited, have seen fit to do something about this. The majority of the people acting through their Congress, have seen fit to do something about it. And the Supreme Court, in one swirl of the pen, wiped all of that work right off the books which it has taken 20 years to accomplish.

Mr. OBER. And, Mr. Chairman, the Supreme Court itself but a few years ago, Mr. Justice Frankfurter speaking, in other areas—this was in one of the alien cases—spoke of the awesome public responsibility of the President and of Congress to legislate on such matters as internal subversion because they have access to the information, and he pointed out the necessity of judicial restraint.

Now I am going back to the decisions of the Court itself. And yet the majority, as now constituted by the Court, has, I submit, confused this field with the criminal cases where there has been, if I may respectfully say so, a doctrinaire extension of the Bill of Rights beyond anything that there has ever been in the history of the country before. They have confused that with this field where the predominant question always must be the preservation of the country.

Now you have got that same question that was taken up by the British commission from their privy council recently and they, with all of their reluctance to interfere with rights of individuals, concluded that the

time had come when they had, in the interest of survival, to restrict the rights of individuals. It happens all of the time. In the case of a war, you draft young men and send them to foreign lands to fight and die for their country. You can overdo this respect for the rights of individuals, if you completely ignore the right of the country itself to survive and the requirements of security.

Mr. SOURWINE. Mr. Ober, might I ask a question?

Mr. OBER. Yes, Mr. Sourwine.

Mr. SOURWINE. What do you think of the argument that the restricting clause and the granting clause with regard to the appellate jurisdiction of the Supreme Court are really two separate things, one following the other, and that the grant of the appellate power is absolute, and that the purported authority to Congress to restrict and regulate must be exercised only in minor areas and without taking away from the Supreme Court any of its appellate powers?

Mr. OBER. Mr. Sourwine, I see absolutely no justification for any such argument from the language of the Constitution, nor from the decisions that have been interpreted so far as I have studied them.

I think the conclusion, perhaps, arises from the fact that article 3, section 3, says "Judicial power extends" to various classes of cases. Power and jurisdiction are different.

Now, who exercises the power is the question of jurisdiction. The Congress was allowed or authorized and directed to establish such inferior courts as may from time to time be necessary, but the jurisdictional section is article 3, section 2, paragraph 2. It is paragraph 2, under section 2. That jurisdictional section is the only one on jurisdiction, to my knowledge, and there is a sharp difference made between the cases where the Supreme Court has original jurisdiction and the other cases, where they have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

Now, there is a broad grant of power as to the fixing and regulation of jurisdiction, appellate jurisdiction. It doesn't say "except in minor matters." It doesn't say that they shall not disturb a jurisdiction once granted.

The Supreme Court of the United States, from 1869 up to the present moment, has said that the power of the Congress to determine jurisdiction is absolute, and I don't care what some of the people that appeared before you may argue, that isn't the law as of now, and it isn't the Constitution.

Mr. Chairman, I thank you for your courtesy. I am ready to answer any questions that you may want to ask.

Senator BUTLER. Mr. Ober, I asked the questions I wanted to ask as we went along.

Would you have any further questions, Mr. Sourwine?

Mr. SOURWINE. I have one more, Senator.

What do you think of the argument, Mr. Ober, that a grant of original jurisdiction necessarily encompasses a grant of appellate jurisdiction over the same subject, and the Supreme Court, having been granted original jurisdiction over matters to which States are parties, can't be denied appellate jurisdiction over matters to which a State is a party.

I might say that is not my theory, but it was advanced here.

Mr. OBER. In the first place, paragraph 2 of section 2 of article 3 makes perfectly clear distinction and draws a contrast between original and appellate jurisdiction. It is the most ordinary, elementary rule of statutory construction, that where a statute draws a contrast between two different phrases, you can't say that one includes the other. They are in the form of it. It is quite clear that they are talking about different things. They are talking about where there would be original jurisdiction in matters that involve these important things, such as foreign relations, and State relations, and they are drawing a sharp contrast by using the language "appellate jurisdiction."

Well, actually, of course, what you have got is a perfectly plain line of decisions that, in the case of original jurisdiction, means you file it in the Supreme Court of the United States. There is your answer, your complete answer.

Mr. SOURWINE. Do you regard this provision in article 3, section 2, paragraph 2, as one of the check-and-balance provisions of the Constitution?

Mr. OBER. I certainly do, sir.

Mr. SOURWINE. Would you be able to rationalize, then, the statement that to utilize this section is contrary to, and will upset the checks and balances of the Constitution?

Mr. OBER. I certainly cannot. I think that the very purpose of having that provision in the Constitution is to provide a check on the Supreme Court of the United States.

We have got to bear in mind that the Supreme Court isn't sacrosanct, any more than any other of the three branches of Government. It was set up by the Founding Fathers, as I understand it—that is the Constitution—with dispersed power, dispersed into three parts, and dispersed as between the Federal Government and the State governments. That was in order to avoid any type of dictatorship; to avoid Executive dictatorship, congressional dictatorship, or judicial dictatorship.

I believe that it was once said that human government is—in an oligarchy it is the oligarch; in a monarchy, it is the monarch; in a democracy, it is the demos. It is the human element. And because it is a human element, it was necessary to have this dispersed power.

Now if the Court, which has neither person nor sword can nevertheless take over the jurisdiction of State courts in such matters as who shall practice before the State courts, then, Mr. Chairman, our republican conception of government is really terminated.

Mr. SOURWINE. I have one more question, Mr. Chairman.

Mr. OBER. Yes, sir.

Mr. SOURWINE. Do you see in some of these decisions an evil which goes beyond the subject matter of the decision itself, to wit, a deliberate attempt by the Court to fix general policy and to provide for its application throughout the country in other cases; in other words, an attempt to legislate generally?

Mr. OBER. Oh, I think so, Mr. Sourwine. I think in this entire field, and it is not only in this field, it is also in these recent cases involving appeals from the State courts in criminal matters, the Supreme Court is undertaking to lay down a sort of a code of universal application rather than to decide particular cases that come up before it.

Now, you can see that very plainly if you read the Watkins case, for example. A large part of that opinion is complete and absolute dictum. All of the discussion about the first amendment is dictum, and so in other cases. You find the same tendency to express general views which go far beyond the requirements of the decision in the specific case.

Mr. SOURWINE. That was true particularly in Nelson, too; wasn't it?

Mr. OBER. It was very true in Nelson. In Nelson, I think that there was never a case where there was more of an effort to determine what the Supreme Court thought was the right way to treat subversion; in other words, to legislate, to put it bluntly.

I think that is perfectly plain from the entire decision, from one end of it to the other, and they went to the greatest length because as I said a short time ago, they completely disregarded the title in which the Smith Act is found; that is, congressional intent, not to mention the views of Congressman Smith which were expressed on the floor of the House at the time it was introduced, and which assured the States that no power was being taken from them. They completely disregarded the views of the executive, and they overruled decisions going back to the Gitlow case, which I think was more than 25 years before.

They upset the statutes of at least 42 States. Some of those statutes went back 100 years. Most of them were in the last 30 or 40 years. I think it is not an unfair criticism for me to suggest that that is a legislative and not a judicial process.

Mr. SOURWINE. I have no more questions, Mr. Chairman.

Senator BUTLER. Thank you, Mr. Ober.

It has been very enlightening, and we have been very happy to have you here before this subcommittee.

I think the Chair should make a statement at this point.

Mr. Benjamin Smith of New Orleans; is he in the room?

Mr. SMITH. Yes; I am here, sir.

Senator BUTLER. Mr. Smith, I wanted to make this brief explanation. When the hearing started at 10 o'clock, the only witness present was Mr. Ober, and to speed the hearing, I had Mr. Ober take the stand. He had only proceeded for about 10 minutes when Senator Hennings entered the room. So when Senator Hennings had finished, I had Mr. Ober complete his statement. So I would be very happy to have you take the stand now.

I assume we can go for another half hour, and then take a break for luncheon.

Mr. SMITH. Thank you, sir.

What I have to say is very brief.

STATEMENT OF BENJAMIN E. SMITH, REPRESENTING NATIONAL LAWYERS GUILD

Mr. SMITH. I had requested an appearance before the committee through Mr. Royal France, the executive secretary of the National Lawyers Guild, and I was asked by the executive board of the guild to appear, with Mr. Sourwine's consent as counsel, and present a statement of the National Lawyers Guild in opposition to Senator Jenner's bill S. 2646.

Mr. SOURWINE. This statement, then, is the official statement of the guild, but is not your statement.

Mr. SMITH. That is correct, sir. I am speaking for the executive board of the guild.

Mr. SOURWINE. This statement has been approved by the executive board of the guild?

Mr. SMITH. Yes, it was approved on Saturday, the 28th.

Mr. SOURWINE. Do you want to read that into the record?

Mr. SMITH. Yes, it is three pages long. I would like to read it if I may, Mr. Sourwine.

Senator BUTLER. Yes.

Mr. SMITH. S. 2646, introduced by Senator Jenner, is entitled: "A bill to limit the appellate jurisdiction of the Supreme Court in certain cases." It provides that the Supreme Court shall be deprived of appellate jurisdiction in the following five fields: (1) investigative powers of Congress; (2) Federal employees' security program; (3) State antisubversive laws; (4) school boards' antisubversive rules; and (5) admission of lawyers to State practice.

The bill was stated by its proponent to be a measure to chastise the Supreme Court for its decisions in recent cases which incurred the Senator's displeasure.

Mr. SOURWINE. You mean Senator Jenner said that?

Mr. SMITH. It was our understanding, Mr. Sourwine, that Senator Jenner had indicated some displeasure with recent decisions of the Supreme Court.

Mr. SOURWINE. Did Senator Jenner say it was to be a measure to chastise the Supreme Court, or did he refer to it as a measure to curb the Court, to push it back into its proper sphere?

Mr. SMITH. He may have. I didn't hear him say it.

Mr. SOURWINE. You say this is an official statement of the guild. You have no knowledge to the contrary?

Mr. SMITH. No, I have no knowledge to the contrary. I have simply the statement by the guild.

Curiously enough, Senator Jenner, in arguing the merits of his bill, laid especial stress on five decisions of the Supreme Court which are not touched by any provision of the bill, namely, *Communist Party v. Subversive Activities Control Board* (351 U. S. 115); *Pennsylvania v. Board of Directors of City Trusts of Philadelphia (Girard College case)*, (353 U. S. 230); *Mallory v. United States*, (354 U. S. 449); *Jencks v. United States*, (353 U. S. 657); and *Yates v. United States*, (354 U. S. 298).

Obviously, the Supreme Court is not above criticism, and Senators and the public generally have the right to criticize or disagree with any particular decisions of the Court. Moreover, as a practical matter, whenever a Supreme Court decision is based upon other than constitutional grounds, it is within the power of Congress to alter the rule announced by enacting legislation which will establish a different rule. Significantly, Congress has in the recent past enacted legislation in the field covered by one of the cases that has aroused Senator Jenner's ire. This was the Jencks case, in which the legislation enacted embodies Congress' express approval of the principle laid down in that decision by the Supreme Court. The only need for the legislation, according to the Attorney General, was to take care of misinterpretations given that decision by lower courts.

Two of the recent decisions at which the present bill is directed are *Cole v. Young* (351 U. S. 536), dealing with the Federal employees' security program, and *Pennsylvania v. Nelson* (350 U. S. 497), holding that Congress had superseded State legislation in the field of anti-subversive legislation. In both cases the Court's opinion was limited to a finding of congressional intent. There is no constitutional barrier to the enactment of legislation by Congress to declare that its present intent is otherwise. Indeed, numerous bills have been introduced for precisely that purpose. The failure of those proposals to secure congressional approval serves to attest the correctness of the Supreme Court's views on the issues. Moreover, even if Congress does enact new and different legislation in the two fields mentioned, it is not consistent with our form of government to suggest that the programs should not be subject to Supreme Court review to confine their administration within the bounds of the congressional intent and the Constitution.

The bill does not bar judicial review in the fields which it covers, but provides only that review must fall short of the Supreme Court. It thus permits conflicting and inconsistent decisions by 11 different circuit courts of appeal and 48 different State supreme courts. The proponents of the bill thus prefer confusion to order.

The real purpose of the bill is to discipline the Supreme Court because it has recently been upholding civil liberties. This even though four members of the Supreme Court are Eisenhower appointees who were confirmed by Senates consisting substantially of the present membership. In the light of its purpose and effect, the bill is obnoxious because it interferes with the independence of the judiciary and with our constitutional system of separation of powers.

It happens that the National Lawyers Guild believes that the Supreme Court decisions which have offended Senator Jenner are good decisions and sound law. But even if we disagreed with the decisions, we would oppose this bill as endangering the integrity of our judicial system. In the language of the resolution adopted by the house of delegates of the American Bar Association, the bill is—

contrary to the maintenance of the balance of powers set up in the Constitution between the executive, legislative, and judicial branches of our Government.

Mr. SOURWINE. Were you here to hear Mr. Ober's testimony?

Mr. SMITH. Yes, sir, I did.

Mr. SOURWINE. Do you regard the provision in article III, section 2, paragraph 2, of the Constitution with respect to the appellate power of the Court, as one of the check-and-balance provisions of the Constitution?

Mr. SMITH. Yes, I do.

Mr. SOURWINE. Well, will you explain how the utilization by the Congress of a check-and-balance provision of the Constitution can be contrary to the maintenance of the balance of power set up in the Constitution?

Mr. SMITH. Well, I think that it depends, Mr. Sourwine, upon the way in which this portion of the Constitution is made use of. I think that certainly it is a part of the check-and-balance system of our Government, but I think it is certainly a question of opinion as to what you propose to enact under this part of the Constitution as to whether or not it really serves the intent of supporting check and balance.

The American Bar Association's committee on individual rights as affected by national security said in a report that confusion and conflicts in decisions would result, and that—

It is difficult to conceive of an independent judiciary which must decide cases with constant apprehension that if a decision is unpopular with a temporary majority in Congress, the Court's judicial review may be withdrawn.

We concur also in the views of the New York Times editorial of February 20, 1958, that—

Legislation of this kind would not merely leave constitutional law in these fields to the lower Federal or State courts, and therefore in a state of confusion. It would do something much worse: Strike directly at the independence of the judiciary.

Senator BUTLER. Thank you ever so much, Mr. Smith.

Mr. SMITH. If there are any questions you desire to ask me, I'll be happy to answer them.

Senator BUTLER. No. What is the membership of your group? The national membership?

Mr. SMITH. I would say approximately 2,000, sir.

Senator BUTLER. I have no further questions.

Mr. SOURWINE. I have no questions.

Mr. SMITH. Thank you for your courtesy.

Senator BUTLER. Thank you for coming.

Is Miss Janice Roberts here?

Miss ROBERTS. Yes, I am.

Senator BUTLER. Miss Roberts, you represent the Religious Freedom Committee?

Miss ROBERTS. That is right.

Senator BUTLER. What is the nature of that organization, and what is its membership, and where does it function, and what is its function?

Miss ROBERTS. The committee has its main office—its only office—in New York City at 118 East 28th Street. Membership is national, and the first part of the prepared statement that I have indicates the purpose and activities of the committee. I have been asked by our administrative group to present this statement to you today on behalf of the Religious Freedom Committee, Inc.

Senator BUTLER. Good. All right. You may proceed.

STATEMENT ON BEHALF OF RELIGIOUS FREEDOM COMMITTEE, INC., NEW YORK, N. Y., BY MISS JANICE M. ROBERTS, EXECUTIVE SECRETARY

Miss ROBERTS. Religious Freedom Committee is a voluntary membership organization of clergymen and laymen and women in church and synagogue. Its stated objective is to maintain unimpaired the American heritage of the free exercise of religion.

The activities of Religious Freedom Committee are in three main areas: 1. To provide the clergy, the laity and the public with factual information concerning invasions of the field of religion by agencies of government;

2. To enlist the clergy and laity in measures designed to guarantee that no agency or official of government shall engage in activities contrary to the first clause of the first amendment; and, if necessary,

to support efforts to carry this constitutional question through the courts;

3. To provide legal advice for ministers of religion and other persons whose right to the free exercise of religion may be abridged by actions of investigating committees or other government bodies.

Religious Freedom Committee is concerned with the preservation of all the democratic rights of the Constitution believing that freedom is indivisible. The bill under consideration here today, S. 2616, is designed to prevent the Supreme Court from accepting appeals and rendering judgments in a wide variety of cases.

It strikes directly at the independence of the judiciary and its adoption would upset the system of checks and balances constituting our basic form of government.

Mr. SOURWINE. May I ask a question?

Has your organization been approved by any official body representing any religious denomination?

Miss ROBERTS. Our Religious Freedom Committee is a voluntary membership organization, and its membership is comprised of people representing, not officially, but by reason of their own views, 32—

Mr. SOURWINE. You have not answered my question.

The question was has your organization been approved by any official body representing any religious denomination?

Miss ROBERTS. I don't believe that it is correct for any one religious organization to require approval by another. I don't understand that approval—

Mr. SOURWINE. Your organization is not considered a church?

Miss ROBERTS. It is not a church.

Mr. SOURWINE. Does it purport to speak for any religious denomination or organization?

Miss ROBERTS. It speaks for itself.

Mr. SOURWINE. It speaks only for the members, it does not purport to speak for, say, the Methodist Church?

Miss ROBERTS. It speaks for itself.

Mr. SOURWINE. Do you have any Catholics in your organization?

Miss ROBERTS. We do not. We have invited many Catholic priests to become members. We have not received any response.

Mr. SOURWINE. Is there any affiliation between your organization and the Methodist Federation for Social Action?

Miss ROBERTS. Our organization is a completely independent organization, comprising members within and outside the Methodist churches and all branches of Judaism.

Mr. SOURWINE. I say, is there any substantial overlapping between your organization and the Methodist Federation for Social Action?

Miss ROBERTS. What is the meaning of the word "overlapping" in this sense?

Mr. SOURWINE. Do you have many members who are also members of the Methodist Federation for Social Action?

Miss ROBERTS. We have many Methodists in our group.

Mr. SOURWINE. You were assistant recording secretary for the Methodist Federation for Social Action, were you not?

Miss ROBERTS. Mr. Sourwine, I don't think these questions are appropriate to the matters we are discussing here.

We are getting so far afield from the legislative purpose of this particular inquiry.

Senator BUTLER. Will you please answer the questions?

Miss ROBERTS. I would like to have explained to me why this is pertinent, whether I worked with some other organization or not.

Senator BUTLER. You are not on trial or under oath or anything.

Will you please answer the questions, and we can get on with the business of this committee.

Miss ROBERTS. I will be glad to get on with the business of the committee.

What is the question pending?

Senator BUTLER. I would rather not have any ideas from you as to what the legislative purpose of this committee is.

Miss ROBERTS. I asked to be heard with regard to Senate S. 2046, and that is what I came here to speak for.

Senator BUTLER. And when you come here, you will answer questions propounded to you by counsel for this committee.

Mr. SOURWINE. The last question was whether you had not been the recording secretary for the Methodist Federation for Social Action?

Miss ROBERTS. I have held that job from time to time.

Mr. SOURWINE. At a time when you were also an official of the Religious Freedom Committee?

Miss ROBERTS. Yes.

Mr. SOURWINE. At a time when you were also an official of the Religious Freedom Committee?

Miss ROBERTS. Yes.

Senator BUTLER. And what was so painful about that?

Will you proceed?

Miss ROBERTS. I will be glad to.

Senator BUTLER. I wish you would.

Miss ROBERTS. As members of Religious Freedom Committee, we have a special basis for concern; namely, the possible infringement of the free exercise of religion under this proposed legislation.

The exercise of religion goes beyond belief and faith into service or action in accordance with the precepts of one's belief. Religious organizations and leaders, both clerical and lay, must be free to advocate and apply the principles of their religion. They must be free to voice moral judgment on matters of social concern without fear of intimidation and harassment by government agencies or officials.

This concern for religious liberty under the proposed law is not an abstraction. There are specific cases now in Federal and State courts which arise from actions of religious leaders in the application of the teachings of their religion, notably in such matters as integration, the advocacy of peace and increased communication among all the people of the world.

For expressing their religiously motivated convictions in these areas, individuals and organizations have been harassed, publicly pilloried and penalized by State and Federal agencies and investigative committees where their final recourse in the maintenance of their constitutional rights has been appeal to the United States Supreme Court.

Such legislation as this bill would foreclose such recourse and make our citizens the victims of arbitrary temporary political moods, when, in the long run, these individuals and groups may have an invaluable contribution to make on public discussion of national policy.

One of the most significant and far-reaching cases in the field of religious freedom is now pending before the Supreme Court. It involves the California law requiring churches to sign a loyalty oath to secure tax exemption. This law enacted by the California Legislature violates the separation of church and state. It has the effect of requiring conformity by the churches.

Historically, the freedom for churches and synagogues to speak out on contemporary issues and bring to bear the impact of their moral insights upon society has been recognized to be in the public interest.

This California law, if upheld, could easily become a precedent for those wishing to restrict the moral influence of the churches and synagogues of the land, encouraging the enactment of similar legislation in other States.

Senate bill 2646 would preclude any review of this dangerous legislation by the High Court. It is worth noting that the decision of the California Supreme Court was by a 4-3 vote, the substantial dissent presenting the traditional point of view embodied in the first amendment to the Constitution.

A second important case in which the rights of religious conscience are central is that of Dr. Willard Uphaus, also pending before the Supreme Court.

Mr. SOURWINE. Is he an official of your organization?

Miss ROBERTS. No, he is not.

Mr. SOURWINE. Do you have any connection with him?

Miss ROBERTS. He is a very good friend of mine, and I have visited in his home on several occasions.

Mr. SOURWINE. Isn't he a former executive director of the Religious Freedom Committee?

Miss ROBERTS. No; he has never had—

Mr. SOURWINE. He was never connected with it?

Miss ROBERTS. No; he has never had office in the Religious Freedom Committee.

Mr. SOURWINE. Is he connected with the Methodist Federation for Social Action?

Miss ROBERTS. He is a Methodist layman, and I believe he has been active in that group.

Dr. Uphaus is a layman in the Methodist Church whose life has been devoted to religious work. He has been a teacher of religious education in colleges and theological seminaries and for many years was executive secretary of the National Religion and Labor Foundation. He is now director of the World Fellowship of Faiths, an organization that falls directly within any broad interpretation of a religiously motivated group.

World Fellowship had its spiritual origin in the Chicago World Parliament of Religion and brings together representatives of different beliefs for discussion and to further mutual understanding.

The Uphaus case was brought into court as a result of an improper demand by the attorney general of New Hampshire for the guest list of the World Fellowship Center at Conway, N. H. Dr. Uphaus refused to comply on the first amendment grounds of religious conscience and free assembly and was found in contempt.

The United States Supreme Court sent the case back to New Hampshire for dismissal in light of its decision in the Sweezy case.

When the State court declined to reverse, Dr. Uphaus returned to the Supreme Court and is currently applying for relief.

As both the California loyalty oath and Uphaus case show, passage of this bill could lead to complete chaos and confusion in the definition of constitutional rights which ought to be uniform throughout the country and not be determined by the many lower Federal or State courts.

Another case of religiously motivated individuals being imperiled was that of Anne and Carl Braden. An ancient and previously unused statute of the State of Kentucky dealing with "criminal syndicalism and sedition" was applied against seven people because of actions they had taken in the field of integration; and Carl Braden was convicted.

It is a matter of record that all major religious bodies in America, Christian and Jewish, have defined integration as a religious principle and have called upon their members to do all in their power to effectuate it.

The Bradens are communicant members of one of these major denominations. Their lives have been conditioned by the teachings of that church.

Mr. SOURWINE. Do you know the Bradens personally or either of them?

Miss ROBERTS. The Religious Freedom Committee had communication with them when we filed—

Mr. SOURWINE. Do you know them personally?

Miss ROBERTS. I am speaking for the Religious Freedom Committee.

Mr. SOURWINE. You are speaking for them.

Do you know the Bradens personally, either of them?

Either you do or you don't. There's no crime involved.

Miss ROBERTS. Yes, I know the Bradens.

Mr. SOURWINE. Do you know Carl Braden to be a member of the Communist Party?

Miss ROBERTS. I have no knowledge of anybody being a member of the Communist Party unless they have told me so.

Senator BUTLER. Well, has he told you?

Miss ROBERTS. Of course not.

Mr. SOURWINE. All right.

Miss ROBERTS. Their attempted application of a relevant Christianity has been the product of their association with able men in the episcopacy and ministry whom their entire denomination knows and recognizes as loyal exemplars of the Christian faith and life.

The Kentucky Court of Appeals recognized the relevance and cogency of the religious motivation by accepting an amicus curiae brief filed by Religious Freedom Committee.

After the Nelson ruling came down from the Supreme Court, the Kentucky Court of Appeals threw out the conviction of Carl Braden. In any similar or parallel case that might arise in the future, the protection of the Supreme Court, which ultimately freed these Christians in the advocacy of their religious convictions would be denied.

One of the sections of this bill would prohibit review by the Supreme Court of actions of committees of Congress.

Considerable damage has been done to the separation of church and state and the free exercise of religion by investigating committees of

Congress, in spite of the constitutional provision that Congress may not legislate in the field of religion.

Mr. SOURWINE. Does your organization still stand for abolition of the Senate Internal Security Subcommittee?

Miss ROBERTS. That is a national policy and public information. That is right.

Mr. SOURWINE. All right.

Miss ROBERTS. The House Committee on Un-American Activities and the Senate Internal Security Subcommittee have subjected clergymen and other religious leaders to unwarranted interrogation concerning activities they had undertaken in the social application of the imperatives of their religion. They have gone so far as to seek information about private conversation held in a minister's study.

Mr. SOURWINE. Can you document that charge with regard to the Senate Internal Security Subcommittee?

Miss ROBERTS. I can't present a document.

Mr. SOURWINE. When?

What religious leader?

Miss ROBERTS. Just a moment. I want to give you the correct information.

In 1953, in the early spring or late winter, in Boston, in executive session, when this committee was chaired by Mr. Jenner, there were a number of clergymen from that area subjected to such interrogation.

Mr. SOURWINE. Were you present?

Miss ROBERTS. I was not present.

Mr. SOURWINE. Have you read the record?

Miss ROBERTS. I have seen the record in the past. I don't have it with me.

Mr. SOURWINE. You said it was in executive session?

Miss ROBERTS. That is correct.

Mr. SOURWINE. How did you get it?

Miss ROBERTS. Well, perhaps I saw somebody's account of the record, then.

Mr. SOURWINE. You weren't there, and you haven't read the record, and yet you venture to say what kind of interrogation?

Miss ROBERTS. I venture to say what kind of interrogation because the ministers who reported this are reliable people, and I have confidence in the veracity of their statements.

Mr. SOURWINE. Go ahead.

Miss ROBERTS. These committees have invaded the field of religion by listing religious organizations and individuals as subversive.

The House committee called professional ex-Communist witnesses to give testimony concerning an alleged conspiracy among clergymen and lay people to destroy religion. Release of the false testimony to the public compounded the evil of this unconstitutional action.

These committees have issued publications in such a way as to influence one side of religious controversy.

We have grave apprehension that if cases arising from actions of committees of Congress cannot be reviewed by the Highest Court of the land, encouragement would be given to committees to undertake further incursions into the field of religion. Beyond the damage that would be done to church-state separation, freedom of conscience, and the rights of those immediately concerned, the resultant intimidation could curtail the freedom of the pulpit and the application of prophetic religion to the social order.

It is widely recognized that these are turbulent times in which the country is going through a period of internal transition and is facing new factors on the international scene. It is no simple matter to establish wise social policies for the Nation.

Surely the insights to be gained from religious conviction through the life of worship and prayer and painstaking study have a contribution to make to public thought. Any move that inhibits such thinking or seeks to confine it within the patterns of the moment, can hobble and stint the ethical development of our Nation, and cripple its witness in the world today.

This issue of abridgment of free expression is not a matter of either a liberal or a conservative approach. Both can be useful in a time like this; and curtailment of either can harm the national welfare. At the present time the trend is to restrict and penalize progressive and leftwing views. But it is conceivable that at some future time the situation would be reversed.

We of the Religious Freedom Committee believe that the principles of free speech, press, assembly, petition for redress, and religious liberty apply to all individuals and groups at all times. These are permanent principles in the American philosophy of life and must be maintained no matter what the majority point of view or the internal or external pressures of any particular period.

The first amendment guaranties of free expression are essential to the preservation of truth and liberty. We believe profoundly in the scriptural injunction:

Ye shall know the truth and the truth shall make you free.

Senator BUTLER. Thank you, Miss Roberts.

Mr. SOURVINE. I have here a letter to Senator Jenner from the Honorable Leon M. Bazile of Ashland, Va., enclosing a statement regarding the issues now under consideration.

Senator BUTLER. It may be placed in the record.

FIFTEENTH JUDICIAL CIRCUIT,
Ashland, Va., March 3, 1958.

DEAR SENATOR JENNER: It is gratifying to those who respect the Constitution of the United States to know that you are trying to curb the Supreme Court which has no respect for that great instrument.

Three years ago I delivered a speech before the judicial section of the Virginia State Bar Association which set forth my views of what the Court had been doing up to that time. It may be of interest to you, and I am enclosing a copy of this speech.

With my best wishes, I am,
Sincerely,

LEON M. BAZILE.

(The text of the speech is as follows:)

The Constitution of the United States is a written document. A particular section cannot mean one thing at one time and another and different thing at another time.

As Judge Cooley in his great work on the Constitution said: "A cardinal rule in dealing with written instruments is that they are to receive an unvarying interpretation and that their practical construction is to be uniform. A constitution is not to be made to mean one thing at one time and another at such subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. A principal share of the benefit expected from written constitutions would be lost if the rules they establish were so flexible as to bend to circumstances or be modified by public opinion" (Cooley, Constitution and Limitations (2d edition) 52).

The glory of American constitutional law, as we have known it, is that it has been built on precedents from the beginning much as a brick wall is constructed.

To our great benefit, those wisemen who founded our Government rejected the idea of an unwritten constitution and adopted a written constitution as the fundamental law of our Government.

The written Constitution was intended to be a guaranty against tyranny and oppression by the Government, a subject with which our Founding Fathers were intimately acquainted.

American constitutional law, until recently, had been a thing of slow growth.

As long as the Supreme Court of the United States consisted of great judges who had been trained in the law and who were men that, when they ascended that Court, put aside the politics with which they had previously been concerned and became judges who respected the oath that the Constitution requires them to take, our system of constitutional law was fairly stable, and when a question involving United States constitutional law came before a lawyer he knew how to advise his client, and the court before whom that issue came how to rule on it.

What has happened to United States constitutional law in recent years?

We now and for some years past have had a Supreme Court, the majority of whose judges, and apparently all of the judges of that Court, have no respect for the precedents of the past not for the language of the constitution which that Court is charged with upholding and defending.

For the benefit of an atheist, it rewrote and added words to the First Amendment that are not found in that section. *People ex rel. McCullum v. Board of Education* (333 U. S. 203 (1947)).

Because of the peculiar views of the late Mr. Chief Justice Stone about the desirability of taxing everybody, it upset the law of interstate commerce and from this have followed decision after decision by which it has been held that people wholly engaged in intrastate commerce are engaged in interstate commerce and subject to Federal regulation.

In the *United States v. Appalachian Electric Co.* (311 U. S. 377, 61 S. Ct. 291 (1940)), that Court upset a long line of decisions to hold that an unnavigable stream was in fact navigable and subject to Federal regulation.

Even Mr. Justice Nathan Cardozo who was an able and even a great judge when he was on the New York court of appeals seemed to lose all sense of responsibility when he became a member of the Supreme Court.

In 1935, the Congress passed what is known as the Social Security Act. Under that act, the United States levied a tax upon the employers and employees of the States. It was provided that for any State to obtain any benefit from this tax that it had to enact a social-security law which had to be first approved by the Federal Social Security Board if it met with the requirements of that Board. If the State enacted such a law, then the United States agreed to refund to the State or allow the taxpayers 90 percent credit for the tax paid.

This is a perfectly damnable formula by which the Congress, if so advised, could destroy every State in the Union.

Mr. Justice Cardozo stated the vital issue thus: "Its assailants take the ground * * * that its purpose was not revenue but an unlawful invasion of the reserved power of the States; and, that the States in submitting to it have yielded to coercion and have abandoned governmental functions which they are not permitted to surrender."

These contentions, as we know, were overruled and Justice Cardozo said that the States were not coerced into passing approved social-security laws, although as we all know, the Commonwealth of Virginia was certainly coerced into passing such a law.

The fact that Mr. Justice Cardozo had his tongue in his cheek when he wrote this opinion is illustrated by what he said near the end of his opinion (301 U. S. 590): "In ruling as we do, we leave many questions open. We do not say that a tax is valid when imposed by act of Congress, if it is laid upon the condition that a State may escape its operation through the adoption of a statute unrelated in subject matter to activities fairly within the scope of the national policy and power. No such question is before us."

Can you conceive of any question which the present court would hold was not within the scope of national policy and power?

Mr. Justice McReynolds who was by far the ablest member of the Court with unerring precision pointed out the consequences of this iniquitous opinion (301 U. S. 609): "By the sanction of this adventure, the door is open for progress-

also inauguration of others of like kind under which it can hardly be expected that the States will retain genuine independence of action. And without independent States, a Federal union as contemplated by the Constitution becomes impossible."

The late Mr. Justice Jackson was admittedly a man of ability but in *Wickard v. Filburn* (317 U. S. 111, 63 S. Ct. 82 (1942)), he held that under the Wheat Quota Act, that if a man raised more wheat on his farm than the quota assigned him that he was subject to the penalty imposed by the Federal Control Act even though all of the wheat raised was used on his farm and not one grain thereof went into commerce.

He said (317 U. S. 128): "But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Homegrown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions of restrictions therein. This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing its purposes to stimulate trade therein at increased prices.

Is there anything that remains intrastate commerce?

Possibly not, if Congress claims it, under such reasoning as this.

Thus, under the wage and hour law, intrastate transactions become subject to that law as we saw in *Mitchell v. Volmer Co.* (75 S. Ct. 800 (1935)), which caused Mr. Justice Minton to declare in his dissenting opinion: "Reliance upon this Court's opinions becomes hazardous business for lawyers and Judges, not to mention contractors who are not familiar with the vintage test."

Other examples of the destruction being worked by that Court could be multiplied, but I shall refer to only one other case which is probably the most disgraceful act engaged in by any court. That is the decision in *Brown v. The Board of Education* (347 U. S. 483, 74 S. Ct. 680 (1954)), in which the Supreme Court of the United States whose members are by article VI of the Constitution to "be bound by oath or affirmation to support this Constitution," overruled well-considered and rightly decided opinions by such Judges as Mr. Justice Henry Billings Brown, concurred in by Mr. Justices Stephen J. Field, Horace Gray, George Shiras, Jr., Rufus W. Peckham, Edward D. White, and Mr. Chief Justice Melvin W. Fuller, and by Mr. Chief Justice Taft concurred in by such Judges as Oliver Wendell Holmes, Willis Devanter, James Clarke McReynolds, Louis D. Brandeis, George Sutherland, Pierce Butler, Edward T. Sanford, and Harlan Fiske Stone on the authority of certain psychology and sociological books written by men who have no knowledge of constitutional law and who have been accused by Senator Eastland of being Communists or belonging to Communist-front organizations.

Never before has any court so debased itself as has the Supreme Court of the United States.

We well may tremble for our future when we realize that into the hands of such irresponsible politicians has been committed the power to be the final arbiter in the construction of the fundamental law under which we live.

The only consolation that we can take in this matter is that no one can be expected to respect any opinion rendered by a court that has no respect for the opinions of its great predecessors.

Clarence Mitchell, NAACP.

TESTIMONY OF CLARENCE MITCHELL

Mr. MITCHELL. I am Clarence Mitchell, director of the Washington Bureau of the National Association for the Advancement of Colored People. I am accompanied by J. Francis Pohlhaus, counsel of the Bureau.

I apologize that our fellow Marylander, Mr. Marshall, who was supposed to present this statement, cannot be here, because he is working on some matters in our Arkansas school cases. But, with your permission, Mr. Chairman, I would like to read it.

Senator BUTLER. You may proceed.

STATEMENT OF THURGOOD MARSHALL, READ BY CLARENCE MITCHELL, DIRECTOR, WASHINGTON BUREAU, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ACCOMPANIED BY J. FRANCIS POHLHAUS, COUNSEL

Mr. MITCHELL. Mr. Marshall's statement is as follows:

I have been requested by the National Association for the Advancement of Colored People to testify in opposition to S. 2040, a bill to limit the appellate jurisdiction of the Supreme Court in certain cases.

This bill proposes to deprive the Supreme Court of jurisdiction in the following five areas:

1. Actions of congressional committees;
2. Actions of Governmental agencies established by Congress to deal with subversion among employees of the executive branch;
3. All State laws dealing with subversion within the State's borders;
4. All regulations of school boards dealing with subversion among teachers;
5. All State provisions dealing with the admission of lawyers to practice.

As this committee knows, and as Members of the Congress also know, the National Association for the Advancement of Colored People and its lawyers are particularly interested in protecting the rights of Negroes from unconstitutional acts and deprivation of rights contrary to the 14th amendment. We are likewise interested in the fullest protection of due process and equal protection clauses of this amendment.

The present bill would deprive the Supreme Court of jurisdiction to review the legality and/or constitutionality of the rules, bylaws, and regulations adopted by school boards or similar bodies concerning subversive activities among its teachers.

This particular provision gives alarm to all of us interested in academic freedom. It is particularly dangerous to allow local school boards under the guise of curbing subversive activities to penalize teachers for belonging to such organizations as the NAACP.

Mr. MITCHELL. I might say, Mr. Chairman, because you are exposed to a different climate on this sort of thing in our State of Maryland, it may seem a little fantastic to you that a person who is a teacher could be penalized and called subversive for being a member of the NAACP. Yet, there is such a statute in the State of South Carolina, which would deny employment to teachers and other State employees who are members of the National Association for the Advancement of Colored People. We undertook to take that case to the Supreme Court on behalf of some of the teachers. After we got past the district court, the State legislature very hurriedly revised the law so that it didn't mention the NAACP specifically, but had the same general purpose. I assume we may very well have to start from scratch again. Such State action is a very old kind of thing, and yet there it is, as a matter of record. Now I return to Mr. Marshall's statement:

Such punitive action against teachers has already been tried in the States of Georgia and South Carolina. It is being contemplated in other States. Those unlawful penalties against public-school teachers are brought about solely because of opposition to programs of school integration.

It is our belief that public-school teachers should not be made the goats of the struggle between segregation and integration. We also believe that these teachers should not be penalized for belonging to organizations which at the whim of the local school board could be declared subversive. Such a rule would require all public-school teachers to belong to only those organizations meeting the approval of the school board. Needless to say, any organization established to raise teachers salaries or to protect them from unfair administrative action might easily be characterized as subversive under such broad authority. Other possible ramifications of such power to abuse the rights of individuals need not be emphasized.

The same protest must be made against section 5 of said bill which would leave local and State boards free to penalize lawyers on the alleged ground that they belong to subversive organizations or were acting in opposition to local State laws already declared unconstitutional by the United States Supreme Court.

Mr. SOURWINE. Does that mean you do not approve of home rule with respect to the admission to the bars of supreme courts?

Mr. MITCHELL. I followed with great interest, Mr. Sourwine, the exchange between Senator Butler and Mr. Ober as they were discussing the proposed bill which Senator Butler has introduced.

I think I can see, Senator Butler, what you have in mind with reference to trying to protect the courts against abuse by lawyers. But our experience indicates that passage of your bill would be a very unfortunate development for all lawyers who are interested in civil rights in the Southern States. I would like to leave with you, Senator—

Senator BUTLER. This is for—you mean just a transitory thing? My bill goes to permanent admission to the courts.

Mr. MITCHELL. I understand that.

Senator BUTLER. You are speaking now of an appearance maybe once in 10 years, or 5 years, or something?

Mr. MITCHELL. No, Senator. I am speaking of a rather well-organized campaign which is now going on in the South for the purpose of preventing colored lawyers, or any other kind of lawyer, from representing people in civil rights cases. There is such a statute now in the State of Virginia which we have challenged. So far our objections to that law have been upheld by a three-judge court. I assume the State will take it up to the Supreme Court.

Senator BUTLER. What is the nature of that statute?

Mr. MITCHELL. That statute operates in such a manner as to prevent lawyers from representing people in school desegregation cases.

Senator BUTLER. That would have no relationship to what I am talking about.

Mr. MITCHELL. Well, I think it would, Senator, in this respect. Undoubtedly, the State of Virginia very quickly after your bill became law, would undertake to set up a requirement which would effectively prevent colored people from becoming members of the bar. We have already got the rudiments of that in the State of Georgia.

For example, we have won in the courts the right of Negroes to get into the University of Georgia Law School. The State has now retaliated by passing a requirement which means that before an applicant can get into the law school he must get approval of certain people who are white. Obviously, they would not agree to letting him in.

Senator BUTLER. That is true of any State. Any State has the requirement, has a right to say that a man must have certain educational qualifications. But you wouldn't trust the highest court of a State to rule on that question and rule honestly on it? Have you lost all faith in State courts to rule on questions of that kind?

Mr. MITCHELL. No.

Right here, I think it might be a good idea for me to get off one of these little exchanges I heard once. Somebody asked whether colored people are in favor of States rights. The person who was asked the question said, "yes, Negroes are in favor of States rights, as long as they have some rights in the States."

I think as it applies to Maryland, there wouldn't be any question that our court of appeals would be fair and would handle these matters in an objective manner. But the record would show that this is not the case in the States where we are currently trying to get compliance in the Supreme Court decision in the school segregation case.

Mr. SOURWINE. Are you saying in substance that there are States in the Union from whose supreme courts you would not expect to get a fair decision?

Mr. MITCHELL. I would not only say that, but that there are States from whose supreme courts we have not gotten fair decisions.

Mr. SOURWINE. Therefore, your decision is that from the standpoint of your organization, at least, State courts cannot be trusted in this field, and there should be a single Federal rule?

Mr. MITCHELL. Well, I would say we have not studied this particular bill because, of course, it was introduced only yesterday. But in listening to the exchange, I would think that we would feel that States could not be entrusted to determine whether an individual's United States constitutional rights had been violated by action depriving him of his right to be a member of the bar.

Senator BUTLER. In other words, you don't believe you can get due process from the State? Everything has to be settled or it is not due process?

Mr. MITCHELL. No, I would say only in some instances, Senator, we wouldn't get due process from the State. I think that is amply supported by the record. We would certainly not expect to get due process in Mississippi and I can take the rest of today explaining why that is true.

Mr. SOURWINE. I didn't mean to argue with you. I just wanted the record straight as to what your position was.

Mr. MITCHELL. I appreciate that, and if the chairman is willing to accept an official statement on behalf of our organization with reference to this particular bill, I can do that by mail. But I am reasonably certain that it will be the same as what I have stated.

I now return to Mr. Marshall's statement:

As long as Negroes in States such as Mississippi, portions of Alabama, and portions of Louisiana are being effectively denied the right to vote, they are denied redress through normal political avenues such as State legislatures or elected officers of the executive branch of State government. Their only recourse for protection against unconstitutional acts of oppression in violation of the 14th amendment is through the courts and, ultimately, the United States Supreme Court.

Mr. MITCHELL. I forgot to mention, Mr. Chairman, if I could digress a minute, that there is one significant thing I hope you earnestly will consider as you study the bill that you have offered.

Last year, when the Congress was considering the civil rights bill, we who were advocating passage of that legislation did not seek an amendment to it which would have anything to do with the jury system. I think that some people who were less enthusiastic about the civil rights bill than we were did see jury service as a thing which required some attention, and accordingly an amendment on the jury selection system was made a part of the law.

Now, the purpose of that amendment was to make the standards on selecting Federal jurymen in the States consistent. It would seem to me that if the Congress has expressed the intention to standardize the

jury selection system in Federal courts, it would be moving in the other direction if we withdraw Federal protection from the conditions that control the admissions to the State bar.

I might add as a little note of interest in that, one of the first groups to benefit in this part of the Federal law was a group of white women in the State of Mississippi, who wanted to serve on juries and had not been previously permitted to serve because they were women.

Mr. POHLHAUS. I think it would be better to say it was to make uniform the Federal practice, rather than to make conform to State practice. This did not, of course, affect State law.

Mr. SOURWINE. I wasn't aware that it had affected State law or State juries.

Mr. POHLHAUS. That is correct.

Mr. MITCHELL. I am happy to be straightened out on this, and that shows the value of appearing with counsel.

But I do think the point is still applicable, that obviously, the intention of Congress was to provide greater opportunities for people to serve on juries in areas where it was thought that they were denied such opportunities because of race, and I would think that you could logically extend that to the question of practicing before the bar. I don't differentiate between State and Federal courts, as some people do.

Mr. SOURWINE. You do not?

Mr. MITCHELL. I think—as some people do. I think that to say, as was said earlier, that the State would not be permitted, or rather, a man wouldn't be permitted, to practice before a State bar, but could practice before the Federal bar is sort of unrealistic. It would certainly be meaningless to many of our people in the South who want to practice before both types of courts and who would be rather effectively stopped from practicing if some of the States had this power to declare their actions subversive and so forth.

Mr. SOURWINE. You are aware, aren't you, that the Congress would have no power to pass any law respecting State juries or State courts?

Mr. MITCHELL. I would say there certainly isn't any way that the Congress could be prevented from safeguarding the rights of individuals to enjoy whatever constitutional benefits they are supposed to have in State courts as members of the bar, just as it protects the right to vote, and things of that sort.

Mr. SOURWINE. That is your opinion?

Mr. POHLHAUS. I would like to question the statement made by Mr. Sourwine.

Congress has passed a law which is on the books, title 18, section 243, which makes it a criminal offense to bar anyone from a State jury because of race, creed, or color, so in the enforcement of the 14th amendment, certainly Congress has the right to make laws which affect the makeup of State juries.

Mr. MITCHELL. I would say our organization has won a great many cases before the Supreme Court on the Grounds that Negroes were systematically barred from jury service by the States.

Senator BUTLER. There have been such cases from our State, I think.

Mr. MITCHELL. I am sorry to say that is true. I am happy to say, however, that times have changed a great deal, and I couldn't conceive of one arising in Maryland at this time.

Senator BUTLER. Well, you live and learn, so keep on going, because I thought there would be very little opposition to a bill of the character of the one that I introduced. I thought it would be so fundamental that a State would have the right to say who would practice before its own courts.

Mr. MITCHELL. That was the reason, Mr. Chairman, that I asked for an opportunity to submit a letter on this.

Senator BUTLER. I would like to have it for purposes of the record. But are we going to preempt all State activities and just completely obliterate the States because some injury may fall to one segment of the public or the other? Do we just give up our whole system of government and forget it because we don't trust anybody?

Mr. MITCHELL. I don't think we can make an extravagant concession like that.

Senator BUTLER. That is what it would lead to.

Mr. MITCHELL. I don't think it would. The reason I asked for an opportunity to submit our position in writing is because I listened to an exchange between you and Mr. Ober, and I was so surprised when you both seemed to indicate your bill wouldn't create much objection that I thought perhaps I hadn't heard all of the reasoning behind it. I would like to submit something that represents our mature judgment.

Senator BUTLER. I would certainly like to read it.

Mr. MITCHELL. I must say in all honesty, Senator, that I think your bill would be, from what I have heard of it, a very dangerous thing for colored people in the South.

Senator BUTLER. That judges of the highest courts of the States, who have taken a solemn oath to uphold and defend the law, and the Constitution of the United States and of their own States, would deliberately render opinions discriminating?

Mr. MITCHELL. I am sorry. There has been a long history of doing that.

Senator BUTLER. I don't think I would go that far.

Mr. MITCHELL. As a matter of fact, we wouldn't be around here and it wouldn't be necessary for Congress to pass, as it did, this civil-rights bill if we did not have a problem.

Senator BUTLER. Do you mean to tell me you have a long history of the supreme courts of several States—

Mr. MITCHELL. I am sorry to say that is true; yes. I am sorry to say that there is an appalling number of such situations.

For example, only recently, the United States Supreme Court finally reached a decision that a colored man who had been trying to get into the University of Florida for 9 years should be admitted, and the Florida Supreme Court—

Senator BUTLER. That is an entirely different field. They have a right to decide what they want and you have a right to go to the supreme court because that is a State-supported institution, and public funds are in it.

Mr. MITCHELL. Well, I think that we have been confronted with this kind of situation in the South. First, there has been a systematic denial of the right to vote, which has effectively prevented people with our point of view from having any influence on State legislatures, city councils, and governors.

In order to get out of that predicament, we have given legal assistance to people who wanted it in taking their cases to the courts, and that has met with a considerable amount of success. The opposition now has embarked on a program to choke off the court action. If the opposition succeeds in choking off the court action, having already choked off other possible avenues of redress, through the legislature, they will effectively prevent people from getting any kind of redress. It certainly is a very realistic situation with us, that we would expect there would be that kind of action.

Senator BUTLER. A well-qualified young man, a graduate of a fine college, with no record of any kind, you think that the supreme court of any State would say that he was not worthy to practice law?

Mr. MITCHELL. I am sorry to say that the Supreme Courts of the States of Tennessee and Arkansas and Georgia, if they upheld the laws that are now on the books, would be forced to reach that kind of a conclusion in a great many instances, where individuals would be before them for violating certain statutes. These statutes, of course, are aimed at preventing lawyers from representing people in civil-rights cases.

Senator BUTLER. Certainly the State has the right now, if he is engaged in criminal or corrupt activity, to bar him.

Mr. MITCHELL. That is just the point. You see, in some of these States, it is a criminal offense to seek integration in schools. I have, for example, a very enlightening document that Mr. Pohlhaus prepared on the various State laws, over 100 of them, that have been enacted since the Supreme Court decision in school desegregation cases in 1954. In many, many instances, these statutes make it a crime for an individual to try to seek integration in various walks of life, such as schools, buses, and things of that sort.

In Georgia, for example, it is possible to have the State bureau of investigation move in and arrest people who undertake to do something.

Senator BUTLER. Well, all right.

Mr. MITCHELL. Well, to conclude Mr. Marshall's statement:

Bill 2646, viewed in the light of the existing circumstances in some areas of this country, could be the opening wedge in a determined effort to destroy the effectiveness of our judicial system. While such action would almost certainly nullify the 14th amendment insofar as Negroes and certain minorities are concerned, it would eventually lead to the possibility of unrestrained action by State government against any group that might at the time be in disfavor. This to my mind is the opposite of constitutional government as intended.

We, therefore, urge as strongly as we can that mere disagreement with certain decisions of the Supreme Court should not be sufficient to start toward the complete restriction of the jurisdiction of that Court.

Mr. MITCHELL. Mr. Chairman, if you care to have me do so, I could leave with you personally, or for the record, whichever way you prefer it, this summary of the State laws.

Senator BUTLER. I think it is a little out of the scope of this particular hearing.

Mr. MITCHELL. I would like you, personally, to see it.

Senator BUTLER. I would like to read it, yes. But I don't think it should go into the record. It is a little out of the scope of this inquiry.

Mr. MITCHELL. I didn't necessarily think it should go into the record, but I do think it has a bearing on your bill.

Senator BUTLER. Thank you, Mr. Mitchell.

Now we have Miss Rony and Mrs. Ballard. Are they both present?

Mrs. BALLARD. I am Mrs. Ballard, from Ilchester, Md.

STATEMENT OF MRS. L. W. BALLARD, ILCHESTER, MD.

Mrs. BALLARD. I am Juliet Brook Ballard, Mrs. Lyttleton Ballard of Piney Branch Road, Ilchester, Md. Before my marriage, I was by profession a social worker, and I have my bachelor of arts degree in economics and sociology from Randolph Macon Woman's College, and I have done most of my work for my master's degree at the Richmond School of Social Work.

I asked to come, because I felt that I must, that I was impelled to. I know so many people who, like myself, are seriously concerned at the opinions and recent decisions of the Supreme Court and we all feel that it is going to change our way of life. Most of us don't know what to do about it. We talk with each other, but we are not used to this. We are used to having orderly process, in which someone takes care of subversion. I feel that it has come to such a crisis that we, the little people, need to speak too. I am one of the little people. I know that there are many who feel like I do.

Now, I have made my statement rather short. I have tried to crystallize it, because I feel that is kinder to you and me, both.

I feel that one of the most basic of human rights is that of self-protection against those seeking to destroy us. That is also true in the case of a whole people. By those agents they choose, they protect themselves.

Power is vested directly in the people. Those agencies they directly choose and persons whose authority stems closely through those they choose, therefore, most truly represent their wishes. The committees of Congress are more truly the people's agents than the members of the Supreme Court and, in the case of immediate protection of our people against subversion, the power of the people is vested in these, their direct agents.

This same is true in regard to offices of a State dealing with subversion, to school bodies seeking to keep their institutions free of subversion, and to the executive branch of our Government. In the same connection, bar associations have a right to establish their own requirements, depending on this basic right of all humans.

Senator BUTLER. Mrs. Ballard, I am very proud to be your Senator, or one of them. I think you have spoken very well.

As you have seen from sitting in the room today, there are so many crosscurrents, there are so many rights that must be considered. I think that the Supreme Court of the United States, itself, has held that the first right, of course, is the right of self-preservation.

Mrs. BALLARD. That is what I wished to make plain.

Senator BUTLER. We are all mindful of that. We are going to try to do it without destroying the rights of others, and I think it can be done. It is going to take a lot of consideration and a lot of thought and study. I, indeed, have been enlightened this morning. I have been very happy that I have had the Chair this morning to be more acquainted with some of the crosscurrents. I thought I was pretty well up on what is going on in America. I think I have learned a lot this morning. I have been very happy to be here.

I concur in your opinions. I don't know that I would support this bill, because this bill may be a little too broad in its sweep. As Mr. Ober has very learnedly said, some of these things can be taken care of, in other ways.

I must agree with you, in purely local State affairs, where there is no grant of power whatever in the Constitution for the Government of the United States to have anything to do with it, I can't see why the people can't run their own States.

Mrs. BALLARD. When I was in college, I was interested in political science, and I took quite a few courses in it.

We had a very sound department at Randolph Macon Women's College, which at that time was one of the 7 or 8 leading women's colleges in the country. I think it still is, but I haven't kept up with it.

It was drilled into us by Mr. Peak, our political science professor, that this Government, which is the finest government, in my opinion, that has ever existed in the world, was based on the tripartite system, legislative, executive, and judicial.

In my opinion, the judicial group has taken over functions of the legislative and executive, as has been brought out so clearly.

Senator BUTLER. You have a lot of company in that thought.

Mrs. BALLARD. That is how I feel: That it is just the duty of every citizen to speak out at a time of crisis.

Such a time of crisis has come to us.

There is one other thing I would like to add: I have noted as I followed cases and proceedings and whatnot, that sometimes those who do not wish to answer the questions of congressional committees, and who don't do it on grounds of fifth amendment, and other reasons, make reference to our Founding Fathers, and to their principles, and when you get through, the idea of associating somehow associates with them. I particularly call your attention to the case of Henry H. Collins, who, when he was questioned, before the House Un-American Activities Subcommittee regarding Communist espionage in the United States, declined to answer quite a few questions. But he also brought in the fact that one of his great-uncles was an aide to General Washington.

Now, I think in view—as I say, that is not just one instance. It is one I am bringing up so you will see what I mean.

I think in view of that and the fact that people who don't feel it is their duty to answer questions, and who don't feel it is their responsibility to take the interest of their country to heart, I feel we should also look at the little people like myself, who feel one has a responsibility and a privilege to answer the questions of a committee concerning our country's welfare.

For that reason, I wish to note that I come down from President Washington's brother.

Senator BUTLER. Thank you ever so much, and I wish that there were more like you; although I have a hunch that there are many, many more like you behind you who haven't come forward.

Mrs. BALLARD. That is just it. They don't know what to say.

Senator BUTLER. We were very happy to have you. Thank you.

The committee will stand in recess until 2:30.

(Whereupon, at 1:30 p. m., the committee recessed, to reconvene at 2:30 p. m., the same day.)

AFTERNOON SESSION

Senator BUTLER (presiding). The subcommittee will come to order.
Senator Jenner?

Senator JENNER. At this time for the record I would like to insert an article appearing in the Indianapolis Times of February 10, 1958.

Senator BUTLER. It will be so ordered.

Senator JENNER. Written by Mr. Leckrone. Also, one from the Standard Times of New Bedford, Mass., dated January 28, 1958, an editorial.

Let the record show that these editorials are duly admitted as part of the record.

One from the San Diego Union, dated Thursday morning, February 20, 1958, an article editorial.

And one from the Los Angeles Examiner dated February 27, 1958, stating "Jenner bill would curb the Supreme Court."

From the Fort Wayne Sentinel, Fort Wayne, February 14, 1958. "The Supreme Court Is In the Frying Pan."

One from the New Orlando Sentinel, dated Saturday morning, February 15, 1958, "Mule Blood and the Supreme Court."

From the Indianapolis Star, dated February 18, 1958, an article by Holmes Alexander, and another from the Indianapolis Star, of February 16, 1958, "Preview of Bedlam."

Another from the New York Times of Sunday, March 2, 1958, entitled, "Bill Called Peril to Supreme Court."

(The articles referred to are as follows:)

[From the Indianapolis Times, February 16, 1958]

Editor's notes—By Walter Leckrone

IS SUPREME COURT TOO SUPREME?

The United States lived in fear of sudden attack by the mighty armies of a foreign dictator and had begun a "crash program" of rearming against that threat.

Foreign economic aid was being sought by some other nations and the dominant faction in our national administration favored granting it, and was also quietly planning to use United States troops to give foreign military aid as well.

The United States Supreme Court was arrogantly overriding State laws and courts with a stream of decisions that in effect enacted new statutes and nullified portions of the United States Constitution, in furtherance of its new doctrine that all power belonged in the Federal Government, especially in such times of national crisis.

I am describing, of course, and quite sketchily, the situation that existed 158 years ago, around 1800.

The foreign dictator was Napoleon, not Khrushchev.

No power in Europe seemed capable of withstanding him. History ultimately proved he had never had the slightest intention of attacking the United States, although it was never clearly revealed just where the idea that he might, apparently held exclusively on this side of the Atlantic, originated. His diplomats did try to soft-talk the United States out of a gift of \$50 million in foreign aid, but they didn't get the money.

The crisis was represented as real enough at home, though. Appropriations were rushed through Congress and an Army raised. The aging, and by this time a little childish, national hero George Washington was summoned from his well-earned retirement to nominal command of it, although Alexander Hamilton held the actual command.

Mr. Hamilton himself apparently did not consider the French menace a very grave one. At least he was deep in schemes of his own to use this emergency United States Army in wars against Spain and perhaps Portugal to drive them out of their Latin American colonies, where obvious commercial prospects existed.

Against this background, meanwhile, the Supreme Court busied itself with

subversive activities. In its then well-established view, any disagreement with Federal Government was subversive activity, and any open criticism of any official act was a crime punishable by fine and imprisonment. It relied for this opinion on the alien and sedition laws * * * which courts ever since have held plainly violated the Constitution * * * but its members added what amounted to legislation of their own to the already harsh terms of those dubious statutes. Samuel Chase, of Maryland, a lame-duck political hack appointed to the court in 1790 and sometimes described as the worst of all United States Supreme Court Justices, was so enthusiastic in this respect that he sometimes refused to let witnesses or counsel be heard in defense of those accused and occasionally pronounced them guilty before their trials.

Alas, though, the Supreme Court, whose powers and functions are only vaguely defined in the Constitution, had begun to assume powers which rested solely on its own decision that it had such powers. It was abruptly reversed by congressional action as soon as Thomas Jefferson became President in 1801 and undertook to reestablish constitutional government. The foreign menace, too, sort of faded away soon afterward.

That was not, even then, the first clipping of judicial wings by the power of the people through their legislatures. The 11th amendment, ratified in 1795, had forbidden the Court to hear cases filed by an individual against a sovereign State.

It may not, indeed, be the last.

Last week the United States Senate Judiciary Committee set public hearings on the bill introduced last session by Indiana Senator Jenner to restore the Supreme Court to proportions it originally was intended to hold.

This, too, concerns subversive activities.

Alarmed by repeated proof that Communists who actually are agents of a hostile foreign government had wormed their way into scores, possibly thousands, of key positions in national and local governments. Congress, and 42 of the 48 State legislatures, had enacted laws providing means of getting rid of them and protecting national and State governments against their dangerous infiltration.

In 10 decisions within 18 months the United States Supreme Court virtually nullified all those laws, both State and national. Reversing 15 Federal and State supreme court decisions, and overruling the United States Congress and 42 State legislatures, the Justices held that a State cannot make a law against subversive actions because the Federal Congress has preempted that field, a novel and highly dangerous doctrine even apart from the Communist arena. (By the same reasoning a State could not have an income-tax law because the Federal Government has one.)

It went on from there to make it all but impossible for a Communist, even a proven traitor, to be fired from any public job, National, State or local; to make convictions under most existing Federal anti-Communist laws so nearly impossible that most pending cases have been dismissed, including one in Indianapolis; to hamstring any congressional investigations of Communist activities in or out of Government, and almost, if not quite, to forbid even asking any officeholder or seeker if he is a Communist.

Chief Justice Earl Warren and Justices Hugo Black and William Douglas concurred in all 10 of these remarkable decisions, Justice Felix Frankfurter in 9 and Justice John M. Harlan in 8 of them. Only Justice Tom Clark was against as many as 7 of them, Justice Harold Burton against 3 (and for 6) and Justice Harlan against 2. The Court was overwhelmingly in accord with this whole line of thought.

Contrary to popular belief, the Supreme Court is not completely supreme.

It is subject to many of the checks and balances so carefully and so thoughtfully established in the Constitution, even though, since its very first term as a court, it has steadily undertaken to enlarge and expand its own powers by its own decisions.

The Constitution, as amended, provides that the Supreme Court shall have "original jurisdiction" in any case involving an ambassador, a minister or a consul to a foreign power, or in any case brought by a State. But, it goes on, "in all other cases" it shall have jurisdiction to hear appeals from lower court decisions "with such exceptions and under such regulations as the Congress shall make."

Senator Jenner's bill proposes to make "such an exception."

It simply, and in very few words, provides that the Supreme Court shall have no jurisdiction or authority to review or to rule upon any appeal of any case

that involves actions or rules or procedures of Congress, or State or local authorities or laws, or boards of education, in cases against subversive activities.

The bill in short, proposes by completely legal and constitutional procedure to take away from the Supreme Court all powers to interfere with American defenses against communism—quite frankly on the grounds that it has shown it is not to be trusted with such powers.

While this bill applies only to this one category of cases its enactment into law might, it seems to me, have effect of nudging the Supreme Court back into some measure of the balance contemplated when it was created.

Its passage would, at the very least, establish again that the people of the United States possess the ultimate power over any of the governmental agencies they have created.

For a Court which has been able, as this one did, with nine perfectly straight faces, to decide that professional baseball is a sport and not a business while professional football is a business and not a sport, many Americans consider such a measure of reform away past due.

[From the Standard-Times, New Bedford, Mass., January 25, 1958]

COURTS AND COMMUNISTS

The magazine National Review has commented editorially on what surely must seem to international observers both East and West, as a continuing oddity of American life, namely, that this country treats Communists so much better than it does former Communists.

The publication stated, "No one ever bothered Louis Budenz when he was managing editor of the Daily Worker, but he has been hounded, badgered and denounced since his break with the (Communist) Party.

"Hardly a week goes by without the freeing of jury-convicted Communists by judges who seem to think that the first amendment guarantees the right of treasonable conspiracy. Meanwhile, former Communists who have proved their re-found loyalty by deeds as well as words are rewarded by joblessness or jail."

Among those who went to jail, of course, were David Greenglass and Harry Gold, the two key witnesses whose testimony uncovered the Rosenberg espionage ring and who have, for 8 years, fully cooperated with the FBI and the other Government agencies. They still sit in the prison to which they were sentenced in the Rosenberg trial. Under the law, Greenglass was eligible for parole 3 years ago, but the Federal Appeals Board has refused it.

It is noteworthy that although herculean "liberal" efforts were made to free the Rosenbergs, no strident voices of protest are raised over the continued imprisonment of Greenglass and Gold.

The unrepentant make out much better. The Supreme Court reversed the convictions of 14 California Communist leaders who have been found guilty of violating the Smith Act and freed a union official who had been convicted of contempt of Congress after refusing to identify Communists in the labor movement. The High Court also reversed the contempt conviction of a New Hampshire lecturer and author who refused to answer questions of the State's attorney general in an investigation of alleged subversive activities.

Further, the Supreme Court set aside the Pennsylvania conviction of Pittsburgh Communist leader Steve Nelson, a ruling which had the added effect of suspending the sedition laws of 42 States, Alaska, and Hawaii. A majority of the same course also decided that aliens who have been under a final deportation order for 6 months may not be directed by the United States attorney general to cease Communist activities.

These are a few of the rulings that prompted Senator Jenner (Republican, Indiana) to remark he is afraid "the Court has put us back where we were 20 years ago" in the legal battle against Communists. One might also conclude that the cooperative go to jail and the unregenerate go free, which, of course, will discourage others who might be inclined to cooperate.

[From the San Diego Union, February 20, 1938]

What's the answer?

HIGH COURT AND CONGRESS

In their efforts to protect individual rights and yet preserve national security the Supreme Court and Congress often step on each other's toes. Recent controversial decisions by the Court have placed the essentials of judicial review once more under scrutiny.

Critics of the Court—in and out of Congress—have said that the Supreme Court's decisions place more emphasis on individual rights and immunities guaranteed by the First Amendment than on other constitutional guarantees. Many Congressmen feel that the Court has trespassed on the legislative province of the Federal and State governments.

Those who side with the Court assert that it is not at fault. They say the fault lies with the unlawful and unconstitutional procedures that have been permitted to develop. They argue that the Court's decisions are aimed at striking the balance between liberty and authority.

Congress has two principal ways of resolving the conflict with the Court. The first is to tailor laws to fit the Constitution's requirements, or to change or clarify laws that have met the Court's objection. The second is to curb or abolish the Court powers of judicial review. History shows that all attempts to abolish such powers have been unsuccessful.

Senator Jenner, Republican of Indiana, has sponsored a bill that would greatly restrict the judicial review powers of the Court. His bill is now being studied by the Senate Internal Security Subcommittee. It would forbid the court to review the validity of any congressional committee action, any executive security measures, the antisubversive measures of any State or education body, and any State regulation of admission to the bar.

The Jenner bill's principal aim is to prevent a repetition of the Watkins decision. In that case the Court severely circumscribed the scope of a congressional inquiry. Another target is the Nelson decision which invalidated State sedition laws.

These recent disturbing decisions have resulted in charges the Justices are turning the court into a third legislative body, one removed from the people themselves.

There is no easy formula to resolve the conflict between legislative and judicial power. Perhaps a solution will not be found now. But at any rate the issue may cause the people to take a greater interest in the duties and responsibilities of their legislative and judicial branches, so that laws and not the whims of men may guide our lives and future.

[From the Los Angeles Examiner, February 27, 1938]

The political arena

JENNER BILL WOULD CURB SUPREME COURT

By Fulton Lewis, Jr.

WASHINGTON, February 26.—Indiana's Senator Jenner has come up with a solution for the plagues that have been visited on the Nation's structure of justice, by Supreme Court decisions over the last year and a half.

His bill, S. 2640, is as neat an example of legislative surgery as one could hope to find. If it fails to go through, however, the established legal profession can thank itself for its inertia and lethargy in supporting the bill in the hearings by the Senate Judiciary Committee.

The liberal left rolled up all of its biggest guns. Joseph L. Rauh, former national chairman of the Americans for Democratic Action and now vice chairman, was the opening witness. The American Civil Liberties Union and endless other like organizations thundered their denunciation.

But the 3 hearing days of last week saw only casual support from the responsible authorities of the American legal family, and few of those. As of the end of next week the hearings are closed and what is not in the record by then will not get in the record.

And without the legislation, the Court can continue to knock the props out from under the entire anti-Communist structure of laws and make a shambles of the general law enforcement pattern of the Nation.

DAMAGE ALREADY DONE

To illustrate the damage already done:

In the Nelson case, the Court decided that the sovereign States may not act against the Communist danger, even though they themselves should be in danger of overthrow. An early bitter fruit of this decision: The State of Massachusetts was forced to turn loose some 15 Communists.

In the Konigsberg decision the Court denied to the States the right to bar Communists from practicing law. Justice Black in his opinion naively argued that membership in the Communist Party places no blemish on the character of a would-be attorney.

In another ruling, the Court reached down to localities and held that school authorities may not rid themselves of professors who take the fifth amendment before congressional committees.

Most devastating of all, the Court opened up the confidential FBI files to fishing expeditions by Communist defendants and their counsel, and deprived congressional committees of the right to ask witnesses necessary questions.

"MAKES" THE LAW

The Court insists upon going far beyond its legitimate function of interpreting the law; it now "makes" the law, substituting its judgment for the judgment of the legislative branch.

Senator Jenner meets the problem head on. His bill would strip the Supreme Court of appellate jurisdiction in five specific areas—State anti-Communist laws, congressional investigations, the Federal security program, local control over subversive teachers, and the admission of lawyers to State practice.

His bill stands on firm ground. Section 2, paragraph 2, in article III of the Constitution reads: "The Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

[From the Fort Wayne News-Sentinel, February 19, 1938]

SUPREME COURT IN FRYING PAN?

Our Republic was wisely set up under a series of checks and balances between the executive, legislative, and judicial branches of the Federal Government.

There has been increasing suspicion that one of those branches—the judicial as represented by the Supreme Court—was getting out of line.

That feeling, which became particularly strong in the light of recent decisions of the Court on the issue of communism, starts coming to a head today as the Senate Internal Security Subcommittee launches hearings on a controversial bill which would greatly restrict the review powers of the High Court.

Author of the bill is Indiana's equally controversial Senator Bill Jenner.

Jenner, whose role as a militant anti-Communist is known throughout the country and world, currently reflects the sentiment of a considerable segment of the Nation which feels that the Supreme Court has dealt a deathblow to combating subversive forces from within.

The Jenner bill would forbid the Court to review the validity of any congressional committee action, any executive security measures, the antisubversive measures of any State or education body, and any State regulations on admission to the bar.

A 1-day hearing on the bill was held last January and the measure was sent to the full Senate Judiciary Committee by its Internal Security Subcommittee.

The speed of the action aroused the ire of Senator Thomas C. Hennings, Jr., Democrat of Missouri, who succeeded on February 3 in getting the bill sent back to the subcommittee for additional hearings. The proposal was just too sweeping, Hennings argued, to go to the full committee after brief consideration.

Hennings, chairman of the Constitutional Rights Subcommittee, has defended the Supreme Court and its controversial decisions.

"Rather than be denounced," he says, "the Court should be praised for fulfilling its function as the ultimate guardian of human rights and freedom."

He termed the Jenner bill "an effort to short circuit justice by throwing the switch to Congress."

Our Hoosier Senator, however, does not stand alone in his fight against a Court which he, and many others, feels is capable of sacrificing basic American

rights and the very foundations of the Republic on the altar of political expediency.

For example, Robert Morris, a former New York City judge and until recently chief counsel for the Senate Internal Security Committee, charges:

"An aggressive majority on the Supreme Court, bypassing judicial precedent and grievously misunderstanding the nature of the Soviet organization in the United States, has undertaken a campaign to level all existing barriers against Communist penetration."

In three lectures at Harvard Law School early this month, Learned Hand, the retired chief judge of the United States Court of Appeals for the Second Circuit, pointed out the Supreme Court had "imported" judicial review into the Constitution under Chief Justice John Marshall in the early 19th century.

The Court, he argued, was right in doing so, even though the text of the Constitution "gave no ground for inferring that the Court's judicial interpretations were to be binding on Congress and the executive branch."

Though Judge Hand will admit the validity, even though it be tenuous, of the principle of judicial review, he is equally adamant that the Court not use its assumed powers "to function, as it sometimes does, as a third legislative chamber."

There seems to be the crux of the problem.

It's the old "given an inch, take a mile" philosophy. Acting on a power of judicial review, dubiously acquired, the Court, in its recent decisions, presumed to act both as ballplayer and umpire—a situation which usually plays hob with objectivity.

The ultimate outcome of Jenner's bill is in doubt. We can depend on a great hue and cry from the professional liberals against it.

But we feel that the Hoosier Senator has started the curtain-down on his congressional role with another worthwhile attempt to save a little of America for Americans.

[From the Orlando Sentinel, February 15, 1958]

MULE BLOOD AND THE SUPREME COURT

Few court decisions are ever applauded universally, but most courts have a better record of pleasing the public than the United States Supreme Court.

The checks and balances system under which this country operates ran like a new V-8 for many years, then it began to crack and rattle.

President Roosevelt thought the trouble was with the Supreme Court, although many people, including most Republicans, thought the difficulty lay in the White House.

At any rate, he had the Supreme Court overhauled by his own mechanics, and while the repair job appeared to suit him, it was criticized by some of the therapists who weren't consulted about it.

Ever since then, the Supreme Court has been wheezing and snorting, sometimes refusing to go into gear, sometimes going in the wrong direction, sometimes acting as though it is part mule.

The people who have to keep the pesky thing running, the American citizens, have decided it is a perverse old rattletrap, undependable, contrary, and slightly unsafe at times. They feel they'd rather walk than be bothered with it.

By walking, the people mean they'd rather let some of the judicial decisions made by lower courts stand. Too often, local, area, or State courts have rendered decisions which just suit the people they represent, only to have those decisions stood on their heads by higher courts.

Senator William E. Jenner (Republican, Indiana) has introduced a Senate bill (S. 2846) which would prohibit the Supreme Court from reviewing certain decisions by Congress or lower courts dealing with the control of subversive activities in the United States.

Hearings on the bill will be held by the Senate Internal Security Subcommittee March 10. If the bill is accepted and passed, the Supreme Court could never again: set free witnesses charged with contempt of Congress, or reverse findings of congressional committees; decide the Government should keep on the payroll employees or officers whose retention might impair the security of the United States; overrule a State law controlling subversive activities within that State; throw out rules or laws of school boards or States concerning subversive activi-

ties in teaching bodies; force States to admit persons to the practice of law that the States find unsatisfactory.

In view of the Supreme Court's strange handling of cases involving Communist conspiracies against the United States, Senate bill 2646 is badly needed. The Court, undoubtedly with the best intentions in the world, has set free known Communists.

No one accuses the Court of being sympathetic to subversives, but we do accuse the Court of ruling on the letter of the law more often than its spirit in dealing with those who would overthrow our Government.

The Supreme Court is not obligated to shield Communists, no matter how our Constitution may appear to offer them shelter from prosecution.

Its first duty is to uphold the spirit of the law, and to protect this country.

[From the Indianapolis Star, February 18, 1958]

Holmes Alexander Says:

LAST JENNER BATTLE A MOMENTOUS ONE

WASHINGTON.—A great cannon, loaded to the lips, was somebody's description of Daniel Webster in 1852 at his last momentous appearance in the United States Senate. Tone the description down a little, but not much, and you could use it to identify Senator William Jenner (Republican-Indiana) who is in his last session and primed for a farewell salvo.

Jenner, like Webster, has suffered the slings and arrows of irrational radicalism, but he is a better man than his detractors, and they know it. And Jenner, like Webster, has a set of convictions that are married to the Constitution and are impervious to the gaudy seductions of unlicensed liberalism.

OUT ITS JURISDICTION

A gun in Jenner's valedictorian salute is his bill (S. 2646) which would limit the Supreme Court's jurisdiction in considering certain appeals. Hearings just have begun, but the ideological lines were drawn behind closed doors in scrimmages within the Senate Judiciary Committee. It is the familiar battle, as old as the American Republic, between fundamentalists who believe that our freedoms are best protected by strict adherence to the Constitution and loose constructionists who believe in bending the law to fit the continuing crisis of emergency always. This is how the argument on S. 2646 is shaping.

Fundamentalist: The Founding Fathers devised their incomparable system of checks-and-balances to make certain—among other things—that none of the three branches of Government should ever become too powerful. Thus the Congress, the presidency and the Supreme Court—while all-powerful in unison—cannot separately infringe upon one another's duties and cannot threaten the people's numerous freedoms. In article III, section 2, there is a check by Congress upon the power of the Supreme Court. It reads:

"WITH SUCH EXCEPTIONS"

"* * * the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

This clause, according to constitutional fundamentalism, clearly means that Congress has the right and duty to check the Supreme Court from assuming runaway authority.

Loose constructionism: The Jenner bill (S. 2646) is an attempt to discipline the Supreme Court for decisions which certain Members of Congress do not like. This would be an arbitrary and capricious act by Congress. The law is kept alive and up-to-date by these judicial decisions.

FOLLOWING CONSTITUTION

The fundamentalists do not deny the first part of this charge. Senator Jenner and his conservative colleagues fully admit that they do not like many Supreme Court decisions. They contend that, far from being arbitrary and capricious, they are following the instructions in the Constitution by attaching "exceptions" and "regulations" to the Court's appellate jurisdiction. The following are the five fields in which the Jenner bill would prevent the Court from upsetting deci-

sions reached in lower courts and in Congress. Under S. 2046 the Supreme Court could not overrule:

1. Action against a witness for contempt of Congress.
2. Action of the Federal Government in firing a security risk, as long as it was done under an act of Congress.
3. Legislation in any State for the control of subversive activities within the State.
4. Action of any school or college to control subversive activities within its teaching body.
5. Regulation by the State concerning admission of persons to practice law within the State.

ABUSED ITS POWERS

Obviously, from this list, backers of the Jenner bill believe that the Supreme Court has abused its powers in recent decisions in these fields.

Does Congress have this right? The fundamentalist case, I am told, rests upon the Reconstruction era decision in which a Mississippi newspaper editor named McCordle was arrested for some alleged infringement of reconstruction law. McCordle appealed to the Supreme Court. Congress, fearful of testing the dubious laws of that shameful era, quickly enacted a statute which withdrew (as the Jenner bill would do) the Supreme Court's appellate jurisdiction in the pertinent field of law. The case against McCordle was automatically dismissed. Chief Justice Chase acknowledged the right of Congress to act as it did. He declared: "Without jurisdiction the Court cannot proceed at all in any case * * * the only function remaining to the Court is that of announcing the fact and dismissing the cause."

Thus if Congress should pass the Jenner bill, the Supreme Court would be bound by precedent to treat it as law of the land.

[From the Indianapolis Star, February 10, 1958]

PREVIEW OF BEDLAM

A foretaste of what must happen if Congress does not soon carefully spell out ways to enforce the Constitution upon the Supreme Court has been provided at the Harvard Law School. There a retired Federal district and circuit court judge has delivered a stinging rebuke to the Justices of the High Court for making law instead of interpreting it. What gives the rebuke the impact of a sledgehammer blow is that the man delivering it was Judge Learned Hand.

Judge Hand served for 15 years as United States district judge in New York, and for 27 years after that as United States circuit judge. During those 42 years he became an almost legendary figure, greater in legal reputation than any Supreme Court Justice who supposedly out-ranked him. His opinions were quoted by the Supreme Court itself; they were studied in law schools and used as guideposts by practicing attorneys. His interpretations of the Constitution were as near flawless as man's work can be.

Judge Hand returned to the work of interpreting the Constitution in three Oliver Wendell Holmes lectures at the Harvard Law School early this month. What follows summarizes, we hope faithfully, some of the things he said.

The authority to construe the Constitution is not given to the Supreme Court by the Constitution itself, but has been "imported" into it by court decisions. This authority is "no doubt a dangerous liberty, not lightly to be resorted to; but it was justified in this instance, for the need was compelling. On the other hand, it was absolutely essential to confine the power to the need that evoked it."

The Supreme Court has occasionally constituted itself "a third legislative chamber" to veto laws passed by Congress or make new laws itself without careful regard to the Constitution. Notably in the segregation cases the Court curiously made no mention of the constitutional clause empowering Congress to "enforce" the amendment by appropriate legislation. Consequently (said Judge Hand), "I cannot frame any definition that will explain when the Court will assume the role of a third legislative chamber and when it will limit its authority to keeping Congress and the States within their accredited authority * * *. I have never been able to understand on what basis it (the Court's law-making role) does or can rest except as a coup d'etat."

If the Supreme Court is in fact to become a third lawmaking body, "It should appear for what it is, and not as an interpreter of inscrutable principles." Under existing conditions, when the Judges annul or change a law because of personal (political) opinions, the motive is concealed "in a protective veil of adjectives such as 'arbitrary,' 'artificial,' 'normal,' 'reasonable,' 'inherent,' 'fundamental,' or 'essential,' whose office is to disguise what they are doing. * * *"

Public compliance with a judge's decisions depends finally upon public confidence that the judge has freed himself as far as possible from personal preferences. "This sanction disappears insofar as it is supposed permissible for him covertly to smuggle into his decisions his personal opinions of what is desirable, however disinterested personally those might be. Compliance will then much more depend upon a resort to force, not a desirable expedient when it can be avoided."

The summaries do not by any means cover all that Judge Hand said. The ideas embodied in them, however, led him to the conclusion that "it certainly does not accord with the underlying presuppositions of popular government to vest in a chamber, unaccountable to anyone but itself, the power to suppress any social experiments which it does not approve."

Two grave warnings seem to us to be implicit in what Judge Hand has said. First, the Nation's court system can become nothing but a bedlam of guesswork if lower courts can no longer anticipate that the Supreme Court will guide itself by the Constitution. Written law will have no meaning of its own, but only such effect as the political views of the judges may give it. Second, growing public disrespect for judge-made law could only result in widespread lawlessness, to be curbed only by armed force. This would approach anarchy.

These warnings are not of immediate developments, but of ultimate consequences. The country's salvation may rest in the awareness of the danger among lower court judges, especially such revered leaders as Judge Hand. The lower courts have the right to disregard unconstitutional opinions by the Supreme Court and to arrive at their own opinions with due respect to precedent, tradition and the plain intent of the supreme law, which is the Constitution. It is true that valid lower court opinions might be later overruled by the Supreme Court, but a little chaos now would be better than complete tyranny later.

Until the Supreme Court is brought to its senses, the lower courts should look for guidance not to its new opinions, but to the Constitution itself and the body of law which has long been established as constitutional. And to encourage rule by law instead of rule by men, Congress should immediately adopt legislation instructing the lower courts to thus follow the law, and empowering them to ignore Supreme Court instructions which are contrary to law.

When such men as Judge Hand become worried for the future of the law, the people's representatives would be wise to listen—and to act.

[New York Times, March 2, 1958]

BILL CALLED PERIL TO SUPREME COURT—EDITORIAL WRITER, HAILED BY LIBERTIES UNION, WARNS OF PROPOSAL BY JENNER

A warning of attempts to "cripple" the Supreme Court and to "erect spite walls" around it was sounded yesterday at the annual conference of the New York Civil Liberties Union.

The warning was given by Irving Dilliard, editorial writer of the St. Louis Post-Dispatch, after he had received the Florina Lasker Civil Liberties Award of \$1,000 for outstanding work in the field of civil liberties.

Mr. Dilliard told the conference's luncheon session that Senate bill 2046, submitted by Senator William E. Jenner, Republican of Indiana, was intended to "cripple the Supreme Court" because of recent rulings favoring civil liberties.

Speaking in the Roosevelt Hotel, Mr. Dilliard declared that the Jenner bill "would have Congress vindictively retaliate against the Supreme Court for some eight civil liberties decisions."

He said that the proposed legislation would bar the Court "from appellate jurisdiction in five important fields, such as congressional investigations and Government employment in loyalty investigations."

COURT MAKEUP HAILED

He said the bill also would "block the Supreme Court out in cases involving teachers and lawyers caught in the same net," Mr. Dillard continued:

"The proponents of the Jenner bill and the many other pending attacks on the Supreme Court would have the American people believe that our high bench today is packed with irresponsible jurists of one reckless mind. Actually the nine jurists who make up our Supreme Court now are probably more representative than the members of any previous Supreme Court bench."

A panel discussion on "Wiretapping and Eavesdropping" followed the luncheon session. Stanley J. Tracy, Washington lawyer and former Assistant Director of the Federal Bureau of Investigation, said:

"Uncontrolled wiretapping and eavesdropping constitute a substantial threat to individual liberty, but properly restricted, these activities are essential, if not indispensable, to both national and individual security."

Edward Bennett Williams, professor of law at Georgetown University and also a Washington lawyer, said that although Congress had made it a crime to tap telephones or to use information obtained from taps, "the Federal Bureau of Investigation has been and is continuously engaged in this illicit act, and it has gone and is going unchallenged."

Senator JENNER. Also, at this time I would like to read a part of an article entitled, "How To Read the Federalist," by Holmes Alexander, and then I would like to insert the complete article.

Senator BUTLER. It will be so ordered.

Senator JENNER (reading):

While the founders favored majority rule, they also felt that a proper regard for minority groups was part of the political compact. One way to insure minority rights would be to set up seats in Congress for the various economic and occupational groups—such as bankers, debtors, farmers, soldiers, clergymen, shippers and manufacturers. Luckily, the founders saw that this would be calamitous as, in fact, it has proved in other nations. As an improved substitute, it was decided to make the powers of the Federal Government few, limited, and defined, and to leave the powers of the States many and purposefully vague. This method was regarded as a sure-fire protection of minorities, since local self-government is bound in the long run to look after its own. As Madison puts it, in the Federalist No. 4, the matters of everyday living belonged as close as possible to the people. He wrote:

"The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."

But here, once more, the traditional concept of national sovereignty—this time, the concept of its domestic limitations—has been maltreated by latter day Americans. That whole list of States rights, as given above by Madison, is being usurped by the central government, which itself has come to represent more a sum of virulent minority pressure groups than the composite majority of the Nation.

All this foregoing discussion relates, as you see, to the difference between what the founders intended by the Constitution and what 20th century Americans have done to the Constitution. The changeless verities of good government have remained; it is the integrity of the leaders and the willpower of the people which have failed.

The case may well be hopeless, and the Nation irredeemably doomed. Yet a ray of salvation still glows in the cold, clear truth of that one fixed star—the Constitution itself.

If the American people could once more understand and accept it, as they did in the beginning, we could make another start.

Now, Mr. Chairman, I would like for the entire article to be published as a part of the record.

Senator BUTLER. It will be so ordered. The balance of the article will follow the quotation by the Senator.

(The article referred to is as follows:)

HOW TO READ THE FEDERALIST

By Holmes Alexander

This is the first of a series of 12 essays by the nationally syndicated columnist Holmes Alexander, on the Federalist Papers. Mr. Alexander shows how important is an understanding of what the Founding Fathers intended our Constitution to be and to do, as revealed by the Federalist; and how disastrous is our abandonment of those intentions today. The essays will appear in book form after they have run serially in this magazine.

Alexander Hamilton, a journalist turned soldier and statesman, saw the forming of the Constitution as an historical event of great size, scope, significance and with a special twist that made it a good news-story. Writing for a New York newspaper in October 1787, he observed that:

"* * * it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force."

These words of Hamilton, in The Federalist No. 1, have lived; and so has the Constitution—but there is an important difference in their aging. For an author's work to last more than a century and a half is a good indication that he has said something imperishably important to civilization. For a government to have lasted that long is fair enough, but is far less conclusive of its permanence in history. Yet there is a vital relationship between what Hamilton said and how long the United States of America may be expected to endure. Our existence as the nation which the Constitution intended still depends upon how we answer the questions which Hamilton raised:

Are we, as a representative society of men, really capable of good government? Can we by political reflection and choice retain what the Founding Fathers obtained for us?

Can we, over a much longer run of the centuries, continue to live by the Constitution and its meanings? Or are we doomed to the corruptions and destruction which historically befall those nations whose people just don't know or don't care what's happening to their liberties?

The lion and the lizard, as the poets have written, roam in the empty palaces where government was left to accident and force, to expediency and appeasement, to cheap demagoguery for popular acclaim and timorous compromise with high principle.

What was it the Constitution gave us, and what are the problems of modern stewardship?

First of all, it gave us a nation; and the foremost problem today is to retain and assert our national sovereignty. Actually, this should not be so difficult. The American people, like those of all other nations, are gifted by Nature with an emotion which is the best of all protections of sovereignty. Patriotism is one of the eternal passions. It is possibly the only mass emotion that is universally good. There never was a time in recorded history when men and women did not proudly live and die for the sanctity of family, tribe, race, religion, and country. Patriotism has been the immemorial subject matter of art, music, literature, architecture, statuary, legends and reams of unrecorded oratory. The love of country has moved more persons to perform sacrificial deeds and, on the other hand, has condemned more miscreants to everlasting obloquy, than any other imaginable motivation.

Patriotism, as the annals of man everywhere demonstrate, rises and falls with the civilization where it dwells. Thus the barbarian on one end, and the bored intellectual on the other end, are for the same reason incapable of being passionately in love with their country. But the sturdy folk who make the brave beginnings in nationhood, and the energetic men of action who make the nation great and glorious, and the soldiers who instinctively understand the sentiments which later are engraved on their monuments, these are patriots without apology or any need for analysis about the way they feel. Their name is legend in every country which ever amounted to a hill of beans.

So, to keep America as we inherited her, we need the deep emotional safeguard of patriotism. Conversely, to destroy America, or to change her beyond traditional recognition, could be done by the perversion, debasement, or debilitation of that sacred theme.

Are these thoughts pertinent to our day and problem? It would be idle to pretend otherwise. The national founders, in the 18th century, were aided from the outset by the hot tide of patriotism which surged into battle behind the new-made flag and the new-heard cries of "Liberty or Death," "Don't Tread on Me," and all the rest. When it came to bringing the separate States into a Union, which was the chief business of the Constitution-makers, we find John Jay, in *The Federalist No. 2*, rejoicing that "Independent America was not composed of detached and distant territories (like the British Empire), but that one connected, fertile wide-spreading country was the portion of our western sons of liberty."

But today, in the business of denaturing our American nationalism, we have a public policy which would change the noble lust for liberty into some sort of insurance policy which we purchase from our allies and sell off from our enemies. And the idea of rejoicing in a beloved homeland is supposedly rendered obsolete by the grandiose theory that we can and should develop a devotion for One World.

This public policy of denationalization looks more like a secret conspiracy when we find it planted in places like the educational system, the metropolitan press, and the labor force, where it certainly never took root of its own accord. Be that as it may, if we are going to talk such dates as 1776 and 1789, when the United States of America became a country, we should also name some 20th century dates when the United States made turns in the opposite direction.

There's no doubt that America has never been quite the same since the diplomatic recognition of Soviet Russia in 1933. The political intercourse with a country that had disavowed all nationalism, and pledged itself to revolutionizing the world in the name of internationalism, began to have instant effects upon the loyalty of American citizens. Even before Russia was recognized, the United States had, in 1917, reversed the process of our country's birth and commenced a retreat into the Old World's womb. Things might have been different if our justifications for joining World War I had been frankly patriotic and self-serving. But the excuse of doing something for "the world" was in itself a perversion and dilution of patriotism. It separated us from the true love of our own country and took us from one debauch of international participation to another. When we entered World War I for the wrong reason, we were weakened to the point of accepting President Roosevelt's recognition of Russia for a variety of wrong reasons. These included the delusion that Russian trade was an easy way out of the depression.

With 1917 and 1933 behind us, the plunge into the two-ocean blood bath of World War II and, in 1945, the polygamous arrangements of the United Nations, became acceptable to us almost without protest. When in One World, behave as One Worlders. We had forgotten the fierce pride and protection of old-fashioned patriotism.

It would be strange if all this dissipation of our qualities did not shorten our life-span as a nation. For many years we have consciously failed to live up to the standards set by the Founders. There is just no way to show that the American people acted upon reflection in the recognition of Russia, in the return to the Old World's womb, and in the merger of our sovereignty with five to six dozen UN members. It can't possibly be indicated that we exercised our own choice in any of these matters. We didn't know, we didn't care enough to find out, what these surrenders of sovereignty would do to our liberties. By today we are subject to treaty laws we never passed, to wars of other people's making, to taxes in support of alien and often hostile governments. And by tomorrow—who knows?

This is far from being the end of the mischief by which America is being denatured. The Founders never envisioned self-government as a round robin of self-indulgence. They were not so naive as to suppose that the mass of the American people would always have the will power to keep hands off the public till and larder. But the Founders did believe that the people would practice self-restraint (as, indeed, they always have) so long as the political leaders maintained the Constitutional or representative form of government. Thus James Madison, third co-author of the *Federalist Papers*, said in Number 10:

" * * * It may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves."

Madison was saying, of course, that good leaders who study and debate public affairs are better able to reach wise decisions than the mass of the people are. Here is another author's thought which has been durable enough to last for more than sixteen decades; much longer than, alas, the practice to which it refers. For the representative, or republican, form of government started to go when we turned to direct election of Senators and to the use of popular referendums, now reduced to absurdity by commercially run popularity polls.

By today, unhappily, the parties of both Madison and Hamilton have largely deserted the principles praised in *The Federalist*. Modern political leaders have taken to feeding our people on the aperitifs and aphrodisiacs of human greed. The wisdom that flows from truly representative government is too often replaced by political auctioneering. Personal freedoms of enterprise and individualism are traded away for what is now disgustingly called security. It is an impostor word which stands for the creature comforts and bodily desires supplied by the government—the full belly, the cozy quarters, the certified medicine, the loose credit for looser living, the license that turns into lawlessness.

Domestic and foreign policies come together in a tear-down, level-out, share-America's-wealth program. We are guilty of gross overproduction in farm and factory which is brought by the government and dumped overseas. The excuses about saving "the world" are repeated in peace as in war. The concern that we might properly feel about heaping a national debt upon our children is not generally supposed to be "enlightened self-interest." Always, it is "the world," never America, that gets first and final consideration.

While the Founders favored majority rule, they also felt that a proper regard for minority groups was part of the political compact. One way to insure minority rights would be to set up seats in Congress for the various economic and occupational groups—such as bankers, debtors, farmers, soldiers, clergymen, shippers and manufacturers. Luckily, the Founders saw that this would be calamitous as, in fact, it has proved in other nations. As an improved substitute, it was decided to make the powers of the Federal Government few, limited, and defined, and to leave the powers of the States many and purposefully vague. This method was regarded as a sure-fire protection of minorities, since local self-government is bound in the long run to look after its own. As Madison put it, in *The Federalist* No. 4, the matters of everyday living belonged as close as possible to the people. He wrote:

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All this foregoing discussion relates, as you see, to the difference between what the founders intended by the Constitution and what 20th century Americans have done to the Constitution. The changeless verities of good government have remained; it is the integrity of the leaders and the will-power of the people which have failed.

The case may well be hopeless, and the Nation irredeemably doomed. Yet a ray of salvation still glows in the cold, clear truth of that one fixed star—the Constitution itself.

If the American people could once more understand and accept it, as they did in the beginning, we could make another start.

Senator JENNER. Thank you very much. And as I understand I will be permitted to appear here some time tomorrow before the close of the hearing?

Senator BUTLER. Yes, indeed.

We have today Mr. Smith from Lubbock, Tex., who is not feeling well, and he has asked me to let him speak first.

Will you please come forward.

I might say for the record that Mr. Smith is a former Lieutenant Governor of the State of Texas.

STATEMENT OF JOHN LEE SMITH, FORMER LIEUTENANT GOVERNOR OF TEXAS

Mr. SMITH. As a preliminary, also, I have practiced law from the justice court to the Supreme Court for more than 40 years, which I think is really more qualification for any presentation I make to this committee than having been lieutenant governor for 6 years.

I wish to make this statement:

Opponents of the Jenner resolution make much of the so-called tripartite system of government established under the Constitution, and advance the argument that the resolution will disturb what they call the even balance of power among the executive, legislative, and judicial branches of the Government.

In the first place, it is a false assumption that the three spheres of power are evenly balanced under the Constitution. The ultimate sovereignty of the people, acting through the several States and the Congress chosen directly by them, is clearly recognized and specifically established in the following provisions:

1. In the positive reservation of all powers not delegated by the Constitution to the Federal Government, not prohibited to the States, to the people, or to the States, in article X.

2. Section 1 of article I, provides that:

All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

This body, the Congress, consists of the directly chosen representatives of the people in whom resides the ultimate sovereign power.

After having detailed the legislative powers of the Congress in section 8 of article I, the article is concluded with these emphatic and significant words:

And (the Congress), to make all laws (Interpolating "but all laws") which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

This language is not ambiguous. It clearly means that the powers of government granted by the Constitution, be they legislative, executive or judicial, can be exercised only in the manner set out by the act of Congress. This gives to the Congress the positive authority to outline the procedure and prescribes the limitations under which both the executive and judicial departments perform their functions. It clearly vests both a restraining and a regulatory power in the Congress over the other two branches of Government.

To argue otherwise is to make a mockery of this provision of the Constitution.

Notwithstanding this clear vestiture of power in the Congress the present Supreme Court has usurped to the judiciary much of this authority by in effect declaring that the Congress shall exercise the powers granted to it in accordance with the regulations laid down by the Supreme Court.

Section 5 of article I provides that "each House may determine the rules of its proceedings." This unqualifiedly vests in the Congress

exclusive and untrammelled power to determine its own rules, including the procedure and scope of authority of all its committees, and of course embraces the procedure and authority of its investigating committees.

It will be noted that the word "determine" is used in this specific and exclusive grant of power. It is axiomatic in law that "determine" means to "adjudge, to decide, to decree, to fix." Clearly here the Congress, and not the courts, adjudge decree, determine, and fix their own rules. It is a constitutional power as fundamental as the Executive's right to veto a bill, or the Court's right to issue a proper writ.

More than one President of the United States has vetoed many bills on the grounds that they were unconstitutional. There is no record that his right to do that has ever been challenged. It could not be except by appeal back to the House in which the bill originated.

No court ever took cognizance of the fact that the Executive had a right to veto the bill because he said it was unconstitutional.

Under the authority of this language each House of the Congress is the maker and the judge of its own rules; their extent, scope, etc., and once having determined those rules, and their extent and scope of power, that determination is final, even as to their constitutionality.

Yet in the notorious Watkins case in which this friend and fellow worker of Communists challenged the rules of Congress, we find the present Supreme Court "determining" the rules of Congress, and declaring that such rules as determined by the Congress to be unconstitutional.

I can think of no more brazen usurpation of power by one branch of the Government from another than this seizure of power definitely vested in the Congress. In other words, the Supreme Court by judicial fiat vests a power within itself which the Constitution has vested in the Congress.

Seldom in the history of the Republic has more injury been done to our constitutional processes than was inflicted by this infamous decision; not only in the aid and comfort it gave to the devotees of communism, but in the unwarranted, unjudicial, and unconstitutional assault it made on the legislative branch of our Government.

To those who seem to fear a disturbance of the balance of powers as between the three branches of government I would say that there is a genuine and dangerous disturbance and an unbalance of that power, but the disturbance and unbalance has been precipitated by the unwarranted usurpation of legislative power by the Supreme Court.

In the Sweezy case, in which the defendant was specifically charged with teaching communism in the University of New Hampshire, the Supreme Court denied to the State the right to even investigate this individual who was on the payroll of that State.

In the Nelson case, the Supreme Court freed this admitted Communist and ruled that the States cannot punish persons for sedition.

In the Slochower case, which involved the fifth amendment professor from Brooklyn, the States were virtually disarmed from protecting themselves against Communists or disloyal employees.

All this, the 10th amendment notwithstanding.

In considering these cases, all of which in effect seek to strip the States of any defense against Communists and other subversives and

which deny to the States the legislative right to make laws prohibiting sedition, it is well to look again in the Constitution, especially since the Court held in the Nelson case that, because Congress had enacted the Smith Act, it had adopted exclusive jurisdiction in the field of sedition.

To me as a lawyer this is the most stupid conclusion that allegedly informed jurists might be guilty of.

Nothing in the Constitution gives Congress this exclusive power. Nowhere does the Constitution grant to the Congress the specific and exclusive right to enact such legislation. Commonsense, however, teaches us that the Nation has a right to preserve itself from its enemies, although apparently the present Supreme Court has never discovered this. Nor does the Constitution deny or prohibit to the States the right to enact such legislation. This being true, then, article X preserves to the States this right when it says:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Gentlemen, in view of such obvious disregard of the plain spirit and letter of the Constitution by the Supreme Court, is it any wonder that some of us are alarmed for fear that we are threatened with the rule of an irresponsible judicial oligarchy?

And in this connection I would state that we hear much now about statements being made that hold the Supreme Court in contempt. I wonder that someone has not called attention to the fact that the present Supreme Court by these numerous decisions and others has held the Constitution in contempt.

It should be enlightening to read the second paragraph of article VI:

This Constitution, and the laws of the United States made in pursuance thereof, etc., shall be the supreme law of the land.

The architects of the Constitution agreed that an uncontrolled Supreme Court meant despotism. They remembered the unholy decemvirate of ancient Rome, who usurped absolute and arbitrary power. In that case, it was 10 men who chose to exercise all 3 powers of government the legislative, the executive, and the judicial. In our case we have only nine who seek to emulate the ancient Roman decemvirs.

And because the framers of the Constitution distrusted an uncontrolled Supreme Court they placed a lever of control in the hands of Congress in section 2 of article III, which reads:

The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between a state and citizens thereof, and foreign states, citizens or subjects.

The last section having been amended by later amendments to the Constitution.

In all cases affecting ambassadors, public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned—

which is the whole scope of the judiciary—

with such exceptions, and under such regulations as the Congress shall make.

It is quite obvious, therefore, that the Congress at its own discretion has constitutional power to except any, or even all, of the aforementioned cases from the appellate jurisdiction of the Supreme Court.

This again is evidence that the framers of the Constitution intended that ultimate regulatory authority over the Court should vest in the legislative branch. The Congress cannot only reduce its appellate jurisdiction, but it can set out the regulations relating to the appeal in such a manner as it sees fit.

The exercise of such power by the Congress is now imperative if traditional constitutional government is to be maintained.

Every constitutional right of the people in their Congress and in their States, is menaced by a Court that itself treats the Constitution with contemptuous disregard; that usurps to itself powers that belong to the Congress and to the States; and that seems to take delight in shattering the security of this country, security built up through legislation designed to curb disloyalty, treason, and sedition. This is the task the Congress must face up to and must accomplish before it is too late. For these reasons, I commend to your serious consideration S. 2616. Thank you.

Senator BUTLER. Thank you ever so much, Mr. Smith. And I hope that your visit here has not inconvenienced you too much.

Mr. SMITH. Thank you, sir.

Senator BUTLER. Is Miss Rony here?

Miss Vera Rony?

STATEMENT OF MISS VERA RONY, WORKERS DEFENSE LEAGUE

Miss RONY. I am the National Secretary of the Workers Defense League, and I am here to represent the organization in testifying before this subcommittee.

I regret very much that I do not have a prepared statement, because we originally hoped that we could have one of our general counsel testify in view of the fact that would have been a more technical and lawyer-like approach. And I would like to have our statement prepared by a lawyer.

The gist of what I am about to say—and I was present at the meeting of the board, was sanctioned by it and I am able to speak quite clearly at their direction. It was decided by them.

The Workers Defense League is an organization for the legal aid and education of labor, and minority groups.

Among minority groups we include, also, political dissident groups outside of the Communist conspiracy.

Mr. SOURWINE. You are a Socialist organization, aren't you?

Miss RONY. No, sir. I would say, perhaps, when we were formed in 1936 there were more Socialists than any other kinds of individuals on the board, but I think that is no longer true. I have with me the makeup of our present board, and I would like to submit that.

Mr. SOURWINE. Why don't you insert that for the record?

Miss RONY. Yes, fine. I will insert that.

Mr. SOURWINE. And let it speak for itself.

(The document referred to was not available when the record was sent to the printer.)

Miss RONY. This organization was actually founded to combat the Communist efforts to dominate the labor movement in the days when

that movement was still young and open for domination. Therefore, our organization has a history of conflict and difficulties with the Communist Party.

I think that we know them from sad experience very well, and are therefore very sympathetic with the efforts of this subcommittee to strengthen the internal security of the Government and to try to control that very dangerous conspiracy.

However, we do oppose Senate bill 2040, while being quite sympathetic with what it wishes to accomplish, because we feel that the right of the Supreme Court to review the acts of Congress, and State legislatures, and of the executive branch of the Government, are very important as a kind of balance wheel to redress the sometimes overzealous activities of the other branches of Government in what are legitimate and worthy objectives.

Senator BUTLER. But do you not think that Congress in its turn should discipline the Court, maybe, in its overzealous activities?

Miss ROXY. Well, sir, I see that point.

Senator BUTLER. Or would you rather put your faith in judges than in the elected representatives of the people?

Miss ROXY. No, sir, not quite. Might I answer by saying that if I remember correctly in the 1930's—I hope I was of age to vote then—at that time, it seemed that Congress was, perhaps, running in the direction that many here present did not entirely approve in terms of economic reform which were done hastily, probably with good intention, but with some carelessness with regard to the rights of property.

At that time it was the Supreme Court which held back finally and imposed restrictions on these somewhat overzealous elements of the Communists. This could have been taken care of in a more constitutional way, because the Supreme Court had imposed that kind of limit, halting that activity. So it was not done regardless of the constitutional rights of the individual.

Now we feel from our work that at the present time the balance wheel has swung the other way and that the Congress and the executive branch and the State legislatures in their great desire to cope with the Communist conspiracy, which I will admit is quite diabolical and difficult to cope with, have made such efforts with due violence frequently to the constitutional rights of our citizens—the right of free speech and free assembly and above all the right of due process. We have in our work—

Senator BUTLER. What is there left of the 20 years of labor of the Congress and the executive branch to cope with the Communist conspiracy since these recent Supreme Court decisions—what remains of it—was there anything good about it?

Miss ROXY. Oh, sir—

Senator BUTLER. Then some of the good must have been preserved and it has not been under any of these decisions. It is completely that the work of the Congress has been brought to a standstill.

Miss ROXY. Would you say that these decisions have been destructive rather than limiting? I have understood them and the organization that I represent have understood them to be not destructive criticism.

Senator BUTLER. We have an example—here this morning—where a very attractive lady, not even under oath, nobody trying to badger her or to do anything they should not, refused to answer a question because, why, she said it is not within the scope of this inquiry. Here we are holding a hearing on a bill—

Miss RONY. But she did answer you.

Senator BUTLER. And she has the temerity to come here and tell the Congress of the United States that it is not within the scope of our inquiry.

Is that the kind of an investigative power you think that the Senate should have? So that every witness we call on any question says, "Well, who are you to be asking us any questions. The Supreme Court said you can't do it. We want to know what are your powers, what law you are operating under."

Miss RONY. Mr. Chairman, I believe—

Senator BUTLER. And completely tie the hands of the Congress?

Miss RONY. I do not think that young lady could tie your hands.

Senator BUTLER. She couldn't tie mine. She wouldn't tie mine, I will tell you that.

Miss RONY. My understanding of it—

Senator BUTLER. But that is the net result of it, that the Congress now has no way whatever of dealing with the Communist conspiracy. Twenty years of work thrown out of the window. The people want it—the vast majority of the people want to protect the people against the Communist conspiracy.

All of the work of the States have been overthrown under this Nelson decision, 46 subversive control laws of 46 sovereign States have been overthrown.

The congressional right to investigate has been so hampered that it is almost nonexistent.

What is there left to us?

Miss RONY. There is the possible—

Senator BUTLER. What is there left to this Congress now?

Miss RONY. Is it not possible for your committee or any other committee of the Congress to say to a witness now, "This is exactly the matter under deliberation here. You are testifying here for stated reasons."

Senator BUTLER. Have you ever conducted an Internal Security Subcommittee meeting?

Miss RONY. I followed them.

Senator BUTLER. I do not think there has been anybody in this Congress that has tried to be more of a gentleman than I have, who has learned over backward to be fair to anybody that comes before this committee. And I do not think there has ever been anybody that has been more contemptuously treated by people who refused to answer and assist their country in a very vital emergency.

Miss RONY. What I would like to do, if I may, before I come—

Senator BUTLER. It is almost impossible to follow the rule that you would have us follow and to follow the rule laid down by the Supreme Court, to have to explain to every witness that comes before you, the scope of your investigation, why you are asking this question, and so forth. How are you ever going to get to the bottom of anything? Here we had the lady this morning, that I am talking about—we

will go right back to here—presenting a statement, saying she was here representing an organization, and she refused to tell us who the people were that were interested in the organization so that the Congress, like anybody else that wants to read a statement or a letter would like to know something about the background and the origin of it. We are even denied that—we cannot even know who wrote the statement. Under some silly imagination of hers that the Supreme Court does not permit the Congress to do that.

Miss ROXY. I think the Supreme Court would uphold you on that. May I for a minute—

Senator BUTLER. I am glad you have that much confidence in them.

Miss ROXY. I would like for a minute to try to put the shoe on the other foot. I think that deserves some consideration. We deal with people who believe—who are accused under the Federal employment security program which is one of the matters covered by the Jenner bill, these people believe that they have been fired unjustly and come to us for help. Now in the course of trying to understand these cases—

Senator BUTLER. Well now, may I make this clear to you? I did not vote for the Jenner bill. I am here as the chairman conducting these proceedings. And when the bill came up in the committee I voted to have this hearing because at that time I was not prepared to grasp the broad sweep of the Jenner bill. What I do in the future is my own business. And I shall do what my conscience tells me I ought to do. But I think there are many areas covered by the Jenner bill that could be covered in another way.

Miss ROXY. I am very happy to hear that. I would like to discuss the Federal employees security part of the bill, because that is the part that I think I am somewhat competent, in terms of our organization, to discuss in a more detailed way.

Two things in that program, particularly, have come to our attention that have worried us a great deal.

The first of those things is the Attorney General's list with which I know you are all familiar, so I do not have to describe it.

We first came across that important matter because the employees who are treated under it according to the Executive Order 10450 are evaluated in terms of membership in our connection with organizations listed by the Attorney General.

Senator BUTLER. May I ask one question? I do not want to disturb you further. Do you believe that Federal employment is a privilege or a matter of right?

Miss ROXY. I believe, sir, I do believe that the Supreme Court, if you will forgive me, was quite right that it is probably a privilege. I go that far. That it is probably a privilege, but this does not mean the people may be deprived of it illegally. And this is what the Court said, and I think that that, in this matter, is their position.

Assume that it is a privilege and working on that, I don't see how we can assume it is a right. I would not wish to go that far. These people, nonetheless have these jobs, working hard, have worked on them, were fired and the problem came up they had been accused of membership in such and such an organization. Thereupon the question comes what is the Attorney General's list? What is it? And it turns out as follows—and I have data on this—I will be happy to

answer questions on it—that the Attorney General's list, is, first, established by fiat in 1941 or 1942 by Attorney General Frank Murphy. When the list was established it was a private list and not public. At that time, many of the organizations on the list were not even notified of it that they were on the list. There was no opportunity given to them to defend themselves, to present arguments to the contrary to indicate why they should be on the list.

They were simply placed on the list. The list was made public in 1948, I think. Several years later, at any rate.

At that time the organizations realized that they were in this position. Nonetheless, there was no opportunity for hearings, there was no mechanism for these organizations to attempt to clear themselves to try to protect the careers of people who had at one time or another been connected with them.

In short, in this America, we have the most freedom of anywhere in the world and on which we pride ourselves on our lawful way of life. People had no way whatsoever trying to establish the fact that these organizations may not have been subversive, that they were not connected with the Communist conspiracy, and that those individuals connected with them still had certain rights.

Mr. SOURWINE. This is an interesting discussion, but would you tell us what it has to do with the bill S. 2646?

Miss RONY. Only this, sir, that the Attorney General's list has in our opinion been conducted in a way not consonant with the American tradition and with the Constitution. And that we very firmly believe that the Supreme Court review of matters connected with that program such as, for instance, the Attorney General's list, which has now for 10 years been awaiting some kind of decision and which we hope to bring before the Supreme Court—

Mr. SOURWINE. Who is "we"?

Miss RONY. Pardon me?

Mr. SOURWINE. "Who is 'we'?"

Miss RONY. "We" is the Workers' Defense League, we are sponsoring one of the organizations.

Mr. SOURWINE. Are you on the Attorney General's list?

Miss RONY. Pardon?

Mr. SOURWINE. Are you on that list of the Attorney General?

Miss RONY. Do we what?

Senator BUTLER. Is the Workers Defense League on that list?

Miss RONY. Absolutely not.

Mr. SOURWINE. How are you going to raise the question then?

Miss RONY. What we done, sir, is that we are testing the list on the basis of the Independent Socialist League. And we have no sympathy with the political beliefs of this organization, we simply think they are crazy. I have said so, but we think that they have a right to—

Mr. SOURWINE. You mean you initiated litigation in their behalf?

Miss RONY. We have initiated litigation; that is, we are raising the money to sponsor the case.

Mr. SOURWINE. Did you ever hear of champerty in maintenance?

Miss RONY. Yes, sir.

Mr. SOURWINE. Do you think maintenance is involved in the situation with respect to your organization in this that you say is crazy?

Miss RONY. I do not know what specific thing you are referring to.

Mr. SOURWINE. I am talking about the litigation which is brought, not on behalf of or by an organization which has an actual interest but which is supported by some other organization or a person that does not have an interest.

Miss RONY. The independent—officially the Independent Socialist League has appealed this case for the——

Mr. SOURWINE. But unofficially you are supporting it?

Miss RONY. Unofficially. They do not have a nickel.

Senator BUTLER. Does your objection go beyond the loyalty and security program, because I think you are sort of beating a dead horse because the Supreme Court sort of killed that one along with the other one.

We get that point. Now what other objections do you have with it?

Miss RONY. We believe that much—we happen to have our particular experience with the Federal program, but we believe that the State investigations and State security programs tend to have most of the objectionable features and much more strenuous in some features than the Federal.

Senator BUTLER. Even though the people of the several States want to live that way and the majority of the people pass that bill, you think that the State should not have the right to preserve itself?

Miss RONY. I think maybe they feel this way today. The question is whether they will feel that way later—tomorrow might be too late.

Senator BUTLER. It is too late for what?

Miss RONY. Well, I think that as in this instance I cited, if the Supreme Court had not perhaps held up some of the very radical reforms of the New Deal that a lot of people would have had their business regulated.

Senator BUTLER. I know. But let us stick with what we are talking about here.

Miss RONY. I think it is a very similar thing. People want things which are not quite within the keeping of our own particular tradition.

Senator BUTLER. You mean the State has no business to formulate its own security program, the people living in the several States do not have the right to protect themselves against Communist infiltration?

Miss RONY. Sir, I think the security is a national business.

Senator BUTLER. You do—you think that the Federal Government should tell the State of Maryland for instance, who they can and cannot employ? And then will you take a step further and say they should, also, have that right as to individual employment in private enterprise? Is that, also, a Federal problem?

Miss RONY. May I answer you—I do not think that the Federal Government has the right to tell the State of Maryland who they should or should not employ. But I think the Federal Government may have the right to tell the State of Maryland how to evaluate a particular aspect of this employee's——

Senator BUTLER. Not how to employ, but who to employ?

Miss RONY. Employable—they don't have to employ them.

Mr. SOURWINE. They can tell them to fire and not to fire?

Miss RONY. In behalf of my organization I would not want to go any further. But I do think that the Federal Government can judge whether a man is a Communist.

Senator BUTLER. All right. While we are on that point, do you think that the Supreme Court has better facilities for determining who is subversive over the FBI? Do you think they are possessed with all knowledge on that subject and say who shall and shall not be fired as being a subversive? What information do they have? They have no sources of information. The question is one of policy.

Miss RONY. That is right.

Senator BUTLER. It is not a judicial matter at all. It is a matter of legislative policy as to how the Government of the United States shall treat its own employees and how the several States shall treat their employees.

Miss RONY. I grant that completely, and I think that if you gentlemen were not making policy it would be a terrible day for this country.

Senator BUTLER. They are losing that role.

Miss RONY. No, sir. All I think that we are trying to say here is that what the Supreme Court does is it reviews the way in which the legislature and the executive branch proceeds, the way in which it proceeds, whether it goes beyond the limits where the individual has his sphere of rights, whether it invades his rights, whether the way in which it proceeds, on what it has decided to do, is consonant with our liberties.

Senator BUTLER. Let us take the most elementary case. You cannot bring a newspaper reporter in and ask what the source of information of his story is, because if you do you destroy the press. Because people won't talk if they know that the man they talk to and give the story to will be hauled up and have to say that "John Doe gave me that story." Yet you say, in effect, that the files of the FBI should be public property and everybody in it, everybody who has given anything to the FBI shall be made to appear the same as in a criminal case when it comes down to somebody's loyalty or security of the Government.

Miss RONY. Mr. Chairman, I don't think that is what the Supreme Court said. I would like to say something there. This is an aspect of the security problem with which we are very familiar.

Senator BUTLER. We have a lot of witnesses. It is very interesting to talk to you. And I do not want to cut you off, but we do have a lot of witnesses. I would like to know, just get into the record as quickly as you can, your objections to the Jenner bill.

Miss RONY. All right, I think I have made the fundamental ones.

I would like to answer the question that you raised. I would say that the Supreme Court decision in the matter of the FBI files was a very specific and limited one. What they said was that if an agent testifies, if the FBI testified against a person, that that person or his counsel has the right to examine that specific testimony which is used against the man. Not any old testimony. Not any testimony here and there. Not any old FBI files, but the testimony relating to the problem.

Senator BUTLER. That is exactly what did happen, and the Congress in the last 6 months has passed a law to remedy it, and the Attorney General has asked us to pass that law and it has been passed—that case has been legislatively reversed.

Miss ROXY. I think it is a good law, but we should find out what—I do not think that is what the Supreme Court meant. I wish you could sit for 1 hour and hear some of the witnesses that are brought up on security charges. We do not know what the evidence is; we do not know who gave it. The fellow has lost his job.

Senator BUTLER. You mean, when he loses his job, there is only one employer in the world; that is, the Government of the United States?

Miss ROXY. Sir, it is not only the Government of the United States. There are veterans' rights involved with many of these matters. There is admission to the public housing involved. For instance, the Attorney General lists loyalty cases. There are all kinds of peripheral life which appear in everyday life in addition to being employed by the Federal Government. We can bring, and we have brought, 10 witnesses of the highest caliber who say, "I have known this man for some 20 years; he is not a Communist." If he is a Communist, I am a Communist"—ministers, people who are absolutely unimpeachable. But it does not help the man because somebody has said something about him which apparently is still damaging. And we do not know what it is.

Mr. SOURWINE. The testimony of any person that another person is not involved in a conspiracy is not competent unless the person testifying himself is a part of the conspiracy. The only person who can legally deny for you your part in the conspiracy is you, or some other member of the conspiracy. All any other person can say is that he does not know you to be a member. He cannot testify that you are not.

Miss ROXY. That is why he has to know who accused him. That is just why.

I do thank you for listening to me.

Senator BUTLER. All right. Thank you for coming.

Now we have Mr. George S. Montgomery, Jr., from New York City. It is nice to have you here.

Mr. SOURWINE. Do you have a prepared statement?

STATEMENT OF GEORGES S. MONTGOMERY, JR., ATTORNEY, COUDERT BROS., NEW YORK CITY, N. Y.

Mr. MONTGOMERY. I do not have a prepared statement, I am sorry. I had a difficult time getting here, as it was, without sending anything in advance.

Senator BUTLER. That is all right, we will accept your testimony.

Mr. MONTGOMERY. My name is George S. Montgomery, Jr., an attorney in New York City. I am a member of the Bar Association of New York County, the State of New York, and the American Bar Association.

I will mention two national organizations with which I am connected as a national committeeman.

One is For America, and the other is National Committee for Independent Political Action.

The staff of the two organizations in some respects are quite identical, including J. Bracken Lee, former Governor of Utah; Dean Clarence Manion, of Indiana; T. Coleman Andrews and Morgan Strother, of Richmond, Va.; John U. Barr, of New Orleans; A. D. Heinsohn, of Tennessee; and the former Governor of New Jersey, Mr. Charles Edison. Gen. Bonner Fellers is the representative in Washington.

I am here, Mr. Chairman, not as a lawyer but rather because of a statement which I saw in the record of the hearings last August and made by Senator Jenner. It appears in the report dated August 7, 1957, and on page 25, Senator Jenner said this:

The principal error is that the majority of the Supreme Court of the United States does not understand the nature of the Communist conspiracy. That is the fatal error.

I have the highest regard for the Senator from Indiana. I do not think that there is any American citizen that regrets more than I his retirement from Washington. Nevertheless, I think that this statement is unwise and inaccurate. And I would like to take just a few minutes this afternoon to discuss it.

I think it is vital to the purposes of this bill with which, incidentally, I am highly in favor.

It is certainly difficult to determine whether an individual or a group of individuals is or are familiar with the nature of the Communist conspiracy. It is particularly difficult when we are dealing with a gentry who wear black robes. In the pulpit of the United States we find individuals whose names are associated with numerous subversive organizations. I am inclined to say that these gentlemen do not know the nature of the Communist conspiracy. I would rather describe them in the words of my former friend, the late Albert J. Nock, who said, "These are the men with first-rate sympathies and third-rate minds."

Another part of the black-robed gentry we find in the academic world. And there I think the problem is even more difficult, because the members of the academic world in numerous occasions not only lend their names to subversive organizations but in textbooks and in the classrooms indoctrinate the minds of American youth to philosophies that can be nothing but beneficial to the Communist conspiracy.

I would like to present briefly a message that comes from a member of this academic world. Last week there appeared in the New York Times a letter signed by Stuart Chase, of Georgetown, Conn. This letter is published in the February 24 issue of the New York Times, under this heading: "International View Urged." The article reads: "Crisis is said to demand mankind priority over nationalism."

The writer of the following letter is the author of a number of books on socioeconomic subjects.

Now, Mr. Chairman, if the footnotes in recent Supreme Court decisions do not include the name of Stuart Chase, I assure you it is not because of any lack of ideological affinity between the men in the black robes and the learned doctor, as you may gather as I read this letter.

It is to the editor of the New York Times:

The disastrous attack of French warplanes on a Tunisian village gives us a frightening preview of how a local military officer, acting on his own, might push the button to start a world war.

How can the individual citizen respond to this threat? I believe that more and more of us, as the facts sink in, must swing over to give priority to an international rather than a national view. In recent statement about the crisis rarely does one find priority to mankind. Opinions from American scientists, statesmen, soldiers, leaders gives priority to the United States.

Interpolating, what a shocking statement.

We are in dreadful danger, means that 176 millions of us in 48 States. are in dreadful danger of losing out to Russia. The actual situation, of course, is

that mankind, including the Russians--2,000 million of us, in 6 continents now, and all our descendants, are in dreadful danger from blast, burns and strontium 90.

It is not possible for any nation or combination of nations to "win" a world war in the present state of the technical arts. If nuclear war begins, every nation will lose. Our leaders mostly admit this when pressed, but the Nation still has priority in their thoughts and words.

Nationalism is perhaps the most powerful of all of the ideological drives implanted by the culture, and is reinforced by a complex of deep emotions, which can be triggered off by many different symbols.

For instance, the Stars and Stripes.

If enough of us around the world could think about the crisis as members of the human race there would be no crisis. Members of a given society do not conspire to destroy it, but it is not easy to shift priority from one's own society to the society of mankind. The logic for the world view is widely accepted, but the emotional drive is lacking--except by a handful of stalwarts like Gen. Omar Bradley, Cyrus Eaton, Norman Cousins, Raymond Foedtlek.

More of us like them need to see the urgency of exploring all possible methods for negotiation, accommodation, and disarmament, even if it means some reduction in national sovereignty as did the Acheson-Lillenthal-Baruch plan for the control of atomic energy in 1946. We need to realize that just as a soldier formerly could defend his home only by defending his nation, so now it is only by defending mankind that we can save our own country.

Mr. Chairman, that message brings home to me the fact that I and every associate of mine in "For America," and in the Political Action Committee, are enemies of mankind.

I say that that is the philosophy which is behind the recent Supreme Court decision. There is a complete obliteration of any feeling of loyalty to the country, of loyalty to their constitution, of loyalty to their flag.

Dr. Stuart Chase is about as much interested in the results of a conflict between the Kremlin and the American Nation as he is between a ball game between Brooklyn and Pittsburgh.

Leaving the academic world for a moment and coming to Washington and before going to the Supreme Court, if I may, I would like to pause at the White House.

I think this is very relevant, Mr. Chairman, because the President of the United States has made some remarkable appointments to the Supreme Court. And I believe that it is quite pertinent in considering this bill to ask the question, "Does the President of the United States understand the nature of the Communist conspiracy?"

Well, it is an amazing record. We do have a statement made to the public that the President was hard put to it to defend the American way of life, freedom under the American constitution, as opposed to Communist slavery in the shadows of the Kremlin.

I understand that the modern Republican leaders are still sweating icewater when they recall that event.

I, also, understand that that press conference at which these remarks were made is and will be the last unrehearsed press conference in his Presidential career.

Now that, I think, might lead one to believe that the ex-President of the United States does not understand the nature of the Communist conspiracy.

However, there are other points which might give you pause.

In December of 1955 the President sent to the world a Christmas message, in which he said:

The peaceful liberation of the captive peoples has been, is and until success is achieved, will continue to be a major goal of the United States foreign policy.

I have searched the record of the President of the United States for one single instance where his action supported those noble words, and I have not found them.

On the contrary, just last month, on the morning of Lincoln's Birthday, February 12, 1958, I opened the New York Times, and saw a picture of the President of the United States with a warm smile shaking hands with the latest agent from the Kremlin.

Now, I think that in determining the answer to this vital question, it would be in order to review briefly, and I will make it very brief, some salient points in the history of the present Chief Executive.

During the last two decades he has served as leader in several capacities. He has been a commanding general. He has been Chief of Staff. He has been a college president. And he is now Chief Executive.

During this period we have seen, among other things, American soldiers restrained at the threshold of Berlin while Communist hordes entered the city to commit one of the most horrible orgies of rapine and pillage that history records. We have seen following World War II at a time when the American Nation was more powerful than it had ever been in its history, both absolutely and relatively, by deliberate destruction of material and by deliberate protection of espionage, this Nation reduced to a state of peril today where our friends whisper behind our backs that we are in danger of extermination overnight.

Now, the third thing that happened, that the record should show, is that during this leadership, men in the field of science, industry, and the military field of America were deliberately restrained, though able to do so, from penetrating into outer space until such time as the Kremlin leadership was permitted to perform that feat and astound the world.

Now, Mr. Chairman, I say that this record is not consistent with a series of bungling by well-intentioned leaders. It is too sinister. There is something behind this that is more than just mistaken judgment. I believe—and I think this is still relevant to your inquiry—that the President of the United States owes the American people an accounting of his stewardship. I believe that if he does not do so voluntarily, that some Senator or some Congressman with the courage and determination should force him to tell the story.

I believe that until this story is told, we are getting into greater and greater peril every day that passes because as long as his story is not told, what happens to those forces that brought us to this plight?

Now, to the Supreme Court. The Senator from Indiana says that a majority of the Supreme Court do not understand the nature of the Communist conspiracy. I think that the Senator from Indiana challenges the accuracy of his own statement by that splendid speech that he made in the Senate when he revealed the unbelievable series of decisions rendered by these nine black-coated men.

Mr. Chairman, even the Pittsburgh Pirates and the Washington Senators win a baseball game now and then, but in the Supreme Court of the United States under its present membership, any time that

there is a controversy involving the interests of an American citizen as opposed to the interests of the Kremlin masters, the American citizen cannot win.

Now, if a majority of the Supreme Court of the United States were not aware of the Communist conspiracy, at least you would expect that an American might win once out of twice or once out of 6 times or once out of 20 times. At least some time he might be expected to win.

Now, under these circumstances I personally—and I think I express the sentiments although I can't vouch for it, of the associates that I mentioned—urges the Senate and the House to go to the utmost within their congressional powers to cut down the authority and the powers of the present members of the Supreme Court.

To illustrate how deeply convinced I am on this subject, I would like to take 2 minutes to present to you a form of petition which has been prepared and is made available by a citizen of New York to Americans from coast to coast. This is a petition to the Congress of the United States:

Whereas the Supreme Court Justices have repeatedly broken their oaths to uphold the Constitution of the United States by usurping power, by destroying the rights of the States, and by giving comfort to our enemies, the Communists:

Therefore, we the undersigned citizens of the United States and of the sovereign States thereof do hereby petition Congress to redress our grievances, to restore the Constitution and the Bill of Rights, and to reinvigorate the Republic by impeaching the present Justices of the Supreme Court; and further do hereby petition the Congress to take immediate effective steps to repair to the extent possible the damage to the Constitution of the United States and the sovereign rights of the separate States by enacting appropriate legislation, with unequivocal language, which will permit of no treacherous distortion by any member of the Supreme Court.

The petition form, Mr. Chairman, contains this message to anyone considering signing it:

Impeachment of a Supreme Court Justice is serious, but Abraham Lincoln said, "The people of these United States are the rightful masters of both Congresses and courts, not to overthrow the Constitution but to overthrow the men who pervert the Constitution."

If you have any doubts about signing the attached petition, please read the great speech of Senator William H. Jenner in the Senate on July 20, 1957, and Dan Smoot's report of July 1, 1957, entitled "Supreme Court." These should satisfy you that the Supreme Court decisions add up to treason and that the words of the Supreme Court Justices themselves will furnish solid bases for their own impeachment.

Senator BUTLER. Mr. Montgomery, I might call your attention to the fact that Abraham Lincoln at the time of the handing down of the Dred Scott decision, when he was naturally very much annoyed with the Court, nevertheless said that he felt that the right of the Court to declare unconstitutional an act of Congress was probably the lesser of the evils, and I don't think he went to the extent of just tearing the Court apart. And I think that we have got to move very carefully in this field. I think that we must assume that these gentlemen are certainly not motivated by the evil influences. I think we have got to find some way to get at the problem without just going in and taking away or trying to take away all of the jurisdiction of the Court in these particular fields. I think it is too sweeping.

Mr. MONTGOMERY. I have the greatest sympathy with your feelings. A year ago I would have expressed myself exactly as you have. At this time I will say, Mr. Chairman, if I may, that I have no intention

of leaving to a future historian in decades to come the task of telling my grandchildren that in mid-20th century there existed in high places of trust in my country treason and treachery.

Now, I think that unless somebody has the courage to come out and face that fact---it is either true or it isn't.

Senator BUTLER. There is plenty of room for courage, but there is also plenty of room for thought and consideration.

Did you hear Mr. Ober testify this morning?

Mr. MONTGOMERY. No; I wasn't here.

Senator BUTLER. Mr. Ober testified this morning on this bill and he pointed out and very succinctly and very learnedly pointed out that a lot of the decisions of the Supreme Court can be cured by simply having the Congress amend existing legislation upon which those opinions were based.

Mr. MONTGOMERY. That is a theoretical solution, isn't it?

Senator BUTLER. It isn't a theoretical solution. It is an actual solution.

Mr. MONTGOMERY. If it can be done, sir.

Senator BUTLER. Insofar as the cases go, probably in the two fields of the right to practice law and the right of a State to be able to hire and fire its own employees as it sees fit, I probably go as far as you do, that the Supreme Court has invaded the rights of the States.

In some of these other programs, there may be better ways found to come--to arrive at the solutions than to just go in and tear the Court down. The Court is a valuable part of American life.

Mr. MONTGOMERY. Oh, no question.

Senator BUTLER. I had the-- well, I guess it has been 4 years ago now--I sponsored a joint resolution to give the Supreme Court the absolute right of appeal under any case arising under the Constitution of the United States, and I did that with the firmest and finest intentions, believing that the Supreme Court certainly has a place to play in the American way of government. It certainly has its duties and responsibilities as we do in our field. I think the Supreme Court in some cases has overstepped its bounds.

It is a question of how to get at it without tearing the house down. And I for one will give it all the thought and attention that I am capable of and try to arrive at a solution that will be for the benefit of all the people.

I don't believe that to just condemn the Court generally would bring us to that position.

Mr. MONTGOMERY. I want to make it clear, Mr. Chairman, that I am not talking about the Supreme Court of the United States. I am talking about the nine particular members of the Court that happen to wear the robes now.

I think the Supreme Court of the United States is one of the greatest institutions in the history of Government.

Senator BUTLER. Well, if it is an institution, then, it must be preserved.

Mr. MONTGOMERY. It must be preserved.

Senator BUTLER. And I agree that when it steps out of line and doesn't do as it should do, that this power of the Congress should be exercised. But I believe that it should be exercised with the greatest of care and only after the most sincere deliberation. This is a very serious step.

Now, the Founding Fathers put this escape clause in the Constitution for the purpose of giving the Congress, in my opinion, a check on the activities of the Supreme Court, the same as they gave to the President the right to veto a bill of the Congress and make us get two-thirds to override it. This is a Government of coordinated and equal branches, and when one gets out of kilter, the other has a right to check on it. But I don't think that we can say that it is wholly bad. I know that there are ways that this can be done.

It can be done to the satisfaction of all the people, and I am certain it can be done without just tearing the Court apart.

Mr. MONTGOMERY. Well, I don't think that you or anybody else can answer that question. How is it that we get 27 decisions against the American citizen?

Now, I tell you the odds just don't add up on anything other than something sinister. However, I have expressed myself.

Senator BUTLER. I will admit that some of the decisions have been very distasteful to me. As a matter of fact, I was on the committee that drew the legislation that overrode the *Jencks* case because I thought it was a very dangerous case, but I think it can be handled in an orderly way. It can be done in an orderly way and I have never been quite prepared to say that we ought to exercise this power that we do have in anything but a very careful and thoughtful manner.

Mr. MONTGOMERY. It is a very serious step and I expect some time in the future, I just don't know when—I will say on these petitions I am not asking a single soul to sign these petitions. They are coming in, snowballing from all over the country, from every walk of life. It is a tremendous think how angry the American people are about the Supreme Court.

Mr. SOURWINE. You are not asking this committee to take any action with respect to the impeachment of the Court.

Mr. MONTGOMERY. No, sir.

Mr. SOURWINE. You know that has to originate in the House.

Mr. MONTGOMERY. That is right. I just wanted to submit this form of petition. I certainly am not—

Senator BUTLER. I don't want my position to be misunderstood. I have always been—well, no matter what I have always been, I have always prided myself in believing firmly in the constitutional system, and from my legal education and from the reading I have done, it is pretty hard to get away from the place that the Court plays in American life, and I have no desire to injure the Court. I think the Court in some fields has stepped out of its orbit. It has done things that it shouldn't do. And I think those things should be corrected even by the Congress exercising the constitutional right that it has to withdraw jurisdiction, but that is an extreme remedy. It is a very extreme remedy, and if there is any way to do it, it should be done in the other way.

Mr. MONTGOMERY. I agree, I agree. But I have come to the conclusion that it can't be done in any other way. That is where we differ.

Senator BUTLER. We have had testimony before the subcommittee that it can be done in another way, and if it can be done in another way, I think we should do that, because as much as—I just think too

much of the system, this system that we live under has been too good to all of use to just haphazardly hack away at any one of the branches of it.

Mr. MONTGOMERY. But the consequences, Mr. Chairman, of this extreme measure would be simply to eliminate certain members that now occupy the Supreme Court and replace them with others. The Supreme Court is still the high court of the land, only that it would be improved as to personnel. I don't think it could be worsened by any such move.

I wonder if I could take just 2 minutes for 2 observations.

Senator BUTLER. Yes; we have a lot of witnesses. I do want to hear them, and I don't want to cut anybody off.

Mr. MONTGOMERY. I want to present to Senator Jenner what I believe to be a great ecomium which proves that he is doing a good job and has probably got his fingers pretty close to the enemy's nervous system.

Here again, coming from New York, I am afraid I have to use this New York Times more than I should, but here is from an editorial which appeared last week:

William E. Jenner, of Indiana, who is doing a service to the Nation by retiring from the Senate this year is author of a bill to limit the appellate jurisdiction of the Supreme Court in certain areas where the Court has been courageously defending some of our basic American liberties.

I am sure—

Mr. SOURWINE. I will say that is in the record. It was placed there by Senator Jenner.

Mr. MONTGOMERY. He placed it there himself. I knew he would be proud of it.

The last thing I will say, and then I will retire, I have received informal reports that the American Bar Association in Atlanta, Ga., adopted a resolution disapproving of the Jenner bill.

Mr. SOURWINE. The text of that resolution, sir, and the transcript of the proceedings of the house of delegates in connection with it are in this record.

Senator BUTLER. They were introduced in this record this morning.

Mr. MONTGOMERY. Well, then, I will just say as a member of the American Bar Association, if they feel that they are going to remain supine and expect Congress to sit idly by while these nine men in black tear up our Constitution and tear down our flag, then I say God help the members of the American Bar Association and protect them from the consequences of such suicidal folly.

Thank you.

Senator BUTLER. Thank you.

Mr. SOURWINE. Mr. Chairman, Mr. Will Maslow of the American Jewish Congress, who was scheduled to come this afternoon has notified the committee he was unable to come, and his statement has been put in the record.

Mr. William V. Chappel, Ocala, Fla., the chairman of the constitutional amendments committee of the Florida House of Representatives, sends this telegram, the gist of which is that he is unable to be here, and I ask that the telegram be made part of the record.

Senator BUTLER. It will be made part of the record.

Mr. SOURWINE. He makes, Mr. Chairman, a request in the last paragraph which, I submit to the Chair, I will say that the request doesn't seem reasonable to the counsel.

Senator BUTLER. It doesn't seem to be germane. The telegram will be put in and made a part of the record.

(The telegram referred to is as follows:)

OCALA, FLA., March 4, 1958.

J. G. SOURWINE,

*Counsel, Internal Security Subcommittee,
Senate Office Building, Washington, D. C.*

Reference Senate bill 2646, regret unable to appear today before subcommittee because of unavoidable circumstances.

I congratulate the members for their untiring labors with vital security problems and wish much success in their solutions to the ends that Congress and the several States might more positively control subversive activities within their respective jurisdictions, and that our Supreme Court might more clearly reflect its intended judicial function of interpreting the laws as contrasted with its self-imposed legislative function of making the laws.

I respectfully urge that copy of Florida's Interposition resolution be filed as part of subcommittee's report.

WILLIAM V. CHAPPELL, Jr.,
*Member, Florida House of Representatives,
Chairman, Constitutional Amendments Committee.*

Senator BUTLER. I see General Bibb here. General, will you step forward, please, sir. It is nice to have you here, sir.

Mr. Binn. Thank you, sir.

STATEMENT OF EUGENE S. BIBB, BALTIMORE, MD.

Mr. Binn. Mr. Chairman, in order to identify myself, may I state that my full name is Eugene Sharp Bibb and I reside at 905 St. Paul Street, Baltimore, Md.

I graduated at the University of Minnesota and took postgraduate work at Columbia University and Oxford University. I am a retired soldier and a retired lawyer and have been a member in good standing of the bars of the United States Supreme Court and of all State and United States courts of record in the States of Minnesota and New York for more than 35 years. I am a retired senior officer of the Army and am a wounded combat veteran of the Mexican Punitive Expedition (1916), World War I (1917-19) and World War II (1941-50), and saw combat action abroad in all of those wars. Since retirement in 1950 I have been a writer, lecturer, and radio commentator.

I appear here today in support of Senate bill S. 2646, commonly known today as the Jenner bill, specifically withdrawing all jurisdiction of the Supreme Court over cases involving congressional committees' action, executive security programs, State security programs, school boards, and admissions to the bar.

My sole criticism of this well thought-through bill is that it does not go far enough. I am urging the Congress to pass legislation forbidding to the Supreme Court all jurisdiction over all decisions of the State courts of last resort, over all matters which are exclusively within the rights of the several States reserved specifically to the States and the people by the 10th amendment to the Constitution.

At the outset I must make it clear that no man reveres our judicial system more than I do. Furthermore no man respects the inviolable

sanctity of the independence of our courts more than I do. But when the Supreme Court sets itself up above the law of the land and sits arrogantly in prideful menace to the Republic, then I vigorously contend that it is time for congressional discipline of the offending members of that Court and a stern curbing of the limitless power for evil usurped by this Court.

The Court has ruled unconstitutionally and without power in favor of convicted Communist traitors in 10 out of 19 of such cases considered by the Court. It has dealt fatal blows at key points of the legislative structure erected by the Congress for the protection of the internal security of the Nation against the worldwide Communist conspiracy. By some of these decisions all State antisubversive laws and regulations have been rendered null and void. States have been denied the inalienable right to combat the Communist conspiracy and have been denied even the right to bar Communists from practicing law. Convicted Communist traitors have been freed and turned loose by this "Supreme Court of Sociology" on flimsy, lawless technical excuses. The Court has brashly challenged the authority of the Congress to decide the scope of its own legislative investigations.

I agree with the distinguished writer David Lawrence, editor of the widely read U. S. News & World Report, when he characterized this body of immoral, pro-Communist "Supreme Court law" as "Treason's Greatest Victory!" I also agree with a prominent Senator when he declared on the floor of the United States Senate, in June 1950, that--

If the Supreme Court had another 3 or 4 months to hand down decisions in aid of the deadly Communist conspiracy, our Government and our institutions might well be at the mercy of the Communist conspiracy by the end of the summer.

It is all too painfully obvious that the majority of the Supreme Court is inexorable in its grasp for total power. When the Court arrogates to itself the irresponsible right to rewrite and amend the Constitution of the United States (amendment 14) and make law de novo (Negro segregation cases); when the Court malevolently does violence to the lawful provisions of State constitutions and State statutes; when the Court capriciously and mischievously, usurps the functions of trial juries and willfully ignores the proven facts and rewrites the law to its own Jacobinic purposes (California Communist cases and others); when the Court undertakes to exert the power, without the right, to invalidate wills and to void trusts made thereunder, without even a hearing on the merits of the case (Girard College case); when the Court contumaciously contrives to destroy the rights of the States in deliberate contravention of the letter and spirit of the Constitution which the Court members solemnly swore to "preserve and defend"; when the Court deliberately provides safe and secure havens of refuge in the United States for all traitorous Communist conspirators in our midst and bars their lawful conviction and punishment under the law, and when the Court, in its revolutionary frenzy, shows utter contempt for the ancient legal doctrine of stare decisis, and wantonly strikes down our precedents, traditions and institutions, built on reason and logic, then I proclaim that that Court is guilty of malfeasance in office, if not high treason. These are some of the impelling reasons for the adoption of the instant bill before this committee and

for stern disciplinary measures originating in the House of Representatives and triable before the Senate.

Mr. Chairman, to try members of the Supreme Court of the United States in impeachment proceedings seems unthinkable but it may well be mandatory in the salvation and rebuilding of our Republic.

It is enlightening at this point to note the vote of the Court in decisions involving internal security measures:

	Against	For
Warren, Chief Justice.....	10	0
Black, Justice.....	10	0
Douglas, Justice.....	10	0
Frankfurter, Justice.....	9	1
Harlan, Justice.....	8	2
Brennan, Jr., Justice.....	8	0
Burton, Justice.....	6	3
Clark, Justice.....	2	7
Whittaker, Justice.....	1	0

To say that the Court majority voting against all internal defenses against the onrushing Communist conspiracy seeking to engulf us, is pro-Communist would be the understatement of the year.

In review of the 10 decisions enumerated above the following is submitted:

1. *Communist Party v. Subversive Activities Control Board*: The Supreme Court refused to uphold or pass on the constitutionality of the Subversive Activities Control Act of 1950, deliberately hamstringing the Subversive Activities Control Board.

2. *Pennsylvania v. Nelson*: The Court held that it was unlawful for the Commonwealth of Pennsylvania to prosecute a Pennsylvania Communist Party leader under the Pennsylvania Sedition Act and held in effect that the antisedition laws of 42 other States and the Territories of Alaska and Hawaii cannot be enforced.

3. *Fourteen California Communists v. United States*: The Court reversed two Federal courts which convicted these traitors and ruled that teaching and advocating the forcible overthrow of our Government, even "with evil intent," was not punishable under the Smith Act as long as it was "divorced from any effort to instigate action to that end." Here is the height of this Court's specious sophistries.

Mr. Chairman, the Court held at that time that to convict a Communist you must find him at the barriers in the streets with guns in his hand, urging other Communists to strike all the other white people who appear on the streets, in favor of the Reds.

The Court ordered 5 of these convicted Communist traitors acquitted and freed and ordered new trials for another 9, making it impossible to reconvict these traitors. Mr. Justice Tom Clark, in his sharp and vigorous dissenting opinion, had this to say in this connection:

This Court should not acquit anyone here. In its long history, I find no case in which an acquittal has been ordered by this Court on the facts. It is somewhat late to start in now usurping the function of the jury, especially where new trials are to be held covering the same charges.

4. *Cole v. Young*: The Court reversed two Federal courts and held that, although the Summary Suspension Act of 1950 gave the Federal Government the right to dismiss employees "in the interest of national

security," it was not in the interest of national security to dismiss an employee who contributed funds and services to a confessedly Communist group, unless that employee was in "a sensitive position."

And now I ask you, Mr. Chairman, What is a sensitive position? I dare say that a Senator's position is sensitive and I dare say that a stenographer's position is sensitive so long as he is with the Government.

5. *Service v. Dulles*: The Court reversed two Federal courts which had refused to set aside the discharge of John S. Service by the State Department. The FBI had a recording of a conversation between Service and an editor of the Communist magazine *Amerasia*, in the latter's hotel room, in which Service spoke at length about "military plans which were very secret." The FBI had found large numbers of secret and confidential State Department documents in the *Amerasia* office. The lower courts had followed the McCarran amendment, which gave the Secretary of State "absolute discretion" to discharge any employees "in the interests of the United States."

6. *Stachower v. Board of Higher Education*: The Court reversed the decisions of three New York courts and held that it was unconstitutional automatically to discharge a teacher, in accordance with New York laws, because he took the fifth amendment when asked about Communist activities. On petition for a rehearing the Court admitted its own error but denied a rehearing.

7. *Watkins v. United States*: The Court reversed the United States district court and six judges of the Court of Appeals of the District of Columbia, and held that the House Committee on Un-American Activities could not require a witness, who admitted, "I freely co-operated with the Communist Party," to name his associates in the Communist Party, even though the witness did not invoke the fifth amendment. The Court said: "We remain unenlightened as to the subject to which the questions asked petitioner were pertinent." If that isn't double talk, I never heard of it. Three later decisions of the Court have strictly followed this foul decision.

8. *Jencks v. United States*: The Court reversed two Federal courts and held that Clinton Jencks, who was convicted of filing a false non-Communist affidavit, must be given the contents of all confidential FBI reports made by the Government witness in this case, even though Jencks—

restricted his motions to a request for production of the reports of the trial judge for the judge's inspection and determination whether and to what extent the reports should be made available.

Mr. SOURWINE. Mr. Chairman, may I interrupt at that point?

That is a characterization of the Jencks case which I know the chairman will recognize as accurate as far as it goes, but the important factor of the Jencks case which a number of witnesses here have failed to bring out is that the Court ordered reversal of the conviction and a new trial for Jencks under circumstances where such a trial was impossible. This is not a situation where Jencks was freed because the Government wouldn't give him access to the testimony of the witnesses against him. It is a case where he was freed because the Supreme Court said the conviction couldn't stand because he was not given material he hadn't even asked for.

Mr. Binn. Yes, and the Supreme Court knew at the time that they reversed the lower court that he could never be retried and therefore in effect they knew that they were freeing him at that time, isn't that correct, sir?

Mr. SOURWINE. I don't know what the Supreme Court know, sir.

Mr. Binn. I don't think I do, or I don't think I know anybody else who does, including the Supreme Court, sir.

9. *Sweezy v. New Hampshire*.

The Court reversed the New Hampshire Supreme Court and held that the attorney general of New Hampshire was without authority to question Prof. Paul Sweezy, a lecturer at the State university concerning suspected subversive activities including a certain lecture.

10. *Konigberg v. State Bar of California*.

The Court reversed the decisions of the California committee of bar examiners and of the California Supreme Court and held that it was unconstitutional to deny a license to practice law to an applicant who refused to answer this question put by the bar committee: "Mr. Raphael Konigsberg, are you a Communist?" and a series of similar questions.

A number of other decisions of like import follow the 10 cases cited.

Now, as to the Jenner case, Mr. Chairman, in my long experience in life I have found that a controversial figure or cause often makes devoted friends for no other reason than the enemies he or it makes. So it is with the instant Jenner bill. I should be much in favor of it if for no other reason than the character and activities of the opponents thereto. When Americans for Democratic Action, American Civil Liberties Union, Anti-Defamation League, NAACP and the Communist Reuther and his mob, and others of like ilk are opposed to any person or legislation, all loyal, sound Americans usually favor him or it on general principles, if no other. However, I do not rest my favoring position in this instance solely upon that basis, obviously.

Opponents of the bill shout stridently that it is another example "of the growing tendencies in Congress to set itself up as a super Supreme Court." This is utterly false. What the Jenner bill seeks is to shove the Supreme Court back into its own backyard and to prevent it from further arrogation of authority, from further attempts to rewrite the law to conform to its own socialistic sophistries, and from further judicial encroachments into the legislative field which is the exclusive function of the Congress.

If this sound bill serves to chasten the arrogant Supreme Court majority, to discipline it into a realization that it is not a law unto itself, to bring back a reasoning, logical interpretation of the Constitution without destruction of the letter and the spirit thereof, then, indeed, will the legislation well serve the best interests of the Republic.

In closing my statement may I not express appreciation for the opportunity of being heard and for the courtesies extended to me personally by this committee.

Now, Mr. Chairman, I am prepared to answer any revelant questions propounded by the committee and its counsel.

Senator BUTLER. Mr. Sourwine, have you any questions?

Mr. SOURWINE. I have no questions, Mr. Chairman.

Senator BUTLER. I have no questions, General. Thank you for appearing here and forcibly and with conviction stating your convictions on this very important subject.

Mr. Binn. It is hoped that the cause was not hurt by too forcible pronouncements.

Senator BUTLER. No, I don't think so, no.

Is Mrs. Griswold here?

Mrs. GRISWOLD. Yes.

STATEMENT OF MRS. ENID GRISWOLD, MONTCLAIR, N. J., WOMEN'S PATRIOTIC CONFERENCE

Mrs. GRISWOLD. Senator, my statement is very brief.

Mr. Chairman, the 32d Women's Patriotic Conference on National Defense which recently convened in Washington unanimously adopted the following resolution:

Resolved, That the 32d Women's Patriotic Conference on National Defense pledges active support to the principles of Senator Jenner's bill 2040 to limit the appellate jurisdiction of the Supreme Court in certain cases.

As chairman of this conference, which is comprised of 10 patriotic and service organizations, I appreciate very much the opportunity given me to present this resolution personally and to testify in favor of this bill.

Upon first thought it seemed to me rather presumptuous for one with absolutely no legal training to express opinions upon such a subject before this body. However, upon further reflection I realized that it is unnecessary to be trained in the intricacies of the law and constitutional interpretations to comprehend the serious effect upon our Government structure, Federal, State and local, caused by the series of decisions of our present Supreme Court.

It does require a knowledge and appreciation of our history, and understanding of our Republic as established under the Constitution, and of our philosophy of freedom which has provided such great impetus to our growth and development as a Nation. It is also essential to have an understanding of the tremendous menace in the world today, international communism, which has gone steadily onward engulfing one nation after another until it has now enslaved over 900 million people.

Although this worldwide conspiracy has long been at work within our country, through the untiring efforts of the FBI, congressional investigating committees and other duly constituted Government agencies, some of the conspirators of the movement have been ferreted out. By means of legislation enacted locally and on the State and Federal level, some of the leaders have been brought to trial and convicted after long and tedious procedures.

Every guaranty of freedom, the very freedom these people were endeavoring to destroy, as well as every artifice has been used on their behalf by their counsel. By the punishment meted out to these enemies of our country, their activities were held in check and loyal citizens of our country encouraged in their opposition to the Communist menace.

But the long series of decisions of our present Supreme Court has freed these traitors to continue their dastardly work of destruction, and how appalling it is to compare these findings with the stated objectives, the program of the Communists, and to realize how perfectly they fit into the current Communist line.

How in these ultra-liberal interpretations of our Bill of Rights a license has actually been granted to destroy those very rights and privileges.

It does not take a legally trained mind to ask why we are told that we must dispense billions of our substance around the world to encourage other peoples and nations to stand firm against communism when we have opened wide the portals here at home. It does not require a profound understanding of constitutional law to ask why America's young men must be drafted into the armed services and sent to many parts of the globe to help others shore up the defenses against Communist aggression while within our own country we have permitted to be torn down the walls which had been so painstakingly erected.

Senato bill 2646 provides an immediate means in certain specific cases of repairing to some degree the damage that has been done by the decisions of the High Court, and I believe some such legislation to be absolutely essential at this time. I note that at a recent meeting of the American Bar Association, the house of delegates has expressed opposition to the bill as contrary to the maintenance of the balance of power set up in the Constitution between the three branches of Government.

I might add the observation that this stand is quite at variance with the scholarly report of the Bar Association's Committee on Communism which was issued at the last summer's meeting in London.

I submit that this balance of power provided in the Constitution has already been upset by the judiciary when they invaded your field, the legislative branch, by writing new laws which were sweeping in their effect upon our responsibilities, and which will, I believe, if permitted to remain unchallenged, make of the legislative branch an increasingly impotent arm of the Government. I would expect the Members of the Congress to guard their prerogatives more zealously and to prevent further intrusions into their branch of the Government.

Provision for this action is written into the Constitution, for it is you of the Congress who are given the authority to limit the appellate jurisdiction of the Supreme Court. If this is not done, how can anyone support a program which takes from the citizens of our country so large a proportion of their earnings, which further increases a debt for future generations to cope with, when the conspiracy which creates the need for large expenditures is permitted to operate unhindered within our midst?

Mr. Chairman, I note that you have stated that you consider this particular bill an extreme remedy. It may be an extreme remedy, but I believe that these are extreme cases. I have read with much interest the various ideas that lawyers have proposed; that each decision be dealt with individually by an individual bill or that some law already enacted by the Congress be amended in some way to meet the necessities of the situation.

Senator BUTLER. That would seem to me to be the orderly process. If the Supreme Court of the United States says that the Congress has passed an act and we construe that as to mean a certain thing, and the Congress feels that it didn't mean that, it is very easy for the Congress to say, "We didn't mean that," and that reverses that de-

cision, and that decision is no longer the law. It is very easy to do it that way, and that is the way it has historically been done. As a matter of fact, there was one case that arose in Maryland that I think was legislatively reversed within 24 hours from the time it was delivered by the Supreme Court, and that has been the historical way to correct errors in the rulings of the Court.

Mrs. GRISWOLD. I understand that.

Senator BUTLER. And, when it can be done that way, why should it be done in any other manner? Now, there are some areas that you may have to deprive the Court of jurisdiction. Maybe the Court has overstepped its bounds and is assuming jurisdiction unto itself that it has no constitutional right to assume. In those cases I am foursquare for the Jenner bill. But, in cases where the Court is acting within its sphere and has simply said that the Congress meant one thing where the Congress thinks it meant another thing, then I think we should correct it by saying "This is what we meant." And that is the easiest way in the world to correct it, and that is the orderly way to correct it. That is the way that the coordinate branches of the Government should operate. The coordinate branches of the Government should not be one at the throat of the other.

The executive should certainly not try to slur the legislative branch or the judicial branch. The judicial branch should be very careful how it steps into the field of the legislative branch or the executive branch. In that way the Government works in unison. But, when you have 1 part of the Government pulling against the other 2, you have no unity and you have no government. There is an orderly way of achieving the things that you want to achieve, and I am for achieving every one of them. But I am for achieving them in the way that they should be achieved and in the way that will do the least permanent damage to the fine structure of government under which we live.

Mrs. GRISWOLD. I understand that, Senator. May I go back to our original resolution and state that we pledged our support to the principles of Senator Jenner's bill?

Senator BUTLER. I noted that very carefully. I pledged my support to the principles of the Jenner. But there are ways and ways of arriving at the same place. And I feel that, if the Supreme Court has said, as it has in 3 or 4 of these cases, that, under the meaning, under the words of the Congress as used in this enactment, we believe that the Congress meant this, and, therefore, we ruled that way, it is only common courtesy and decency that we should not go to the Supreme Court and say, "We are going to take your power away after you decided those cases." It is for us to amend the act, which we can do, and say, we didn't mean that at all. We meant this. And that decision is set aside in an orderly manner.

The two organs of government are working together. They are not working against each other. It is like, as President Wilson used to say, the ship of state is really a ship of state, but when the three branches of government cease to work in unison, it is like a ship headed straight into the wind. The sail flutters and she gets no place.

This is a government of coordinate branches. We must be respectful of the rights, obligations, and duties of the other branches, and we must adjust differences with the least friction to any of the branches. because, if you don't do that, permanent injury may result and we

may do a lot of things that would be very bad for the country in the long run. And I hope this country has many, many, many years beyond any expectation that we may have. And I think we have got to be very careful the way we handle these matters. I want to see everything done that you want to see done. I can tell you that confidently. I want to see everything done. I think some of these decisions have gone way, way, way beyond the scope of reason. I think the rule of reason has been abandoned in a lot of them. But it is just the method to be employed.

Mrs. GRISWOLD. May I just end with this?

Senator BUTLER. And I think that is what the bar association meant. Now, I hope that is what they meant when they passed their resolution.

Mrs. GRISWOLD. From what was reported in the New York Times, it was impossible to tell exactly what they did mean.

Senator BUTLER. I hope that is what they meant.

Mrs. GRISWOLD. May I just end with this statement?

Senator BUTLER. Yes.

Mrs. GRISWOLD. Speaking for the patriotic organizations which I have the privilege of representing, I urge that this distinguished committee act favorably upon the necessary legislation and recommend its passage by the Congress of the United States.

Senator BUTLER. Well, I think you can rest assured that that will be done. I think this committee will give very grave thought to all of these problems. We are here taking testimony for the purpose of finding the answers to these questions. We, as a committee, believe that the matters involved in these opinions have been serious enough not only to have these very extended hearings, but to have a full-dress debate on the floor of the United States Senate in connection with the matters involved, and I am certain that the Senate and the Congress, generally, want to do the right thing, and they want to do it in the way that will leave the least injury to the fabric of government.

Mrs. GRISWOLD. Thank you for the privilege.

Senator BUTLER. Is Mr. Flett here?

Mr. SOURWINE. Mr. Chairman, while Mr. Flett is coming to the stand, may I offer some matter for the record?

Senator BUTLER. Yes, indeed.

Mr. SOURWINE. This is an article by David Lawrence, from the March 7, 1958, issue of U. S. News & World Report. It is editorial in nature. Its inclusion was requested by a member of the committee.

Senator BUTLER. It will be made a part of the record.
(The document referred to is as follows:)

[U. S. News & World Report, March 7, 1958]

FAMOUS JUDGE REBUKES SUPREME COURT

By David Lawrence

Judge Learned Hand, now retired, is one of the most eminent men ever to sit on the Federal bench. For many years he presided over the Second Circuit Court of Appeals in New York, and his opinions were usually accepted by the Supreme Court of the United States. Indeed, his opinions came to be regarded by the legal profession as among the most persuasive expositions of "the law of the land."

Recently, Judge Hand delivered a series of three lectures before the students at Harvard Law School. He dealt with the widely debated concept that the Supreme Court may "legislate" at will.

These lectures have just been published by the Harvard University Press. While they are written in dispassionate and restrained phrases, the lesson contained therein is unmistakable. It is one of the sharp rebukes of the Supreme Court for a tendency to set itself up as a "third legislative chamber."

Judge Hand issues a warning as to what the American citizen faces whenever the Supreme Court not only restricts the right of legislative bodies to legislate but itself assumes a legislative function.

Judge Hand does not confine his criticism merely to the present-day Supreme Court. He points out that an 1894 opinion of the Court foreshadowed current trends. He quotes the Court's declaration at that time that a State legislature's "determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

Judge Hand observes that "such a definition leaves no alternative to regarding the Court as a third legislative chamber." He then notes the subsequent disavowals of such a doctrine by the Supreme Court, and cites a 1952 opinion which says:

"Our recent decisions make plain that we do not sit as a superlegislature to weigh the wisdom of legislation, nor to decide whether the policy which it expresses offends the public welfare."

Judge Hand remarks: "One would suppose that these decisions and the opinions that accompanied them would have put an end—at least when economic interests only were at stake—to any judicial review of a statute because the choice made (by Congress or the State legislatures) between the values and sacrifices in conflict did not commend itself to the Court's notions of justice."

Judge Hand finds, however, that the Supreme Court recently has not only proceeded to impose its own view on what is wise or unwise legislation, irrespective of constitutional powers, but seems to have applied hostile rules where "property" was involved and softer rules where "liberty" was at issue. He says:

"I cannot help thinking that it would have seemed a strange anomaly to those who penned the words in the fifth [amendment] to learn that they constituted severer restrictions as to liberty than property, especially now that liberty not only includes freedom from personal restraint, but enough economic security to allow its possessor the enjoyment of a satisfactory life.

"I can see no more persuasive reason for supposing that a legislature is a priori less qualified to choose between 'personal' than between economic values, and there have been strong protests, to me unanswerable, that there is no constitutional basis for asserting a larger measure of judicial supervision over the first than over the second."

Judge Hand puts his finger on the cases that today transcend all others as examples of usurpation of power by the Supreme Court. He says:

"The question arose in acute form in 'the segregation cases.' In these decisions, did the Court mean to 'overrule' the 'legislative judgment' of States by its own reappraisal of the relative values at stake? Or did it hold that it was alone enough to invalidate the statutes that they had denied racial equality because the [14th] amendment inexorably exempts that interest from legislative appraisal?

"It seems to me that we must assume that it did mean to reverse the 'legislative judgment' by its own appraisal. It acknowledged that there was no reliable inference to be drawn from the congressional debates in 1868, and it put its decision upon the 'feeling of inferiority' that 'segregation' was likely to instill in the minds of those who were educated as a group separated by their race alone.

"There is indeed nothing in the discussion [by the Supreme Court] that positively forbids the conclusion that the Court meant that racial equality was a value that must prevail against any conflicting interest, but it was not necessary to go to such an extreme. *Plessy v. Ferguson* [the 1896 case approving 'separate but equal' facilities] was not overruled in form anyway; it was distinguished [differentiated] because of the increased importance of education in the 56 years that had elapsed since it was decided.

"I do not see how this distinction can be reconciled with the notion that racial equality is a paramount value that State legislatures are not to appraise and whose invasion is fatal to the validity of any statute.

"Whether the result would have been the same if the interests involved had been economic, of course, I cannot say, but there can be no doubt that, at least as to 'personal rights,' the old doctrine seems to have been reasserted.

"It is curious that no mention was made of section 3 (of the 14th amendment), which offered an escape from intervening, for it empowers Congress to 'enforce' all the preceding sections by 'appropriate legislation.'

"The Court must have regarded this as only a cumulative corrective, not being disposed to divest itself of that power of review that it has so often exercised and as often disclaimed.

"I must, therefore, conclude this part of what I have to say by acknowledging that I do not know what the doctrine is as to the scope of these clauses; I cannot frame any definition that will explain when the Court will assume the role of a third legislative chamber and when it will limit its authority to keeping Congress and the States within their accredited authority."

Judge Hand says he "has never been able to understand" on what basis, other than as a "coup de main," the Supreme Court adopted the view that it may actually legislate. By "coup de main," he means, of course, arbitrary usurpation of power.

Should we establish a "third legislative chamber"? This is the penetrating question asked by Judge Hand, but he adds quickly: "If we do need a third chamber, it should appear for what it is, and not as the interpreter of inscrutable principles."

But Judge Hand doubts the wisdom of letting a judge "serve as a communal mentor," and deems inexpedient any such wider form of review based on the "moral radiation" of court decisions. He gives these reasons for his view:

"In the first place, it is apparent, I submit, that insofar as it is made part of the duties of judges to take sides in political controversies, their known or expected convictions or predilections will, and indeed should, be at least one determinant in their appointment, and an important one.

"There has been plenty of past experience that confirms this; indeed, we have become so used to it that we accept it as a matter of course.

"No doubt it is inevitable, however circumscribed his duty may be, that the personal proclivities of an interpreter will, to some extent, interject themselves into the meaning he imputes to a text, but, in very much the greater part of a judge's duties, he is charged with freeing himself as far as he can from all personal preferences, and that becomes difficult in proportion as these are strong.

"The degree to which he will secure compliance with his commands depends in large measure upon how far the community believes him to be the mouthpiece of a public will, conceived as a resultant of many conflicting strains that have come, at least provisionally, to a consensus.

"This sanction disappears insofar as it is supposed permissible for him covertly to smuggle into his decisions his personal notions of what is desirable, however disinterested personally those may be.

"Compliance will then much more depend upon a resort to force, not a desirable expedient when it can be avoided."

Those last words could apply to the use of troops at Little Rock, which certainly was "not a desirable expedient" and could have been avoided.

There seems no doubt that Judge Hand would like to see the Supreme Court adhere to its basic function of interpreting legislation without adding laws not written by the people's legislatures. He evidently deplors the tendency to vest political power in the Supreme Court of the United States, whose Justices are appointed for life. He concludes:

"For myself it would be most irksome to be ruled by a bevy of platonic guardians, even if I knew how to choose, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs.

"Of course I know how illusory would be the belief that my vote determined anything; but, nevertheless, when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture."

Judge Hand has rendered a great service to contemporary understanding of the true limits of the Supreme Court's power. For there are limits, and the Congress, acting for the people, can and should impose such limits lest we fall victim to absolutism in our own institutions.

MR. SOURWINE. This is a statement which the presiding officer at a previous session asked Mr. Thomas S. Cadwalader, of Baltimore, then a witness, to furnish.

SENATOR BUTLER. Is this the letter that he wrote?

Mr. SOURWINE. The original is being transferred to the former chairman, who asked for it. I thought this carbon should be gotten for the record.

Senator BUTLER. It will be made a part of the record.
(The letter referred to is as follows:)

BALTIMORE, Md., March 3, 1958.

J. G. SOURWINE, Esq.,
Chief Counsel, Subcommittee on Internal Security Act,
Senate Office Building, Washington, D. C.

DEAR MR. SOURWINE: I enclose herewith the memorandum I prepared as requested the other day by Senator Dirksen, together with a carbon copy which you may send him if he wishes it.

Very truly yours,

THOMAS F. CADWALADER.

RE S. 2046: HISTORICAL MEMORANDUM SUBMITTED, AT REQUEST OF SENATOR DIRKSEN, BY THOMAS F. CADWALADER

I stated in my testimony that there was an almost rhythmic alternation in popular feeling as to which of the three great departments of the Federal Government presented the greatest menace to liberty. The Senator presiding at the subcommittee hearing asked me to give a summary of these occasions.

I should, first, say that there has always been great difference of opinion in the country as to whether any important act or series of acts was a menace or not, depending, of course, on which side was threatened. The long contest between those who supported States rights and those who favored centralized power has historically produced a series of crises, including, of course, a major war. But there has also been the tension between classes, producing the alternative prevalence of radical and conservative views in one or other of the three departments. One set of tensions overlaps and crosses the other.

1. The Judiciary Act of 1789 led to the fear of the judicial power on the part of the States rights supporters and also on the part of the popular party, which then was also against strong government. There was much criticism of the Supreme Court, culminating in a general uprising of sentiment when, in *Chisholm v. Georgia*, it upheld the right of a private citizen to sue a sovereign State. The result was the 11 amendment, overruling the Court and abolishing any such jurisdiction.

2. The alien and sedition laws passed in the Adams administration were severely attacked by the same popular elements, and the Virginia and Kentucky resolutions were passed denying the power of the political branches of the Government to control what the conservatives of the day deemed to be subversive activities, sparked, no doubt, by the French Revolution, which was in full swing and whose horrors made thoughtful people gasp. The popular sentiment against these laws really destroyed the Federalist Party.

3. The conservatives were terrified, in turn, by President Jackson's attack on the Bank of the United States and considered him what we would now consider a leftwing tyrant, but in the course of time many whose instincts and prejudices were conservative came to take a very different view.

4. The arbitrary acts of President Lincoln in suspending the writ of habeas corpus and setting up military commissions to try civilians who opposed the war against the Southern States led to fierce denunciations by northern Democrats and seriously threatened his reelection in 1864.

5. The decision of the Supreme Court in 1868 in *Ex parte Milligan*, holding the trial of civilians by military commission unconstitutional, was violently attacked by all the radical press of the day, especially Greeley's New York Tribune, the Independent published under the auspices of the Congregationalist churches, and many others. It has long since been recognized as one of the bulwarks of our liberties.

6. Soon after the Milligan case, the radicals feared greatly that the Supreme Court would nullify the reconstruction acts. In the case of *Georgia v. Stanton*, the Court, doubtless somewhat frightened by the violence of the radical Congress, which, by excluding all the Southern States from both Houses, had an artificial, overwhelming majority, held that the rights claimed by the plaintiff State were political and not property or personal rights, and, therefore, not within judicial competence to decide. They entirely ignored the vast number of personal and

private wrongs and trespasses which were daily visited upon the people of the occupied States by their military governors and puppet officials.

However, the fears of the radicals about the Court were revived when it proceeded to entertain the habeas corpus petition of William H. McCordle, who had been arrested by General Ord, the military governor of Mississippi, for alleged disloyalty. While the impeachment trial of President Johnson was going on, they surreptitiously slipped through the House a bill taking away the Court's appellate jurisdiction in the very class of cases in which they had conferred it only the year before. The Court, of which Chase was Chief Justice, took this lying down. Of course, it was helpless once the act had passed the Senate, but they could have acted more promptly and handed down their decision before their jurisdiction had been curtailed.

So, during the ugly drama of reconstruction, the Supreme Court exercised none of its power to check the excesses of the Legislature.

7. After the victory of Tilden in 1876 and the seating of Hayes, there was a general letdown of tension that lasted for over 50 years. Not that there were no contests, and even violent controversies, during this period, especially on the tariff, free silver, imperialism, trusts, and the war against Germany of 1917-18. But it does not seem that either the executive, the legislative, or the judicial branch was singled out as a particular menace to liberty during all this time.

However, with the great depression of the 1930's, the executive and legislative branches soon found themselves in trouble when their radical actions came up against a still conservative judiciary. Hence, President Roosevelt's proposal to "pack" the Court, as President Grant had done with the help of the old radical Congress when the Court had held void the acts making depreciated paper money legal tender. There was, undoubtedly, a strong uprising of sentiment to support the Court against the President, but the Court itself was frightened into changing its tune and sustaining acts that in previous years it would, unquestionably, have held void. The Court-packing bill was defeated, but the successive reelections of Mr. Roosevelt accomplished the same result for which the bill was designed; namely, filling the bench with radical-minded judges.

8. It is, therefore, now the turn of conservatives to deem the Supreme Court a greater menace to liberty than either of the other departments as now constituted. The popular party nowadays is the advocate of strong central power, as, indeed, the multitudes in other countries, such as Italy and Germany, have been in recent years. Socialism, which was unknown on this side of the Atlantic in the 19th century, is, with the Supreme Court's blessing, halfway established, and, of course, it signifies and requires ruthless centralization of power and arbitrary rule. The rights of States are almost completely ignored, and the rights of private citizens are held only at sufferance.

In regard to the two domestic questions on which the country is in a state of hypertension, namely, racial relations and Communist infiltration, the Supreme Court has taken an active and aggressive stand in a partisan manner. It has sometimes in the past been charged with partisanship, and it must be confessed that, under Marshall, it did all it could to establish a strong central power, but it never went out of its way to invent and insert provisions into the Constitution that are simply not there in order to accomplish particular ends, as a legislative body might draft a statute. This it has done in the Tidewater Oil case, in the case of *Broton v. Topeka*, in *Commonwealth v. Nelson*, and in the cases dealing with subversives in schools, at the bar, and others.

It is for this reason—because the Court is no longer content to decide between different interpretations of the Constitution and the laws, but insists upon originating and forcing into our fundamental law its own notions of what ought to be—that its jurisdiction must now be curbed or we shall find ourselves victims of a governmental Frankenstein that cannot be controlled by any peaceful process known to democratic government or free peoples anywhere.

Mr. SOURWINE. This, sir, is a letter and statement from Mr. J. Nicholas Shriver of Baltimore. I believe it should go into the record.
Senator BUTLER. It will be made a part of the record.

(The document referred to is as follows:)

CROSS & SHRIVER,
Baltimore, March 3, 1958.

HON. JAMES O. EASTLAND,
Chairman, Judiciary Committee,
United States Senate, Washington, D. C.

DEAR SENATOR EASTLAND: I was hoping to have an opportunity to testify, on behalf of Maryland Action Guild and Maryland Forum, two organizations composed of citizens of Maryland and dedicated among other objectives to the exposure and fighting of communism, in connection with your present hearings on Senate bill S. 2040.

However, I understand that your hearings are now drawing to a close and that it would be preferable to submit a written statement rather than to testify in person. With this in mind, I am submitting the enclosed statement, with the request that it be filed among and published with the record of your hearings. Needless to say I would be happy to supplement my views in person at any time.

Respectfully yours,

J. NICHOLAS SHRIVER, Jr.

STATEMENT IN SUPPORT OF THE JENNER BILL, S. 2040

The organizations represented by the speaker wish to go on record most emphatically in support of this proposed legislation. Because much has already been said about this bill, our statement is limited to making some key points which we believe may have some value to your committee in your soul-searching consideration of this very mild step toward reassertion of the legislative prerogative.

Is this a proposal to "destroy" the Supreme Court?

One of the cries of the opposition to the pending bill is that it is a proposal to "destroy" the Supreme Court. This argument is of course a false one, deliberately false unless the person uttering it does not know the Constitution.

The Supreme Court was established by article III of the Constitution, section 1 of which vested "the judicial power in one Supreme Court. Section 2 defined the extent of the judicial power. This section gives the Supreme Court original jurisdiction—that is it is the only Court to hear a case—"in all cases affecting Ambassadors, other public Ministers and consuls, and those in which a State shall be party." Then in all other cases, section 2 provides, "the Supreme Court shall have appellate jurisdiction, both as to law and fact, *with such exceptions and under such regulations as the Congress shall make.*" [Italic added.]

The Jenner bill provides certain exceptions to this appellate jurisdiction, and these, broadly speaking, are designed to prevent the Supreme Court from acting as an appellate court in matters affecting the internal security of our Nation against the Communist conspiracy. Congress, if this bill is passed, will be declaring that our country's security is of such importance that the Supreme Court may not any longer tamper with it. It must be noted, and repeated often because of the superficial appeal of the "destroy the Supreme Court" argument, that Congress would not affect the rights of citizens to have their day in court, and their appeal from an adverse judgment in a lower court. They would, however, in internal security matters have no right to multiple appeals the final destination of which would be the Supreme Court. This is a very limited, very narrow bill, and the Supreme Court's jurisdiction in the vast majority of cases is in no way affected.

Is this the first time Congress has ever acted to limit the Supreme Court? Of course not. James Burnham, in *National Review* for July 20, 1957, cites many precedents. Some of the more striking ones are these:

(1) Congress, after the Civil War, passed the Reconstruction Acts and their legality was challenged in the courts. While *Ex parte McCordle*, which was the case by which this challenge was being made, was before the Supreme Court, Congress repealed the jurisdiction of the Supreme Court to consider all cases arising under the relevant statute. So the Supreme Court, its hands tied, simply dismissed the case.

(2) Congress, at the behest of President Franklin D. Roosevelt exempted from the Supreme Court's jurisdiction the workings of the Price Control Act.

(3) The Supreme Court, by the Dred Scott decision, approved slavery in the States. Congress in 1863 prohibited slavery.

(4) In 1849 the Supreme Court held that a certain bridge over the Ohio River was an "unlawful" obstruction to navigation. In 1852 Congress passed an act declaring the bridge was "a lawful structure." The Supreme Court, defeated, said that although the bridge "may still be an obstruction in fact, it is not so in the contemplation of law."

Why is the remedy necessary?

The Supreme Court has struck at the great foundation stone of our Government, the separation of powers. In a series of ruthless reversals of previous cases, by making what amount to legislative and policy decisions, it has decided (among other things):

(a) that Congress may not ask a witness (who does not invoke the fifth amendment) to name former Communist associates—thus destroying the power of Congress to investigate subversion for the purpose of passing laws controlling it;

(b) that a State legislature may not ask similar questions—with the same result at the State level;

(c) that the Executive Department may not fire from Federal employment known subversives, unless they are in "sensitive" positions—thus approving of the employment of Communists, sworn enemies of America, as long as the Court doesn't think the job is a "sensitive" one;

(d) that a State may not fire a school teacher who has taken the fifth amendment when asked about Communist activities;

(e) that a State may not deny the right to practice law to a candidate who refused to answer whether he is a Communist;

(f) that a State may not even protect itself from subversion by prosecuting Communist party leaders.

There have been many other decisions which may require legislation, but the Jenner bill is aimed at preventing the Supreme Court from interfering with the right of Congress and the States to investigate and to enact legislation to prevent, if possible, the destruction of America by internal subversion; to permit the Federal Government to establish a method to eliminate subversive employees; and to permit the States to determine who shall teach in their schools and who shall practice law in their courts.

Up until 1953 and 1957 no one, including the Communists themselves, could have seriously doubted that the Federal and State Governments were empowered to do all of these things. But the present Supreme Court, going further than even the Communists dared hope, has recklessly scuttled precedent and has just as recklessly set itself up as a legislative body, with the result that there are left in America today for all practical purposes no restraints upon internal subversion. The Daily Worker called the turn, signing the praises of the Supreme Court in a ringing hymn:

"Democracy in America may well rejoice at the recent decision of the Supreme Court * * *

"All honor to the brave men and women * * * who dared the * * * tyrannical [lower court] judges of the McCarthyite terrorism * * *

"* * * It is important to stress the sterling contributions of our party and of other progressive organizations in helping to facilitate the new trends which are creating a more favorable situation in this country * * *

"Democracy in America may well rejoice at the recent decision of the Supreme Court curbing partly the dictatorial powers assumed in recent years by congressional investigation committees, granting new trials in some Smith Act and contempt cases and otherwise relaxing the pressures of the outrageous McCarthyism built up during the cold war years."

The American Bar Association committee on Communist activities, in its report to the association at its annual meeting last summer, recommended remedial legislation in several areas covered by the Supreme Court decisions. The Jenner bill covers many of these areas. Others must be the subject matter of further legislation.

We urge the Congress to pass the Jenner bill in order to try, by this law, to re-establish our defenses against communism at home. We urge the Congress to recognize the proposition that the expenditure of billions and more billions for military defense against armed attack is a foolish waste of our substance if we are going to let our enemies at home have a free hand. Unless Congress reasserts its authority, the Supreme Court will have succeeded in destroying America without requiring Soviet Russia to fire a single missile.

In conclusion, members of this committee, be it always remembered that the Supreme Court recognized, until recently, that it was a judicial body. In 1824 Chief Justice Marshall stated:

"Judicial power, as contradistinguished from the power of the laws, has no existence. Courts * * * can will nothing."

In Federalist Paper No. 78, Hamilton predicted that "the general liberty of the people can never be endangered" by the courts "so long as the judiciary remains truly distinct from both the legislative and executive powers * * *. Liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments."

The Supreme Court has now become a superlegislature, and therefore "Liberty [has] * * * everything to fear" unless Congress insists immediately upon its legislative prerogatives.

In our founding days a war was fought against taxation without representation. We ask that you, our elected representatives, preserve us from judicial legislation without representation.

Mr. SOURWINE. And this is a letter in the nature of a petition from a group of Baltimore residents asking to be associated with Mr. Shriver's statement. They ask that it be made a part of the record.

Senator BUTLER. That will be made a part of the record.

(The letter referred to is as follows:)

BALTIMORE, MD., March 3, 1958.

HON. JAMES O. EASTLAND,

*Chairman, Committee on the Judiciary,
Senate Office Building, Washington, D. C.*

DEAR SENATOR EASTLAND: We, citizens of the State of Maryland, whose names appear below, all members of civic or patriotic organizations which have lacked either time or opportunity for a polling of their members before the close of the hearings on Senate bill S. 2040, individually request that we be recorded as supporting the views of J. Nicholas Shriver, Jr., given in the copy of his statement attached hereto, and as urging return of said bill, favorably to the Senate of the United States.

Respectfully,

Dr. George H. Yeager, Mrs. George H. Yeager, Dr. Harvey B. Stone, Mrs. Harvey B. Stone, Walter Wintz, Mrs. Walter Wintz, Francis J. Hamill, Raymond J. Hardy, Mrs. Raymond J. Hardy, John J. O'Connor, Jr., Mrs. John J. O'Connor, Jr., John Wilcox Frisch, Mrs. John Wilcox Frisch, Mrs. R. M. Morningstar, Robert Goldsborough, Carroll B. Schlipp, Mrs. Carroll B. Schlipp, H. Boyd Hook, Mrs. Sarah Hook, Mrs. John T. Wells, George S. Goodhues, Jr., Mrs. George S. Goodhues, Jr., Lennox Birkhead, Mrs. Lennox Birkhead, Mrs. E. Ruth White, Mrs. Alexander F. Jenkins, Alexander F. Jenkins, Jr., Mrs. Glen Greenwood, Jere O. Hamill, Mrs. Jere O. Hamill, George D. O'Neill, Mrs. George D. O'Neill, Dr. Douglas H. Stone, Mrs. Douglas H. Stone, John Pepe, Mrs. John Pepe, Mrs. Velma Nye, Mrs. Yvonne Moore, Mrs. Francis J. Hamill, Dr. Anna Mathiesen, Louis D. Carroll, Mrs. Louis D. Carroll, Dr. E. T. Bouchelle, Robert B. Bouchelle, Dr. George F. Carter, Mrs. George F. Carter, Miss Anne Warfield Martin, George S. Goodhues, Sr., John J. Iago, Mrs. John J. Iago, Alfred E. Manning, Mrs. Thomas H. Kane, Mrs. O. W. Beck, Mrs. Edward Dougherty, Mrs. Joseph S. Huxley, Joseph S. Huxley, Glen Greenwood, Dr. Leo Brady, Mrs. Leo Brady, Mrs. Elizabeth Cooney, Mrs. Mable Harmon, Mrs. Wm. H. Carroll, C. G. Carroll, Mrs. C. G. Carroll, Mrs. Doris Kane, Miss Agnes Cooney, Dr. John Engers, Dr. Charles R. Goldsborough, Mrs. Charles R. Goldsborough, Miss Katherine S. Walsh, John J. Eisenhart, Mrs. John J. Eisenhart, Mrs. W. S. Gunter, W. S. Gunter, Mrs. Elizabeth Cooney, Dr. Daniel S. Shanahan, Mrs. Daniel S. Shanahan, Dr. Joseph V. Jeppi, Edward J. Coolahan, Mrs. Edward J. Coolahan, Mrs. Bessie Ballon, Mrs. Herman Baesch, Mrs. Jean D. Campbell, Mrs. Louise Thomas, Dr. Amos R. Koontz, Mrs. Amos R. Koontz, Miss Aileen Kelly, Wm. J. Sexton, Mrs. Wm. J. Sexton.

I certify that all the above names are those of persons who personally endorsed the above letter.

ANNA MATHIESEN.

Mr. SOURWINE. This is a letter in the nature of a statement from Mr. P. A. del Valle, president, Defenders of the American Constitution.

Senator BUTLER. It will be received and made a part of the record. (The letter referred to is as follows:)

DEFENDERS OF THE AMERICAN CONSTITUTION, INC.,
Washington, D. C., February 20, 1958.

Hon. JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee,
Washington, D. C.

DEAR SENATOR EASTLAND: The Defenders of the American Constitution, having knowledge of the fact that hearings are now being held on Senator William E. Jenner of Indiana's bill to restrain the Supreme Court from further jeopardizing the security of the Republic by decisions such as those rendered in the cases of Jencks, Watkins, Service, Yates, Sweezy, Schwabe, Konigsberg, Nelson, Slochower, and Cole, do hereby request that this, their statement, be accepted in lieu of personal appearance by myself, due to my being snowbound and unable to leave my farm.

We feel very strongly that, if the bill, S. 2646, is defeated calling for appellate jurisdiction of the Supreme Court's limitation, particularly in the matter of investigative function of the Congress; the security program of the Executive; the sovereign rights of the States with regard to education, subversion, and the practice of law within their jurisdiction, then the Republic will cease to be a free country under the Constitution, and will become virtually an oligarchy wherein all men are subject to the whims and wishes of a handful of men who have seized the power from the Congress, from the Executive, and from the 48 sovereign States of the Union.

As defenders of the American Constitution we call upon the Congress to assert itself against the encroachment of the judiciary upon the functions and powers which rightfully were placed in their hands by the Founding Fathers in the Constitution. Should we fail to pass this bill, thus removing the wedge driven into constitutional government by these unconstitutional decisions, then we shall have surrendered supinely to those enemies, foreign and domestic, against whom we have all sworn a solemn oath to uphold and defend the Constitution of the United States.

May God grant that your courage and your patriotism be adequate to overcome the vicious pressures of those enemies of the Republic and their dupes and stooges, who seek to prevent this urgent repair to the Constitution and to the ship of state.

Yours sincerely,

P. A. DEL VALLE,
President, Defenders of the American Constitution.

Mr. SOURWINE. This is a statement from Mr. Loren D. Stark, Houston, Tex., which he asked to be included in the record.

Senator BUTLER. It will be made a part of the record. (The document referred to is as follows:)

HOUSTON, TEX., February 26, 1958.

Hon. J. O. EASTLAND,
Chairman, Committee on the Judiciary,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: In response to the invitation of the Committee on the Judiciary to persons interested in testifying regarding S. 2646, I should like to present my views. Since I cannot be present in person, I offer the following statement:

Many of the decisions of the United States Supreme Court during the past 4 or 5 years have given me great concern. Although I am not an attorney and will not discuss the matter from a legal point of view, I do have some knowledge and understanding of the United States Constitution. In my practice as an estate analyst, the practical effect of decisions rendered by the United States Supreme Court are frequently of the utmost importance to my clients.

As a citizen who is interested in maintaining our form of government as a constitutional republic, it appears to me that, officially, the members of the Supreme Court have indulged in excursions which are far afield from their

jurisdiction under the Constitution and in which they lack competence. This fact is manifest in at least three areas:

1. The willful and capricious upsetting of precedent long established by the Court itself is particularly dangerous to the traditional American concept of justice and equity. Many of the Court's recent decisions bear on this matter, but perhaps the most flagrant is the decision relating to the trust created by Girard. In this case, the Court violated the provisions of Girard's will, which had been operating for many years without any question ever having been raised by State courts or any Federal appellate court. In light of this decision, I am compelled to tell my clients that they have no assurance regarding the validity of provisions which they may wish to incorporate in such personal documents as wills, trusts, etc.

The simple fact emerges out of such decisions that the owner of property cannot be certain that his wishes will be carried out with respect to who shall receive his property or how it shall be administered. This is true in spite of the fact that the laws of his State of domicile and the Federal Constitution give him the right to dispose of his property in such manner as he may desire. Surely this situation is contrary to all concepts of property rights heretofore established since the beginning of our country as a nation.

2. The total disregard for the express provisions of the 10th amendment by the Court is appalling. The cases in which the Court has held unconstitutional State laws relating to the trial and prosecution of subversives illustrates this point, although there are many other illustrations. Certainly the authority of each State to enact and enforce laws relating to the conduct of citizens of such States comes clearly within the meaning of the 10th amendment since nowhere in the Constitution is such authority delegated to the United States.

If this alien doctrine of concentration of all powers in the central Government is not checked, how will it be possible to maintain the sovereignty of the several States? It is my view that the decisions of the Court in this area, as well as other areas, will in time totally destroy the integrity of the States and, when this is done, the freedom of citizens guaranteed in the Constitution will be abridged.

3. Decisions which are based on socialized rather than legal concepts are utterly alien to the American concept of government by law. Typical of this type of decision is the Court's decision relating to racial integration. While the law may not constitute an exact science, surely its practice by eminent and learned men since the beginning of recorded history represents a firmer basis upon which to construct rules of human conduct than the embryo status of pseudoscientific preachments of the professional sociologist. If this alien philosophy is to be the rule and guide of our Nation, then it would appear sensible to disband the legislative branch of the Federal Government and, of course, to dissolve all State and local governments.

As I meet with practical business and professional people, respected citizens of this community, I observe that they are appalled and deeply disturbed over the socialistic pronouncements of the United States Supreme Court as evidenced by its decisions in recent years. Speaking only for myself, I approve of the bill, S. 2040.

Very sincerely yours,

LOREN D. STARK.

Mr. SOURWINE. This is a letter in the nature of a statement from Mr. J. Anthony Panuch, of New York. Mr. Panuch was asked to be a witness at the request of one member of the committee, but he said he couldn't come and wanted this to be made a part of the record.

Senator BUTLER. His statement will be made a part of the record. (The document referred to is as follows:)

NEW YORK, N. Y., February 21, 1958.

Hon. J. O. SOURWINE,

Chief Counsel, Senate Subcommittee on Internal Security,
Washington, D. C.

DEAR MR. SOURWINE: 1. I have just returned to the city and find your kind invitation, issued at the request of Senator Jenner, to appear before the Senate Judiciary Committee to give my expert legal opinion on S. 2040, to limit the appellate jurisdiction of the Supreme Court in certain cases.

2. I assume the purpose of this proposed bill is to overcome the effects of the Supreme Court's decisions over the past 2 years striking down as unconstitutional a variety of actions taken pursuant to congressional and State legislation involving various areas of internal security, in cases such as Nelson, Sweezy, Konigsberg, Slochower, Service, Jencks, etc.

3. My viewpoint on the nature and revolutionary objectives of institutional subversion, my experience in combating it at its point of maximum impact in the sensitive agencies of the executive departments and my opinion as to the respective constitutional roles of the Congress, the Executive, and the Supreme Court in erecting defenses against it, are set forth in detail in my testimony before the Senate Internal Security Subcommittee of June 23, 1953 (pt. 13, *Interlocking Subversion in Government Departments*), and specifically at pages 902-907.

4. Viewed in the light of that experience, it is my judgment with all due respect, that the opinions of the majority of the Court in the cases above listed, constitute an unwarranted interference with lawful governmental powers pursuant to a tortured construction of the Constitution in a field where the will of the people as expressed by their legislatures, whether Federal or State, should be supreme. Having said this much and despite my complete sympathy with the legislative purpose of S. 2646, it is my opinion that, should it be enacted into law (which I regard as improbable), it is virtually certain to be stricken down as unconstitutional by the Supreme Court as presently constituted. I advance this view not as a "legal opinion" but because of the fact that any such legislation would challenge the doctrine of judicial supremacy in the field of civil rights which this Court, by its pattern of recent decisions has staked out as its own.

5. Fifty years ago the late Chief Justice Charles Evans Hughes made his famous remark: "We are under a Constitution but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and of our property under the Constitution."¹

The political nature of this subjective approach to the function of judicial review by the Supreme Court, is either unrecognized or ignored. The late Justice Robert H. Jackson in his famous analysis of the struggle of 20 years ago between the late President Roosevelt and the Supreme Court of that time entitled "The Struggle for Judicial Supremacy—A Study of Crises in American Power Politics" has described the doctrine of judicial supremacy as follows:

"The ultimate function of the Supreme Court is nothing less than the arbitration between fundamental and ever-present rival forces or trends in our organized society. The technical tactics of constitutional lawsuits are part of a greater strategy of statecraft in our system . . . The Constitution, in making the balance between different parts of our Government a legal rather than a political question casts the Court as the most philosophical of our departments. It keeps the most fundamental equilibriums of our society, such as that between centralization and localism, between liberty and authority, and between stability and progress. These issues underlie every movement in an organized society" (pp. 311-313).

Justice Jackson recognized the immense social impact of judicial supremacy as a form of power politics.

"These constitutional lawsuits are the stuff of power politics in America. Such proceedings may for a generation or more deprive an elected Congress of power, or may restore a lost power, or confirm a questioned one. Such proceedings may enlarge or restrict the authority of an elected President. They settle what power belongs to the Court itself and what it concedes to its 'coordinate' departments. Decrees in litigation write the final word as to distribution of powers as between the Federal Government and the State governments and mark out and apply the limitations and denials of power constitutionally applicable to each. To recognize or to deny the power of governmental agencies in a changing world is to sit as a continuous allocator of power in our governmental system. The Court may be, and usually is, above party politics and personal politics, but the politics of power is a most important and delicate function, and adjudication of litigation is its technique" (p. 287).

6. From the standpoint of constitutional power politics the problem which S. 2646 attempts to remedy in the field of internal security, is analogous to that which faced the Roosevelt administration during 1935-36 when the Supreme

¹ *Addresses and Papers of Charles Evans Hughes*, G. P. Putnam & Sons; 1st Ed., 1908, pp. 139-140; 2d Ed., 1916, pp. 185-186.

Court of that era struck down as unconstitutional, emergency legislation in the economic field in the hot oil, railroad pensions, farm mortgages, NRA, AAA, bituminous coal, municipal bankruptcy and minimum wage cases. But the decisions of the present Court in the internal security field have applied a subtler form of judicial supremacy. They have emasculated Federal and State legislative action by indirection—rather than by a headlong challenge of its constitutionality which might serve to arouse a hostile public opinion in 1937 as it did in 1937. At the psychological level these decisions have all been in favor of individuals rather than against an aroused electorate which brought the overwhelming Democratic plurality in the 1936 election. Finally they come at a time when the enactment of corrective legislation faces the distractions of a war psychosis in our foreign affairs and the threat of an economic depression at home.

7. I am of course familiar with the long line of authorities beginning with the McCordle decision which held that Congress has the power to regulate the appellate jurisdiction of the Supreme Court. Despite these precedents, I am fearful, assuming S. 2046 or something like it could be enacted, that the Supreme Court would hold it unconstitutional in a proper case, on the ground that it was an attempt to deprive the Court of its original jurisdiction as conferred on it by the Constitution. Any case likely to arise under such legislation would inevitably be challenged as a denial of a right guaranteed to the individual by the first amendment. The issue thus presented would revive the ancient conflict between the constitutional philosophies of Alexander Hamilton and Thomas Jefferson in a 20th century setting. Before the Constitution was adopted, Hamilton had argued against the need for a bill of rights on the ground that such rights should not be a matter of constitutional guaranty "but must altogether depend on public opinion and the general spirit of the people and the Government." The Jeffersonian philosophy prevailed in 1787. How would the modern Hamiltonians fare today?

8. I think the probable result is fairly clear. The greatest Hamiltonian jurist of our time is the venerable Judge Learned Hand. He has declared that the guaranties of the first amendment and most of the remainder of the Bill of Rights are not really law at all. In his opinion, they are only "admonitions of moderation," "moral adjurations," "a mood rather than a command," "not jural concepts at all, in the ordinary sense." I have no doubt that, if men of Judge Hand's constitutional viewpoint constituted the majority of the present Supreme Court, a statute aiming at the purposes sought in S. 2046 would have an excellent chance of being upheld as a reasonable exercise of legislative discretion. But the Court as presently constituted is one in which powerful opponents of Judge Hand's approach, such as Justices Douglas, Black, and Warren appear to exercise a decisive influence over the majority. On this point let me refer you to Justice Douglas' forthright disagreement with Judge Learned Hand as stated in his latest book, *The Right of the People*.

"I disagree with Judge Learned Hand that the prohibitions of the first amendment, in terms absolute, are 'no more than admonitions of moderation.' The idea that they are no more than that has done more to undermine liberty in this country than any other single force."

Justice Douglas then declares his own Jeffersonian faith beyond any reasonable doubt and in sweeping fashion. He says:

"The philosophy of the first amendment is that man must have full freedom to search the world and the universe for the answers to the puzzles of life . . . Unless the horizons are unlimited, we risk being governed by a set of prejudices of a bygone day. If we are restricted in art, religion, economics, political theory, or any other great field of knowledge, we may become victims of conformity in an age where salvation can be won only by nonconformity."

Under this philosophy, if adopted by the majority of the Court, it is difficult to see how S. 2046 could fail to be progressively dismembered in a variety of cases which would immediately be brought to test the constitutional validity of subsections (1), (2), (3), (4), and (5).

9. What then are the probabilities as to the survival of S. 2046 if its constitutionality should be challenged? Justice Jackson in his book above quoted states at page 323: "With us, what is wanted is not innovation, but a return to the spirit with which our early judges viewed the function of judicial review of legislation—the conviction that it is an awesome thing to strike down an act of the legislature approved by the Chief Executive, and that power so uncontrolled is not to be used save where the occasion is clear beyond fair debate."

I am sure that neither Justice Douglas or Black would subscribe to this Hamiltonian philosophy of restraint in the process of judicial review in any

case arising under the first amendment. Where would the Chief Justice take his stand on the desirability of what Justice Jackson regarded as constitutional "Innovation"? Aside from his published court opinions there is an interesting indication of his probable attitude in an article which appeared in the magazine section of the New York Times on June 30, 1957. This article is entitled "'Warren Court'—An Opinion," and its author is Mr. Bernard Schwartz, professor of law at New York University. Dr. Schwartz quotes the Chief Justice (at p. 10), as follows: "When the generation of 1980 receives from us the Bill of Rights . . . the document will not have exactly the same meaning it had when we received it from our fathers."

To this Dr. Schwartz adds at page 11: "The Bill of Rights as it is being interpreted by the Warren Court already has a different meaning than that handed to it by its predecessors"; and, "Warren may not be Stone's equal in purely legal qualifications. But his skill as a statesman has already done much to repair the damage done to the Court's prestige under his predecessors."

10. Under the circumstances, I doubt that any expert "legal" opinion by me or anyone else, excepting possibly a towering juristic and philosophical figure like Judge Learned Hand can be of any real assistance to your committee in the hearings on S. 2646. I hope you will explain to Senator Jenner, for whose integrity, courage, and rightmindedness I have uncommon respect, the reasons why I shall not avail myself of his gracious invitation to testify.

In conclusion, I hope you will realize that nothing that I have said is intended as an aspersion on the political philosophy or the judicial integrity of any member of the Court. Mr. Justice Douglas and I, together with Governor Dewey, were members of the same class at Columbia Law School. We learned our constitutional law under Prof. Thomas Reed Powell, a great constitutional lawyer and a pioneer in the political science approach to the interpretation of the Constitution based on Charles Evans Hughes' declaration that the Constitution is what the judges say it is.

Over the years, Bill Douglas and I have been personal friends. I have respect for his courage, integrity, and boldness in expounding a philosophy of judicial supremacy with which I do not always agree.

Faithfully,

J. ANTHONY PANUOH.

Mr. SOURWINE. This is a letter from the State of Texas, Department of Public Safety in Austin.

Senator BUTLER. It will be made a part of the record.

(The document referred to is as follows:)

TEXAS DEPARTMENT OF PUBLIC SAFETY, AUSTIN

FEBRUARY 26, 1958.

HON. JAMES O. EASTLAND,
*Chairman, Committee on Internal Security,
Senate Office Building, Washington, D.C.*

DEAR SENATOR EASTLAND: The statutory duty which we have to protect the lives and property of Texans and others within our borders from criminals and subversive individuals is becoming increasingly difficult as the result of the more recent decisions of the Supreme Court of the United States. It is not the desire of this officer to recommend any action which violates anyone's rights. The constant increase in crime, however, and the deadly menace of the Communist conspiracy make it imperative that reasonable methods be available to officers who daily risk their lives in carrying out their duties under the sovereign police power of the State.

We are not sufficiently informed to know whether the proposed Senate resolution No. 2646 is the best means to accomplish the return of the police power to the individual States. We do feel, however, that there must be something done and we urgently request the consideration of means which will permit reasonable efforts by police officers to protect the public without their efforts being thwarted by technical considerations which could never have been intended by those who framed our Constitution.

Respectfully yours,

HOMER GARRISON, Jr., *Director.*

Mr. SOURWINE. This is a statement of Mr. Thomas W. Holloman, of Alexandria, La.

Senator BUTLER. It will be made a part of the record.
(The document referred to is as follows:)

ALEXANDRIA, LA., February 14, 1958.

My name is Thomas Wynn Holloman. I was born in Mississippi and am descended from pre-Revolutionary ancestors. I have practiced law in the State and Federal courts for 50 years. I appreciate the invitation to appear before the committee or make a statement for the record.

For two or three decades I have watched with misgiving the erosion of the rights and powers of the 13 original sovereigns, which they did not delegate to the United States, but specifically reserved to themselves and their people through the Bill of Rights and the ninth and tenth amendments.

At first it was the Congress, which undertook under political and popular clamor, to bring all activities and attitudes under the aegis of its all-sweeping wings. The Supreme Court declared that the legislative judgment was supreme and that it had no control. What a pity it changed its mind!

Apparently growing power hungry, the Supreme Court in late years and on nearly every decision day erases some other constitutional rights or power of the States and even undertakes to police the Congress itself. It decrees the "law of the land" in the face of the Constitution and the powers of Congress fixed in that instrument. As late as 1930 Chief Justice Hughes said that the Court could not amend the Constitution by judicial decree. It has reached the point that Jefferson and Henry and George Mason and others feared. Having no specific controls and composed of men who are, in effect, answerable to nobody, it is destroying State judiciaries and State legislation, and every now and then emasculating the acts of the Congress.

I must add that within the year we have seen the Executive invade a sovereign State in the face of the specific provisions of the Constitution and of the enactments of the Congress.

And now the Court is applying "equal protection" and "privileges and immunities" to turn loose felons, rapists, subversives and criminals to the destruction of the safety of the people and the ability of lower courts to protect life and property. Witness Washington City.

Hence this bill by Senator Jenner. Woe betide if it does not pass!

There are two courses open. The Congress itself can enact legislation that will reestablish the laws of the States against subversives, destroyed by the Court in the Nelson case. Many other decisions cannot be so corrected.

So the only effective course is the assertion of the Congress, under section 2, article 2 of the Constitution of its power to limit the appellate jurisdiction of the Court.

I have asked that an additional section be added to this bill as follows: "Any provision of the Constitution of any State or any statute of any State establishing, providing for, regulating, controlling or supporting public education."

If time and space permitted I believe I could offer an unanswerable brief. *Brown v. Board of Education* reverses the Supreme Court of 1896, under which the South, at the expense of white taxpayers, had built and furnished fine schools for our Negro citizens—bringing them to equality as fast as our wealth, destroyed by war and reconstruction, has permitted. The very finest attitudes between white people and Negroes existed at that time. A majority of nine men for "intangible considerations" and on the authority of Gunnar Myrdal's sociological views (not law or reason) wipes it all out by the stroke of an uncontrolled pen and undertakes to destroy the culture and the mores of a whole people.

Has there ever been anything as silly as spending millions in taxes to compel a white school to take 9, just 9, Negroes into its enrollment when there is a new, excellent school for Negroes built principally by white taxation attended by all the other Negroes? Who made the Supreme Court, without pretense of law or reason, the arbiter of the actions and rights and powers of a whole people?

Time and space prevent me from saying much more. I ask the committee to study carefully what was said of the Civil Rights Act of 1866 when it was before the Congress. The decisions of the Supreme Court when the act was new are also enlightening.

Contemporary construction supports our view. It is clear that Congress never construed the 14th amendment as requiring integrated schools. At the same session at which it approved the amendment, it established separate schools for Negroes in Washington and Georgetown. It maintained them for 80 years.

Nor did the States so understand. The same legislatures which ratified the amendment established segregated schools in 12 States, among them Kansas, Nevada and West Virginia.

The following States had segregated schools before and after ratification: California, Illinois, Missouri, New Jersey, New York, Ohio and Pennsylvania. Maryland and Indiana soon joined them.

Mr. SOURWINE. Here, Mr. Chairman, are two memorandums prepared by the Legislative Reference Service of the Library of Congress. I would make this explanation.

The first of the two, dated February 25, 1958, gave rise to the question in the mind of counsel as to whether it did not leave unstated an obvious conclusion, that is, the conclusion that any activity by the Congress under the authority in article III, clause 2, paragraph 2, which fell short of completely stripping the Supreme Court of its appellate jurisdiction would be beyond question constitutional. It seemed to counsel for the committee that this conclusion was inescapable from the memorandum. That was called to the attention of the writer of the memorandum. He then furnished the second memorandum. So that the committee may see the whole thing as it developed. I ask that they both go into the record.

Senator BUTLER. They will be made a part of the record.

(The documents referred to are as follows:)

THE LIBRARY OF CONGRESS,
LEGISLATIVE REFERENCE SERVICE,
Washington, D. C., February 25, 1958.

To: Senate Judiciary Committee, Subcommittee on Internal Security.

Attention: Jay Sourwine, Esq.

From: James P. Radigan, Jr., senior specialist in American public law.

Subject: How far may Congress go in Taking Away the Appellate Jurisdiction of the United States Supreme Court?

There is no possibility of fixing, on the basis of the wording of the Constitution or of the decisions of the Supreme Court, a point up to but beyond which Congress may not go in making exceptions to the appellate jurisdiction of the Supreme Court. This being the case, the question to be answered is whether Congress may take away all of the appellate jurisdiction of the Court. The provisions of the Constitution which pertain to this question are contained in sections 1 and 2 of article III.

"Section 1. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, Laws of the United States, and Treaties made or which shall be made, under their Authority;—to Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of different States;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and Between A State, or the Citizens thereof, and foreign States, Citizens or Subjects.

"In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

These two provisions should be construed so as to preserve the true intent and meaning of the instrument. Cf. *Martin v. Hunter* ((1816), 1 Wheat. 304), *Rhode Island v. Massachusetts* ((1838), 12 Pet. 657).

That Congress may take away all of the appellate jurisdiction of the Supreme Court may be argued on the basis of a long established line of decisions of the Court. These decisions hold that the Supreme Court can exercise only that appellate jurisdiction which the Congress authorizes by statute. (See: *Wiscart*

v. Dauchy (1796), 3 Dallas 321; *Clarke v. Bazadone* (1803), 1 Cr. 212; *United States v. Goodwin* (1812), 7 Cr. 108; *United States v. Gordon* (1813), 7 Cr. 287; *United States v. Nourse* (1832), 6 Pet. 470; *Ex parte Dorr* (1845), 3 How. 103; *Barry v. Mercein* (1847), 5 How. 103; *Forsythe v. United States* (1850), 9 How. 571; *Re Kaine* (1852), 14 How. 103; *Ex parte Vallandigham* (1864), 1 Wall. 243; *Daniels v. Chicago and Rock-Island Railroad Co.* (1866), 3 Wall. 250; *Walker v. United States* (1866), 4 Wall. 163; *Ex parte Yerger* (1869), 8 Wall. 85; *Butterfield v. Usher* (1876), 91 U. S. 246; *United States v. Young* (1877), 94 U. S. 258; *United States v. Sanges* (1892), 144 U. S. 310; *American Construction Co. v. Jacksonville, Texas, Kansas, Western R.R. Co.* (1893), 148 U. S. 372; *Colorado Central Consolidated Mining Co. v. Turck* (1893), 150 U. S. 138; *Chapman v. United States* (1896), 164 U. S. 436; *United States v. Bitty* (1908), 208 U. S. 393; *Montgomery Building & Construction Trades Council v. Ledbetter Erection Co.* (1952), 344 U. S. 178.)

Three excerpts, representative of these cases are: " * * the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress," *Barry v. Mercein*, *supra*; "This Court has appellate power only in cases provided by Congress," *Re Kaine*, *supra*; " * * this Court, therefore, as it has always held, can exercise no appellate jurisdiction, except in the cases, and in the manner and form, defined and prescribed by Congress," concurring opinion of J. Curtis (p. 120) *American Construction Co. v. Jacksonville Ry.*, *supra*.

There are several other decisions which, while contradictory with respect to the basic conception of the source of the appellate jurisdiction in that they hold such jurisdiction emanates from the Constitution and not from congressional statutes, arrive at the same result by rationalizing that the affirmative statutory declarations by the Congress of appellate jurisdiction for the Supreme Court, made by Congress under its power to regulate, impliedly excludes all appellate jurisdiction not included within a statutory declaration. (See: *United States v. More* (1805), 3 Cr. 159; *Durousseau v. United States* (1810), 6 Cr. 307; *Ex parte McCordle* (1869), 7 Wall. 506; *Merrill v. Petty* (1873), 16 Wall. 338; *Murdock v. Memphis* (1875), 20 Wall. 590; *Maynard v. Hecht* (1894), 151 U. S. 324.)

Excerpts from three of these cases are:

"When the first legislature of the Union proceeded to carry the third article of the Constitution into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the Supreme Court. They have not, indeed, made these exceptions in express terms. They have not declared that the appellate power of the Court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative on the execution of such appellate power as is not comprehended within it, *Durousseau v. United States*, *supra*.

"The principle that the affirmation of appellate jurisdiction implies the negation of all such jurisdiction not affirmed having been established, it was an almost necessary consequence that acts of Congress, providing for the exercise of jurisdiction, should come to be spoken of as acts granting jurisdiction, and not as acts making exceptions to the constitutional grant of it, *Ex parte McCordle*, *supra*.

" * * an affirmative description of the appellate jurisdiction of this court in a suit implies a negative on the exercise of such appellate power as is not comprehended within it, *Maynard v. Hecht*, *supra*."

While these two lines of decisions as a practical matter limit the appellate jurisdiction of the Supreme Court to affirmative grants by Congress, there is a most important difference between their underlying concepts when used in support of an act abolishing the whole of the appellate jurisdiction of the Supreme Court.

The decisions predicated upon the premise that the appellate jurisdiction of the Supreme Court stems from statutory grants of Congress certainly sustain the argument that Congress has power to abolish all of the appellate jurisdiction of the Supreme Court. What Congress can grant, Congress can take away.

The decisions predicated upon the premise that the appellate jurisdiction of the Supreme Court emanates from the Constitution do not support the argument that the repeal of all statutory exceptions and regulations would abolish the whole of the appellate jurisdiction of the Court. The underlying philosophy of these decisions would lead, in case of a repeal of all statutes pertaining to the appellate jurisdiction of the Supreme Court, to the conclusion that the Court possessed all the appellate jurisdiction, without limitation, set forth in the Constitution. Without an affirmative grant there could be no implied negative.

The specific question of whether Congress may abolish the whole of the appellate jurisdiction of the Supreme Court never having been before the Court, there are no definitive controlling precedents.

The general expressions in the opinions of the foregoing cited cases must be taken in connection with the issues involved. (Cf. *Handy v. Anthony* (1820), 6 Wheat. 374; *Weaver v. Palmer Brothers Co.* (1926), 270 U. S. 402; *O'Donoghue v. United States* (1933), 280 U. S. 510; and *Osaka Shosen Kaisha Line v. United States* (1937), 300 U. S. 98.) General principles announced by courts which are perfectly sound expressions of the law under the facts of a particular case, may be wholly inapplicable in another and different case, *Parsons v. District of Columbia* (1898), 170 U. S. 45). And, those expressions which go beyond the point involved may be respected but will not control when the specific point is involved for decision. (*Northern National Bank v. Porter Township* (1884), 110 U. S. 608; *Weyerhaeuser v. Hoyt* (1911), 210 U. S. 380; *Humphrey v. United States* (1935), 295 U. S. 602; *Wright v. United States* (1938), 302 U. S. 583.) To make an opinion a rule of decision there must have been an application of the judicial mind to the precise question. (Cf. *Carroll v. Carroll* (1853), 10 How. 275; *United States v. Miller* (1908), 208 U. S. 32.)

The doctrine of stare decisis is not applicable to a decision which has no relation to the rights of property, but concerns a question of jurisdiction only. (*The Genesee Chief v. Fitzhugh* (1852), 12 How. 443, 459.)

There would not be involved in the decision of this question the necessity of accommodating to an unsatisfactory rule, as there is in fact no definite rule, to avoid the unfortunate practical results that might flow from a change thereof (Cf. *Believing v. Griffith* (1943), 318 U. S. 371). To the contrary, the adoption of the expressions in the cases cited to establish a rule of decision in the construction of an act taking away all of the appellate jurisdiction of the Supreme Court would, in effect, abrogate almost completely the powers and functions of one of the three constitutionally created coordinate branches of government.

Among the cases in which jurisdiction was intended to be vested and exercised by the Supreme Court in appellate form are cases arising under the Constitution and laws of the United States. The provisions of the Constitution for the hearing of these cases is obligatory and should be respected. (See *Cohens v. Virginia* (1821) 6 Wheat. 204, 302.)

The removing entirely of this function of the Supreme Court would make, for all intents and purposes, the Congress and State legislatures the final and supreme judges of their own actions. It would abolish the historical and well established concepts of separation of power and of checks and balances. Manifestly the power of Congress to make exceptions to and regulation of the appellate jurisdiction of the Supreme Court must be made with due regard to all of the provisions of the Constitution. (Cf. *Cohens v. Virginia* (1821) 6 Wheat. 204; *United States v. Blitt*, (1908) 208 U. S. 393, 399-400.)

"It is declared that in all the cases affecting ambassadors, etc., that the Supreme Court shall have original jurisdiction. Could Congress withhold original jurisdiction in these cases from the Supreme Court? The clause proceeds: ' * * * in all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction both as to Law and Fact, with such Exception, and under such Regulations as the Congress shall make'. The very exception here shows that the framers of the Constitution used the words in an imperative sense. What necessity could there exist for this exception, if the proceeding words were not used in that sense? Without such exception, Congress would, by the proceeding words have possessed the complete power to regulate appellate jurisdiction, if the language were only equivalent to the words 'may have' appellate jurisdiction. *Martin v. Hunter* (1816) 1 Wheat. 304, 332, 333."

Chief Justice Taney, in *United States v. Gordon* ((1864) Appendix 117 U. S. 697, 699) stated:

"The Supreme Court does not owe its existence or its powers to the legislative department of the government. It is created by the Constitution and represents one of the great divisions of power in the government of the United States, to each of which the Constitution has assigned its appropriate duties and powers, and makes each independent of the others in performing its appropriate functions. * * * The existence of the Court, is, therefore, as essential to the organization of the government established by the Constitution as the election of a President or Members of Congress. It is the tribunal which is ultimately to decide all judicial questions confided to the government of the United States."

Justice Story in discussing the question whether the appellate jurisdictions attaches to the Supreme Court, subject to be withdrawn and modified by Con-

gress, or whether an act of Congress is necessary to confer the jurisdiction upon the Court, said in his Commentaries on the Constitution, Cooley edition 1873, page 538:

"If the former be the true construction then the entire appellate jurisdiction, if Congress should make no exceptions or regulations, would attach pro vigore to the Supreme Court. If the latter, then, notwithstanding the imperative language of the Constitution, the Supreme Court is lifeless until Congress has conferred power on it. And if Congress may confer power, they may repeal it. So that the whole efficiency of the judicial power is left by the Constitution wholly unprotected and inert, if Congress shall refrain to act. There are certainly very strong grounds to maintain that the language of the Constitution is meant to confer the appellate jurisdiction absolutely on the Supreme Court, independent of any action of Congress; and require this action to divest or regulate it. The language as to the original jurisdiction of the Supreme Court admits of no doubt. It confers it without any action of Congress. Why should not the same language as to the appellate jurisdiction have the same interpretation?"

As stated by Charles Warren in Congress, *The Constitution and the Supreme Court*; pages 5-8:

"It is, of course, possible to have a republic without a Supreme Court; but it will be a republic with a consolidated and autocratic government, a government in which the States and the citizens will possess no right or power save such as Congress, in its absolute discretion, sees fit to leave to them. Americans can, of course, adopt such a form of government if they choose—but they should adopt it consciously and by express action; they should not change their present form unwittingly by indirection; they should not destroy its fundamental features, without realizing that it is the foundation which they are destroying."

The question as to how far the Congress may go in taking away the appellate jurisdiction of the Supreme Court, as stated in the first paragraph, cannot be stated categorically.

Predicated upon the postulate that the historical conception of three coordinate and independent branches of government (which has been accepted and respected since the inception of the Union) should be continued, it is respectfully submitted that an act of Congress which would affirmatively take away all of the appellate jurisdiction of the Court would in all probability be unconstitutional as not subserving the general purposes and true spirit of the Constitution.

As the Judicial Code was not for the purpose of vesting appellate jurisdiction in the Supreme Court, but was for the purpose of restricting the obligatory appellate jurisdiction of the Court and for foreclosing appeals to the Court as a matter of right, cf. *Memphis Natural Gas Company v. Beeler* ((1942) 315 U. S. 649), a repeal of its provisions pertaining to the appellate jurisdiction of the Supreme Court would not divest the Court of all such jurisdiction but to the contrary would leave the appellate jurisdiction of the Court, as fixed by the Constitution.

These two propositions seem fully supportable by the premise that the appellate jurisdiction of the Supreme Court emanates from the Constitution and not from acts of Congress.

THE LIBRARY OF CONGRESS,
LEGISLATIVE REFERENCE SERVICE,
Washington, D. C., March 3, 1958.

To: Senate Judiciary Committee, Subcommittee on Internal Security.

Attention: Jay Sourwine, Esq.

From: James P. Radigan, Jr., senior specialist in American public law.

Subject: How far may Congress go in taking away the appellate jurisdiction of the United States Supreme Court?

The provisions of the Constitution which pertain to this question are contained in sections 1 and 2 of article III.

"Section 1. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made or which shall be made, under their Authority;—to Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of different States;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and Between A State, or the Citizens thereof, and foreign States, Citizens or Subjects.

"In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

These two provisions should be construed so as to preserve the true intent and meaning of the Instrument. Cf. *Martin v. Hunter* ((1816) 1 Wheat. 304), *Rhode Island v. Massachusetts* ((1838) 12 Pet. 657).

That Congress may take away all of the appellate jurisdiction of the Supreme Court may be argued on the basis of a long-established line of decisions of the Court. These decisions hold that the Supreme Court can exercise only that appellate jurisdiction which the Congress authorizes by statute. (See *Wiscart v. Dauchy* (1796), 3 Dall. 321; *Clark v. Bazadone* (1803), 1 Cr. 212; *United States v. Goodwin* (1812), 7 Cr. 108; *United States v. Gordon* (1813), 7 Cr. 287; *United States v. Nourse* (1832), 6 Pet. 470; *Ex parte Dorr* (1845), 3 How. 103; *Barry v. Mercein* (1847), 5 How. 103; *Forsythe v. United States* (1850), 9 How. 671; *Re Kaine* (1852), 14 How. 103; *Ex parte Vallandigham* (1864), 1 Wall. 243; *Daniels v. Chicago and Rock-Island Railroad Co.* (1866), 3 Wall. 250; *Walker v. United States* (1866), 4 Wall. 163; *Ex parte Yerger* (1869), 8 Wall. 85; *Butterfield v. Usher* (1876), 91 U. S. 246; *United States v. Young* (1877), 94 U. S. 258; *United States v. Sanges* (1892), 144 U. S. 310; *American Construction Co. v. Jacksonville, Texas, Kansas, Western R.R. Co.* (1893), 148 U. S. 372; *Colorado Central Consolidated Mining Co. v. Turck* (1893), 150 U. S. 138; *Chapman v. United States* (1896), 164 U. S. 436; *United States v. Blitt* (1908), 208 U. S. 393; *Montgomery Building & Construction Trades Council v. Ledbetter Erection Co.* (1952), 344 U. S. 178.)

Three excerpts, representative of these cases are: " * * * the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress" (*Barry v. Mercein, supra*). "This court has appellate power only in cases provided by Congress" (*Re Kaine, supra*). " * * * this court, therefore, as it has always held, can exercise no appellate jurisdiction, except in the cases, and in the manner and form, defined and prescribed by Congress," concurring opinion of J. Curtis (p. 120) (*American Construction Co. v. Jacksonville Ry., supra*).

There are several other decisions which, while contradictory with respect to the basic conception of the source of the appellate jurisdiction in that they hold such jurisdiction emanates from the Constitution and not from congressional statutes, arrive at the same result by rationalizing that the affirmative statutory declarations by the Congress of appellate jurisdiction for the Supreme Court, made by Congress under its power to regulate, impliedly excludes all appellate jurisdiction not included within a statutory declaration. (See *United States v. More* (1805), 3 Cr. 159; *Durousseau v. United States* (1810), 6 Cr. 307; *Ex parte McCordle* (1869), 7 Wall. 506; *Merrill v. Petty* (1873), 16 Wall. 338; *Murdock v. Memphis* (1875), 20 Wall. 590; *Maynard v. Hecht* (1894), 151 U. S. 324.

Excerpts from three of these cases are:

"When the first legislature of the Union proceeded to carry the third article of the Constitution into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the Supreme Court. They have not, indeed, made these exceptions in express terms. They have not declared that the appellate power of the Court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative on the execution of such appellate power as is not comprehended within it" (*Durousseau v. United States, supra*).

"The principle that the affirmation of appellate jurisdiction implies the negation of all such jurisdiction not affirmed having been established, it was an almost necessary consequence that acts of Congress, providing for the exercise of jurisdiction, should come to be spoken of as acts granting jurisdiction, and not as acts making exceptions to the constitutional grant of it" (*Ex parte McCordle, supra*).

" * * * an affirmative description of the appellate jurisdiction of this court in a suit implies a negative on the exercise of such appellate power as is not comprehended within it" (*Maynard v. Hecht, supra*).

While these two lines of decisions, as a practical matter, limit the appellate jurisdiction of the Supreme Court to affirmative grants by Congress, there is a most important difference between their underlying concepts when used in deter-

mining the total power of Congress with respect to curtailing the appellate jurisdiction of the Supreme Court.

The decisions predicated upon the premise that the appellate jurisdiction of the Supreme Court stems from statutory grants of Congress certainly sustain the argument that Congress has power, by way of repeal, to abolish all of the appellate jurisdiction of the Supreme Court. What Congress can grant, Congress can take away.

The decisions predicated upon the premise that the appellate jurisdiction of the Supreme Court emanates from the Constitution do not support the argument that the repeal of all statutory exceptions and regulations would abolish the whole of the appellate jurisdiction of the Court. The underlying philosophy of these decisions would lead, in case of a repeal of all statutes pertaining to the appellate jurisdiction of the Supreme Court, to the conclusion that the Court possessed all the appellate jurisdiction set forth in the Constitution. Without an affirmative grant there could be no implied negative. However, the rationale of these decisions would permit all but a complete abolishment of the appellate jurisdiction of the Supreme Court, as the vesting of the smallest conceivable segment of the enumerated appellate jurisdiction would work as an exclusion of the balance of such jurisdiction.

The effectiveness of the foregoing cited decisions in establishing the power of Congress over the appellate jurisdiction of the Supreme Court must be viewed together with the established rules of statutory and constitutional construction.

The general expressions in cases must be taken in connection with the issues involved. (Cf. *Handy v. Anthony* (1820), 5 Wheat. 374; *Weaver v. Palmer Brothers Co.* (1928), 270 U. S. 402; *O'Donoghue v. United States* (1933), 289 U. S. 510; and *Osaka Shosen Kaisha Line v. United States* (1937), 300 U. S. 98.) General principles announced by courts which are perfectly sound expressions of the law under the facts of a particular case may be wholly inapplicable in another and different case (*Parsons v. District of Columbia* (1898), 170 U. S. 45). And those expressions which go beyond the point involved may be respected, but will not control when the specific point is involved for decision (*Northern National Bank v. Porter Township* (1884), 110 U. S. 608; *Weyerhouser v. Hoyt* (1911), 219 U. S. 380; *Humphrey v. United States* (1935), 295 U. S. 602; *Wright v. United States* (1938), 302 U. S. 583). To make an opinion a rule of decision, there must have been an application of the judicial mind to the precise question. (Cf. *Carroll v. Carroll* (1853), 16 How. 275; *United States v. Miller* (1908), 208 U. S. 32.)

The doctrine of stare decisis is not applicable to a decision which has no relation to the rights of property, but concerns a question of jurisdiction only (*The Genesee Chief v. Fitzhugh* (1852), 12 How. 443, 459).

These rules of statutory construction are not presented as all inclusive of those that might impinge upon the precedential value of the cited cases, nor are they offered as evidence of the inapplicability of the cited decisions, but, rather, as precautionary guideposts against accepting these cases as decisive determinants of the power of Congress over the appellate jurisdiction of the Supreme Court.

Abstractly, it might be argued that Congress has the power to control the appellate jurisdiction of the Supreme Court on the following grounds:

The plain meaning of article III, section 2, clause 2, of the Constitution is such as to permit of but one construction; viz: Congress can regulate and make exceptions to the appellate jurisdiction of the Supreme Court. Words of the Constitution are to be given the meanings they have in common use (*Tennessee v. Whitworth* (1856), 117 U. S. 139, 147; *Fairbanks v. United States* (1901), 181 U. S. 283, 287).

While the appellate power of the United States extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe (*Martin v. Hunter* (1816), 1 Wheat. 304, 337; *The Francis Wright* (1882), 105 U. S. 381, 385; *Ex parte Yerger* (1869), 8 Wall. 85, 98). (See also *Luckenbach S. S. Co. v. United States* (1928), 272 U. S. 533, and *St. Louis, R. R. Co. v. Taylor* (1908), 210 U. S. 281.)

Where the Congress has been granted a discretionary power, it may use any means within the scope of the grant (*Hepburn v. Griswold* (1870), 8 Wall. 603; *Hampton v. Ames* (the Lottery case) (1903), 183 U. S. 321). "Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to reexamination and review, while others are not" (*The Francis Wright* (1882), 105 U. S. 381, 386).

As right of appeal is not essential to due process (*Reetz v. Michigan* (1903), 183 U. S. 505; *Lott v. Pittman* (1917), 243 U. S. 588; *Luckenbach S. S. Co. v. United States* (1923), 272 U. S. 533; *District of Columbia v. Clawans* (1937), 300 U. S. 617), a curtailment of the appellate jurisdiction of the Court raises no question of due process.

Abstractly, it might be argued that the Congress has not the full power to control the appellate jurisdiction of the Court on the following grounds:

As no provision of the Constitution is without effect, *Knowlton v. Moore* (1900) (178 U. S. 41, 87), and every provision must be compared, *Marbury v. Madison* (1803) (1 Cr. 137), and reconciled *Cohens v. Virginia* (1821) (6 Wheat. 204), with the others, a meaning cannot be attributed to the exception provision that will defeat rather than effectuate the constitutional purposes of the appellate vesting provision. Cf. *United States v. Classic* (1941) (313 U. S. 209).

Among the cases in which jurisdiction was intended to be vested and exercised by the Supreme Court in appellate form are cases arising under the Constitution and laws of the United States. The provisions of the Constitution for the hearing of these cases is obligatory and should be respected. See: *Cohens v. Virginia* (1821) (6 Wheat. 204, 302).

A great leading purpose of the Constitution, which must be kept constantly in view, is that the Supreme Court is intended to be the tribunal to make the final interpretations of the Constitution. Cf. *Ex parte Yerger* (1808) (8 Wall. 85, 101) and *Dodge v. Woolsey* (1856) (18 How. 331). Manifestly the power of Congress to make exceptions to the appellate jurisdiction of the Supreme Court must be exercised with due regard to the provision of the Constitution vesting appellate jurisdiction in the Supreme Court, to the supremacy of the Constitution (art. VI, sec. 1, cl. 2) and to the clearly expressed general intent of the Constitution that there should be three coordinate and independent branches of Government.

In view of previous decisions pertaining to appellate jurisdictional matters affecting the Supreme Court and the wording of the constitutional provisions covering the subject, it appears that Congress has an exceedingly extensive power to curtail the appellate jurisdiction of the Court. However, it is doubtful, predicated upon the postulate that the historical conception of three coordinate and independent branches of government (which has been accepted and respected since the inception of the Union) should be continued, that either the whole of the appellate jurisdiction or the whole of the appellate jurisdiction of any of the enumerated classes of cases brought within the appellate jurisdiction of the Supreme Court by the Constitution can be abrogated. It, therefore, appears that there are few firm grounds for alleging the unconstitutionality of an act of Congress curtailing the appellate jurisdiction of the Supreme Court other than that the act in effect abolishes the whole of a segment of the judicial power of the Federal Government or that the act in effect denies the opportunity to have a constitutionally guaranteed right determined by the Supreme Court. An act which did either would be contrary to the true spirit and intent of the Constitution and destructive of the fundamentals of our system of Government.

Mr. SOURWINE. This, Mr. Chairman, is a letter and statement of Mr. Silas Kuiken, of Washington, D. C. The statement is in the nature of a brief. He asked that it go into the record.

Senator BUTLER. The letter and brief will be made a part of the record.

(The documents referred to are as follows:)

WASHINGTON, D. C., March 3, 1958.

In re Senate bill No. 2646.

Hon. JAY SOURWINE,
Chief Counsel,

Senate Internal Security Subcommittee,
Washington, D. C.

Pursuant to the suggestion and direction given to me by Senator William E. Jenner in his letter to me of February 28 instant, and the authority thereof, I am forwarding to you the enclosed copies of summarization submission relative to this bill No. 2646 and clause and provision 5 thereof, to be timely and properly submitted and filed with the subcommittee by the close of business March 4, 1958, as suggested by Mr. Jenner in his letter to me.

Mr. Jenner and I have known each other for 25 years, having practiced law in adjoining Counties for many years. We in Indiana think a great deal of Mr. Jenner, and are very sorry to see him decide to resign from the high public office and service he has and does render to his constituents here in Indiana and to all of the peoples of this great Nation, and to this great Nation. I, like Senator Jenner, am a conservative, and fundamentalist, and believe and practice, first, last and always in the security of our great Nation, and the full preservation of all of its constitutional privileges and rights, and the powers of our courts to preserve and protect these rights and privileges.

We pray and hope that Mr. Jenner will alter his decision and continue to serve all of us with his good service, and most able and capable public service and especially in these great hours of need to preserve the liberty and freedom of our great Nation and its peoples.

Thanking you in advance for your kind and proper and timely attention hereto, God bless you, and all of you most bountifully, and God bless America, I remain

Yours Very Respectfully,

SILAS KUIKEN.

P. S.: Mr. Jenner did not indicate how many copies had to be submitted, if these are insufficient in number, would you be so kind as to have sufficient copies made and submitted accordingly and timely. Thanks.

BRIEF IN RELATION TO PROVISION NO. 5 OF SENATE BILL 2646

In response to permission by the Honorable Senator William B. Jenner, sponsor of the above entitled Senate bill 2646, I wish to respectfully submit the following presentation and summarization relative to clause and provision No. 5 of this bill, to wit:

*First I wish to say that I have known the Honorable Senator Jenner personally for more than 25 years, and that he is a man and Senator of the highest caliber and ability and character and public servant as United States Senator, and that there is no doubt of the earnest sincerity of his belief in the soundness of this bill No. 2646 that he has sponsored and was the author of; and that I do not present the following with any intention or inference of fully acquiescing the opinions written in the Schwere and Konigsberg cases in the Supreme Court, which decisions have seemingly to some extent inspired the including of clause and provision 5 in Senate bill 2646, but that I present the following as an American born citizen of the greatest Nation on the face of this earth, this good United States of America, and in behalf of the theory of preserving forever the great and good principles of all of the provisions of the Constitution and Bill of Rights of our country, and the freedoms and rights provided by them, including all the powers and rights of the Supreme Court of the United States of America, and the right of any and all of the litigants and citizens of this Nation to carry any and all of their litigations of the highest tribunal of this Nation, the United States Supreme Court, from any and all matters of law and litigation they or any of them may have in any and all courts, boards, and commissions of lesser powers and jurisdiction than the United States Supreme Court, and with the thoughts acquired during 30 years in the practice of law (1923-53) including serving as judge pro tempore and special judge in circuit courts, experience in the office of prosecuting attorney, and as President of county bar association for year of 1945 of Dubois County, Ind.; and in the past 5 years as a servant of God in Christian evangelistic work.

1. Clause and provision 5 of Senate bill 2646 seems to be directed at depriving the United States Supreme Court from having any jurisdiction over appeals from, adjudications in, or matters pending in, or before supreme courts of the States, and boards of bar examiners of States relative to control of admissions to the bars of the States in the United States of America, and them or any of them prohibiting members of their respective bars from further practice in their respective States and bars of the States, and that this clause and provision 5 is seemingly founded on objections to the decisions of the United States Supreme Court in the cases of Schwere and Konigsberg, which decisions we cannot fully agree with in all parts.

2. It seems apparent and obvious that to curtail the authority and powers and jurisdiction of the great and highest tribunal of our great Nation, the United States Supreme Court of America, and the most important branch of our three branches of our Government to pressure any and all of the privileges and rights of all citizens and litigants in the United States of America provided for them

by the Constitution and Bill of Rights and laws of the United States of America, would be, to now and forever jeopardize and curtail the full functions and jurisdiction of the great and highest tribunal and branch of Government, the United States Supreme Court, and to now and forever jeopardize, deny, and curtail the rights and privileges of appeal to and litigation in the highest tribunal of this Nation, the United States Supreme Court of America, of any and all matters pertaining to the restrictions sought in clause and provision 5 in Senate bill 2646 pertaining to the practice of law, and admission to bars of States, and all of this by the seemingly and inferred basis of the objections of the Court's decisions in the Schwabe and Konigsberg cases, and any precedent assumed from these cases.

3. It seemingly would be a greater safeguard against injustice, and the full balance of the three branches of our Government, and the rights and privileges of appeal to, and adjudication in, the highest tribunal of our Nation, the United States Supreme Court, and its so much needed full jurisdiction as the final adjudicating body and court in all litigations in, and of, any lesser courts and boards and commissions in this Nation, by any and all litigants and citizens in this Nation; to permit the United States Supreme Court to retain its now full jurisdiction and power in the matters sought to be curtailed by clause and provision 5 of Senate bill 2646, rather, than to set any precedent of destroying and jeopardizing and curtailing the absolute essential and lawful powers and jurisdiction, of the highest and most necessary tribunal of our great Nation, the Supreme Court of the United States of America, the all very important and balancing branch of the trinity of our form of Government which is the greatest and best upon the face of this earth and of any Nation upon the face of this earth.

4. Any reduction of, curtailment of, and/or removal of, the powers and jurisdiction of the Supreme Court of the United States of America seems to definitely reduce any rights and privileges of any and all citizens and litigants in this great Nation, and their constitutional rights and privileges granted to them by the Constitution and Bill of Rights and Supreme Court, of the United States of America.

5. This honorable subcommittee has been established to preserve and protect all of these rights and privileges of each and every citizen and litigant in this great Nation, which clause and provision 5 of Senate bill 2646 seems to seek to curtail and prohibit as to matters referred to in this clause of the bill.

6. If Senate bill 2646 were passed in its present form, with clause and provision 5 included therein, it would not only seem to curtail and prohibit and jeopardize our present form of Government and rights and privileges provided by the Constitution and Bill of Rights of our Government and the citizens and litigants of this great Nation, but it could also create and establish a law which could be unconstitutional and wholly ineffective then for all its intents and purposes too, as in—

The law established the United States Supreme Court of America, in the cause of action, In Ex parte Garland (1880, 4 Wall. 333, 71 U. S. 333, 18 L. Ed 366) the United States Supreme Court held Congress could not disbar an attorney because he had borne arms against the United States during the Civil War, that Court said on page 370 of Wallace, volume 4:

"The attorney and counselor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace or favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than an indulgence, revocable at the pleasure of the court, or at the command of legislature. It is a right of which he can only be deprived by the judgment of the court."

If clause and provision 5 of Senate bill 2646 should or would become a law as part of the bill, and any citizens, litigant and/or attorney, or applicant to be authorized to practice law, is, or would be affected, jeopardized, by the provisions of clause and provision 5, Senate bill 2646, it could be attacked for the possibility of the law being unconstitutional and/or invalid.

7. If the powers and jurisdiction of the Supreme Court of the United States of America were curtailed and/or jeopardized each and every time they rendered a decision which was in some manner objectional (God not having created any perfect human beings, Christ only being perfect, and man not being able to organize or create any governing body or court which is absolutely perfect and infallible) would it not seem better to not recommend and/or pass a law and bill as Senate bill 2646 and clause and provision 5 in Senate bill 2646, which is opposed and objected to by the American Bar Association and the Attorney General of the United States of America, and their legal and constitutional wisdom, and authority.

God bless all of you of the subcommittee, and give all of you wisdom and guidance in this matter, and all matters before you.

Mr. SOURWINE. I have here a statement of Robert Cargill, Longview, Tex.

Senator BUTLER. That will be made part of the record.
(The document referred to is as follows:)

STATEMENT OF ROBERT CARGILL REGARDING S. 2010

LONGVIEW, TEX., March 1, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building,
Washington, D. C.:

Please present to the Senate Judiciary Committee in our behalf the following statement with any comment you care to make.

To Honorable Senate Judiciary Committee:

Re the Jenner bill, now pending. On the basis of results of Texas referendum, July 1950, we submit that the great majority of citizens of this State, and perhaps of the Nation, believe: That any exercise of authority outside its constitutional limitations is an abuse of power from which the Federal Supreme Court should be barred. That this Court in recent decisions appears determined to legislate and to nullify the authority of the States and the rights of the people recognized in the Constitution. In so doing the court violates its oath of office, and creates the urgent necessity for passing the Jenner bill as the means of safeguarding the powers of Congress, the authority of the States, and constitutional government.

That the Court is amenable to the people—not above them. That Congress representing the people can and should fix such limitations on the Court's acts as necessary for the public good, and that only acts and decisions of the Court founded in law and precedent can be the law of any case.

That the Court's only authority under the Constitution is that of judicial review, and Congress can and should in defense of constitutional government limit the Court's acts to such authority. That the Jenner bill will restore authority of the States, the sovereignty of the people, and preserve the Federal Union.

Respectfully submitted.

TEXAS REFERENDUM COMMITTEE,
ROBERT CARGILL, Chairman.

Mr. SOURWINE. And a statement submitted by Edward J. Anderson of Golden, Colo.

Senator BUTLER. That will be made part of the record.
(The document referred to is as follows:)

STATEMENT SUBMITTED BY EDWARD J. ANDERSON, GOLDEN, COLO.,
FEBRUARY 28, 1958

HON. JAMES O. EASTLAND,
United States Senate, Washington, D. C.:

Nothing is so painful for a loyal American to witness as a Supreme Court befriending the enemies of his country. Every pronouncement of the Warren Court dealing with Communist issues must fill the sinister hearts of the men in the Kremlin with the deepest satisfaction.

We have a Supreme Court which is wholly uninterested in those of my rights as a citizen that are gravely menaced by international communism, but which is enormously interested in the "rights" of traitors. This amazes me. All nations have punished treason with death, since it is a crime which strikes at the very heart of society; unless citizens are loyal to their own country, it cannot survive. But treason is viewed by the Warren Court in a sophisticated light and loses its odium as the crime of crimes. Treason is honorable; he who commits it is given stature as a noble, superintelligent American. The penalty for treason is vindication by the highest court in the land, freedom to continue to operate subversively, and even cash awards forced out of the pockets of the taxpayers.

A Communist may infiltrate and corrupt labor unions, churches, clubs; he may propagandize in our schoolrooms; he may steal the Nation's political and military and industrial secrets and give them to Russia. Apparently he is in-

capable of doing anything which the Supreme Court liberals would regard as unforgivable. Those who would bring him to justice are always wrong. In the words of Senator William E. Jenner, "According to the Court: The Senate was wrong; the House of Representatives was wrong; the Secretary of State was wrong; the Department of Justice was wrong; the State legislatures were wrong; the State courts were wrong; the prosecutors, both Federal and State, were wrong; our juries were wrong; the Federal Bureau of Investigation was wrong; the Loyalty Review Board was wrong; the California bar examiners were wrong; the California Committee on Un-American Activities was wrong; the Ohio Committee on Un-American Activities was wrong. Everybody, they said, was wrong except the attorneys for the Communist conspiracy and the majority of the United States Supreme Court."

The Supreme Court misinterprets the intent of Congress in passing laws and dares say that only the Court, not Congress, knows what the legislators had in mind when they framed a given piece of legislation. The liberal Justice of the Supreme Court takes the arrogant position: "The Constitution is whatever I say it is, and I disregard all judicial precedents, and all acts of Congress, that conflict with my superior judgments."

Justices who are crusading for a socialized America write decisions that are of inestimable service to Marxian tyrants. A court whose future decisions are certain to be in the interest of a treasonable minority must be deprived of its appellate jurisdiction so far as Communist cases are concerned. The Constitution authorizes regulation of the Supreme Court by the Congress. Such limitations placed upon the power of the Court are clearly in the public interest. Not to act in this manner is to warn honest Americans that they must learn to endure ever more shocking betrayals by the pseudo-liberals, acting hand in glove with the agents of a foreign and detestable power.

If steps are taken to bring a liberal-minded Supreme Court under the control of the sovereign people, acting through their representatives in Congress, the liberals will try to make it appear that we are ruining our free institutions. We know the answer to that; it is the liberals, not us, who are the destroyers of American justice. We refuse to listen to these clever impostors. We listen instead to real liberals, such as Abraham Lincoln, who once said, "The people of these United States are the rightful masters of both Congresses and courts, not to overthrow the Constitution, but to overthrow the men who pervert the Constitution."

Yours very sincerely,

EDWARD J. ANDERSON.

Mr. SOURWINE. I have nothing further to offer for the record at this time.

Senator BUTLER. Mr. Flett, will you proceed with your statement, sir.

Is it your desire to put your statement into the record and talk on it or read it into the record?

Mr. FLETT. I am going to read part of it.

Mr. SOURWINE. I understand you want the entire statement included in the record?

Mr. FLETT. That is right.

Mr. SOURWINE. You are going to hit the high spots?

Mr. FLETT. I have covered that in a paragraph.

Senator BUTLER. Do it your way.

STATEMENT OF AUSTIN T. FLETT, CHICAGO, ILL.

Mr. FLETT. Mr. Chairman and members of the committee, my name is Austin T. Flett. I am an insurance broker specializing in the sale of capital stock fire and casualty insurance. My address is 135 South La Salle Street, Chicago, Ill. I appear in my own behalf and not as a representative of any other person or corporation.

I am nationally known for writing—lecturing and publishing, *Meeting Mutual Competition*, a treatise on the sale of cooperative insurance, and *The United States as a Satellite Nation*, a treatise on the worldwide cooperative movement whose stated goal is to establish a one-world Communist dominated empire.

My testimony regarding S. 2646 will explain the pinnacles of this conspiracy to influence decisions of the Supreme Court and other courts in the United States and gain control of the executive, of the judiciary, and of the legislative branches of our State and Federal governments so that leaders in this plot may enact their own set of Communist laws which are to supersede the Constitution of the United States of America and other laws enacted by our Federal and State governments.

In view of the fact that the committee is hard-pressed for time, may I suggest calling your attention to a few pointed paragraphs in this testimony and then request that my complete statement be made a part of the official record of these hearings.

Senator BUTLER: It will be so ordered.

Mr. FLETT: So that the Senators and counsel may review and evaluate the contents.

This testimony is the result of my studying more than 10,000 pages of yearbooks as published by the Cooperative League of the United States of America, 1930 to 1954, inclusive, reports of the congresses of the International Cooperative Alliance of London, England, 1902 to 1957, inclusive, and other books and publications I own which are accepted in the worldwide cooperative movement as official or authentic.

The United States tentacle of this movement or cause is a part of, and subservient to, an international conspiracy whose stated goal is to communize national and international trade and commerce, individual, corporate, and national wealth and private property, farmlands, natural resources, the people and governments of all capitalistic nations and establish a one-world, collectivized, nonprofit "cooperative commonwealth" in which the United States of America is to become a participating state policed by foreign troops—who will enforce the liquidation of the executive, legislative, and judicial branches of our Government, emigration and trade barriers, our educational, religious, labor and profit systems, national defense, our flag, and the sovereignty of the United States.

The two major prongs or fronts used in this movement to attain their objectives are:

1. Peaceful infiltration of the economic, educational, labor, political, religious, and social structures of a nation via the teachings of internationalism, peace and disarmament crusades, self-help, mutual aid, a nonprofit economy, democracy and the democratic way of life, and finally, cooperation.

2. The use of force and violence, strikes, sabotage, rebellions and civil war, and other means of legal or illegal resistance to capitalistic industry or governments.

The "peace" leaders in this movement refer to, is based on their terms of the people of the United States and other nations living in this one-world Communist-dominated empire.

The teachings of internationalism are to destroy national patriotism; disarmament programs are to liquidate armed resistance to their movement.

Individual shareholders in cooperative organizations, including the leaders in this movement, are classified as emancipated persons and are known as cooperators.

Millions of these persons are completely uninformed as relates to their contractual obligations for the true objectives of this movement or cause, which is based on misleading our people and teaching them that cooperation is a social and cultural movement for mutual aid and to promote international peace among the various nations.

Because officials of the Federal and State Governments, including Members of the Congress knowingly or unknowingly provided income tax and other legislative favoritism to promote and finance this movement or cause, many of the small, puny, struggling cooperatives of 1933 are today financial giants controlling unexcelled influence, not only in both political parties in our State and Federal Governments, but also in the economic, educational, financial, labor, religious, and social systems of our country.

The first Yearbook of the Cooperative League of the United States of America published in 1930 is one of several of their publications which contains considerable information regarding the early history and un-American activities of the cooperative movement in the United States.

The following quotations from pages 172, 173 and 175 regarding the United States Supreme Court speak for themselves:

UNITED STATES SUPREME COURT ON COOPERATIVES

The legal relationships of human beings are in a constant flux, depending on changes both in the social and economic world, and in the ideology of the legislator and judge.

"There is probably no greater prerogative exercised by the President of the United States than when he makes the appointment of a judge to this Court. The general outlook, the social consciousness of the appointee, and the economic doctrines he has absorbed in his private or public life, before such appointment, will play a more important part in his decision than his learning in the law.

It is refreshing to see such language and attitudes in decisions of our highest court, even though they be the language for the time being of a minority. Slowly the dissenting minority is making itself felt; here and there is a yielding by the majority. The process is slow. The minority opinion of today may be the majority opinion of tomorrow.

(The section referred to above follows in full:)

Source: First Yearbook, The Cooperative League of the United States of America, A Survey of Consumers' Cooperation in the United States (1930)—published by the Cooperative League, Cooperative League House, 167 West Twelfth Street, New York City (pp. 172-175).

UNITED STATES SUPREME COURT ON COOPERATIVES

By Geo. B. Leonard, Counsel for the Franklin Cooperative Creamery Association.

That men of more than ordinary ability and learning consistently differ in the construction of laws does not augur well for the contention that law is a science. Its uncertainties best demonstrate the reverse. In the physical world, reactions of elements can be reduced to positive formulas. This cannot be done as successfully in the field of law. The legal relationships of human beings are in a constant flux, depending on changes both in the social and economic world, and in the ideology of the legislator and judge. This is particularly noticeable in cases involving the relations of employer and employee and of producer and consumer. In the course of but three generations, the individual employer and producer have merged into the huge, inanimate corporation which has become typical of these terms.

This change in industry has brought with it new social problems. The legislator or judge who comprehends their significance, and the injustices and hardships they bring on, and who extends a welcoming hand to measures intended for the promotion of general happiness, is keeping step with progress. On the other hand, he who opposes such measures retards progress, but only for a while.

There is no more important body of men in the government of our people than the Supreme Court of the United States. It consists of nine judges appointed for life by the President of the United States, subject only to ratification by the United States Senate. This Court, by a majority vote of its members, can set aside laws passed by Congress or any State or local legislative body, if in its judgment they conflict with the provisions of the United States Constitution. It construes the meaning of laws and their application. It is the guardian of the United States Constitution as the majority of its members understand and interpret it. There is no appeal from its decision. For good or ill it has the last word. There is probably no greater prerogative exercised by the President of the United States than when he makes the appointment of a judge to this Court. The general outlook, the social consciousness of the appointee, and the economic doctrines he has absorbed in his private or public life, before such appointment, will play a more important part in his decisions than his learning in the law.

It is not a mere accident that this Court, in its decisions involving important economic or social issues, should be divided. Let us take just three cases decided by it in the last year and a half. The majority of six, headed by Chief Justice Taft, is found on one side of the fence, and the able minority, consisting of Justices Holmes, Brandeis and Stone, on the other side.

In the Frost case, decided last February, the Court set aside as unconstitutional an act of the Oklahoma legislature which exempted cooperative ginning from burdens imposed on noncooperative ginning business. For 20 years or more ginning has been considered a public utility in the State of Oklahoma. A license to engage in that business has to be procured from the Corporation Commission. A noncooperative would have to show that public necessity exists for additional ginning in the particular community before the Commission could grant it a license. By a more recent law of that State, the Commission would have to grant a license to cooperatives without a showing of such public necessity, and merely on the petition of 100 citizens and taxpayers.

The United States Supreme Court in that case held that the noncooperative licensee was entitled to an injunction against the Commission restraining it from granting a license to a cooperative, on the ground that the classification of cooperative and noncooperative business was arbitrary, that in fact there was no difference between ordinary commercial corporations and cooperatives, and that, therefore, the noncooperative was not receiving the equal protection of the law with the cooperative, and that the law was therefore discriminatory and unconstitutional.

It was also contended that the property of the noncooperative licensee (the privilege of doing business granted by way of the license) would be interfered with, injured, or taken away because of the unequal competition the noncooperative was subjected to with the cooperative.

Justice Brandeis, with whom Justices Stone and Holmes joined, in a strong dissenting opinion, clarifies the issues by pointing out the differences between the two types of business. "The differences are vital", he says, "and the classification is a reasonable one." The dissenting opinion points out that in cooperatives the members aim to secure a more efficient system of production and distribution and a more equitable distribution of benefits, and, while doing so, to require an equitable assumption of responsibilities. "Their aim", it says, "is economic democracy along lines of liberty, equality and fraternity." To accomplish these objects, the cooperatives provide for excluding capitalist control. As means to this end, they provide for restriction of voting privileges, curtailment of return on capital, and for distribution of gains through patronage dividends or equivalent devices. The distinctive features insuring democracy and discouraging or preventing capitalist control are as fully set forth in this dissenting opinion as can be found in any leading work on cooperation:

First, no person can become a member or shareholder without the consent of the board of directors.

Second, the amount of stock 1 person may hold is limited, generally, not to exceed \$1,000.

Third, the voting power of each shareholder is limited to one vote, irrespective of the number of shares held.

Fourth, a percentage of the profits is set aside for educational purposes.

Fifth, at least 10 percent of the profits must be set aside into a reserve until such reserve fund equals at least 50 percent of the capital stock.

Sixth, the annual dividends to stockholders are limited to 8 percent.

Seventh, the rest of the profits are distributed as patronage dividends to members, or, as the directors may apportion them, to nonmembers, or proportionately between members and nonmembers, as the law of the particular State may provide.

Reading both the majority and the minority opinions, one can readily see that the minority has seen the trend of the times and the economic need which co-operatives are filling, here and abroad, but that the majority of the Court is still steeped in the economic philosophy of yesterday.

The same 3 Justices recently dissented from the majority of 5 in the O'Fallon case, by which the railroads are allowed a basis of valuation for ratemaking purposes that will give them additional millions yearly. It was there decided that the present high cost of reproduction must be taken into consideration by the Interstate Commerce Commission in its valuation of railroads. The Commission, in its valuation, had adopted the prudent-investment theory, which is in accord with the modern trend of thought on that subject, and which gives both the railroads and the public a fair deal.

The majority opinion follows the divided decisions previously rendered by this Court in the Southwestern Bell Telephone and Indianapolis Water cases affecting public utilities. The hundreds of millions added to the stock value of the public-utility companies of this country since these decisions are in a large measure traceable to the rate of earnings they are permitted to enjoy under the protection of the law on the higher valuations. The consuming public is the goat.

Another case of interest along the same lines is the Ribnick case, decided in May 1928. Under the law of New Jersey, the State assumed to regulate the fees charged by employment agencies. In the exercise of its general police power, the State, it is conceded, has no right to regulate prices to be charged by commercial institutions or individuals for their wares or services. But, where a business is affected with the public interest, it can be so regulated. The question, therefore, frequently arises: Which business is, or when does a given business become, affected with the public interest? It has been held, for example, that the following businesses were affected with the public interest and their charges could be regulated by legislative bodies: railroads, street railways, bridges, ferries, telegraph, telephone, gas, irrigation, wharfing, booming of logs, milling, and storage of grain in warehouses.

But, in the Ribnick case, by vote of 6 to 3, it was held that the business of an employment agent is not affected with the public interest, and that, therefore, a law attempting to set a maximum price to be charged by an employment agency for finding employment is unconstitutional. By its decision, the Supreme Court of the United States nullified laws of more than 20 States. A most exhaustive dissenting opinion by Justice Stone, in which Justices Brandeis and Holmes joined, recites the numerous abuses and the excessive charges and exploitation to which people seeking employment through such agencies frequently are subjected, the reports of many commissions appointed to investigate these abuses, and the legislation the various States were led to adopt to control and regulate such agencies. It forcibly advances the proposition that "the economic disadvantage of a class and the attempt to ameliorate its condition may alone be sufficient to give rise to the 'public interest,' and to justify the regulation of contracts with its members." That the conduct of employment agencies affects, vitally, the lives of great numbers of the population, deals with a necessitous class, the members of which are often dependent on them for an opportunity to earn a livelihood and often are under economic compulsion to accept the terms the agencies offer, and that those so situated are peculiarly the prey of the unscrupulous and designing, and that, therefore, the arm of law should be extended for their protection, is the argument advanced by the minority in support of its contention.

It is refreshing to see such language and attitudes in decisions of our highest court, even though they be the language, for the time being, of a minority. Slowly, the dissenting minority is making itself felt; here and there is a yielding by the majority. The process is slow. The minority opinion of today may be the majority opinion of tomorrow. This is the lesson of history.

Pages 247 and 325 list the names of Communist training camps used by cooperative leaders.

Pages 846 to 352 in the 1930 yearbook and pages 248 to 255 in the 1932 yearbook advertise first brand cereals, canned and dried fruits, coffee, motor oil, and so forth, as sold in cooperative stores under the label of the hammer and sickle.

Page 38 of the 1936 Cooperative League Yearbook states:

It is likely that cooperatives will have to watch the legislative halls of the State and Nation more carefully in the future, since we must be prepared for the rising tide of reaction against the movement, which reaction may register itself in all kinds of laws harmful to our cause.

Page 155 of the same yearbook states:

For 32 years, or since its origin, the Farmers Union has proposed the abolishment of the profit system. In order to aid in abolishing the profit system, the union has been busy through these years organizing cooperatively owned buying and selling agencies, * * * we here today pledge each other to be loyal to these principles, loyal to our Farmers Union cooperative business activities, and that we will keep our minds centered on the one supreme task, which is the peaceful overthrow of the capitalist or profit system, and the establishment of the cooperative commonwealth.

Leading "cooperators" in this movement state the life-and-death struggle to destroy capitalism is being fought on the economic platform of the world and that carefully selected, well-trained, educated leaders will function under veiled form and work in the "blood stream" of the profit system like a cancer, and these persons will not declare their radicalism during the transition period of destroying capitalism, as socialization or nationalization of the various nations can be accomplished without informing the public.

The following quotations, which I will skip, refer to the cooperative laws which speak for themselves.

To achieve socialism, it is necessary to wield political power; that is, to gain control of the state and its organization. Government is the first step. The Communist Manifesto, the modern Socialists' breviary, says: "The immediate aim of the Communists is the same for all working-class parties; the organization of the working class as a political party, the overthrow of bourgeois tyranny, the conquest of political power by the working class." A little later the aim is further defined: "The working class will use its political supremacy to dispossess the bourgeoisie of all its capital in order to concentrate it under the control of the state."

I have here several pages of quotations of cooperative leaders regarding influencing legislation. I would be glad to turn these over to counsel for the committee.

That will conclude my oral testimony regarding Senate bill No. 2646. Are there any questions?

(The full statement of Mr. Flett is as follows:)

STATEMENT OF AUSTIN T. FLETT RE HEARING ON S. 2646, TO LIMIT APPELLATE JURISDICTION OF THE SUPREME COURT

Mr. Chairman and members of the committee, my name is Austin T. Flett. I am an insurance broker, specializing in the sale of capital-stock fire and casualty insurance. My address is 135 South La Salle Street, Chicago, Ill. I appear in my own behalf and not as a representative of any other person or corporation.

I am nationally known for writing, lecturing, and publishing Meeting Mutual Competition, a treatise on the sale of cooperative insurance, and The United States as a Satellite Nation, a treatise on the worldwide cooperative movement whose stated goal is to establish a one-world, Communist-dominated empire.

May 11, 1956 and June 18, 1957, I explained this conspiracy briefly to members of the Committee on Foreign Relations of the United States Senate.

Before proceeding with my testimony regarding Senate bill 2046, it is important that I include in my testimony a brief analysis of the nucleus and interlocking ramifications of an international conspiracy to lead the people of the United States into communism via a one-world government, as I believe you will agree that no action should be taken by members of the judiciary or subcommittee regarding this bill without their being fully informed regarding methods used by leaders in this plot to influence, prior to seizing control of, the executive, judicial, and legislative branches of our State and Federal Governments, so they may promote their cause and enact their own cooperative or Communist laws which are to supersede the Constitution of the United States of America and other laws enacted by our Federal and State Governments.

Eighteen years ago, when I started a sales analysis of my competition, known as mutual fire and casualty insurance, I had no idea this analysis would terminate in exposing what is conceded at highest levels in Washington to be the main root of an international conspiracy to destroy the social, economic, and political structure and sovereignty of the United States of America via the teachings of internationalism and cooperation, otherwise known in the worldwide cooperative movement or cause as collectivism, socialism, or communism.

This testimony is the result of my studying more than 10,000 pages of yearbooks as published by the Cooperative League of the United States of America, 1930 to 1934, inclusive; reports of the congresses of the International Cooperative Alliance of London, England, 1902 to 1937, inclusive; and other books and publications I own which are accepted in the worldwide cooperative movement as official or authentic.

The United States tenacle of this movement or cause is a part of, and subservient to, an international conspiracy whose stated goal is to communize national and international trade and commerce, individual, corporate, and national wealth and private property, farmlands, natural resources, the people and governments of all capitalistic nations, and establish a one-world, collectivized, nonprofit, cooperative commonwealth in which the United States of America is to become a participating state policed by foreign troops who will enforce the liquidation of the executive, legislative, and judicial branches of our Government, emigration and trade barriers, our educational, religious, labor, and profit systems, national defense, our flag, and the sovereignty of the United States.

This one-world cooperative commonwealth of nations is to supersede the United Nations—successor to the defunct capitalistic dominated League of Nations.

Since 1921 cooperative and Communist leaders affiliated with the Cooperative League of the United States of America have represented the highly organized, politically powerful, tax and legislative favored cooperative movement in our country at international headquarters of this conspiracy, which is known as the International Cooperative Alliance of London, England. Members of the executive committee of this organization, representing national cooperative unions and federations in 41 nations, state they are the only persons capable of reorganizing and ruling the people of the world and that their national members are autonomous organizations exempt from all laws enacted by capitalistic nations.

The International Cooperative Alliance was organized in 1895 under the auspices of conservative reformers who believed in sharing profits with employees. After 15 years of friction between conservative and radical reformers, disgruntled employees and labor agitators, delegates attending the eighth congress of this organization held in Copenhagen, Denmark in 1910, elected to change the objectives of their movement and follow the principles of the class struggle of Europe as outlined by Lenin at the International Socialist Congress, also held in Copenhagen in 1910.

Since that date leaders of the International Cooperative Alliance, many of whom have also been active leaders in the labor movement, have collaborated with other persons in national and international organizations whose objectives are to lead the people of the world into communism.

During the rebellions in Europe which preceded World War II, to escape execution or being imprisoned, many leading European cooperators fled as refugees to foreign countries, including the United States where they joined domestic cooperators and government officials in organizing Cooperative American Remittances to Everywhere, Inc.

During and after World War II in Great Britain, France, Italy and many other European, Asiatic, African and South American countries, leaders in this movement became top government officials.

Article I of the latest rules of the International Cooperative Alliance—besides listing their name in English, French, German and Russian, official languages of the movement as per article 5—states, and I quote—

"The International Cooperative Alliance, in continuance of the work of the Rochdale Pioneers and in accordance with their principles, seeks, in complete independence and by its own methods, to substitute for the profit-making regime a cooperative system organized in the interests of the whole community and based upon mutual self-help."

Great Britain is considered the motherland of the cooperative and labor movement. British leaders sowed the first seeds of cooperation in Russia about 1900, where it has developed to present day magnitude and threat to our national security. British efforts to organize this movement in the United States were considered a dismal but not a hopeless failure until the advent of the Roosevelt administration in 1933.

As of today, headquarters of the dominating influences in this plot against the people of the United States are (1) London, England, (2) Washington, D.C., (3) Moscow, U. S. S. R., (4) Paris, France, (5) Rome, Italy.

After leading Asiatics into this movement via technical assistance programs of the United Nations and specialized agencies, Red China is slated to become one of the five great powers in the Communist-dominated cooperative commonwealth of nations.

The two major prongs or fronts used in this movement to attain their objectives are:

1. Peaceful infiltration of the economic, educational, labor, political, religious, and social structures of a nation via the teachings of internationalism, peace and disarmament crusades, self-help, mutual aid, a nonprofit economy, democracy and the democratic way of life and finally, "Cooperation."

2. The use of force and violence, strikes, sabotage, rebellions and civil war and other means of legal or illegal resistance to capitalist industry or governments.

The "peace" leaders in this movement referred to, is based on their terms of the people of the United States and other nations living in this one-world Communist dominated empire.

The teachings of internationalism are to destroy national patriotism, disarmament programs are to liquidate armed resistance to their movement.

Individual shareholders in cooperative organizations, including the leaders in this movement, are classified as emancipated persons and are known cooperators.

Interviews and correspondence I have had with officials of the Federal Government, Members of the Congress, prominent business and press executives and other persons, including individual and corporate shareholders in various types of cooperative enterprises affiliated with this movement, indicate that millions of these persons are completely uninformed as relates to their contractual obligations or the true objectives of this movement or cause, which is based on misleading our people and teaching them that cooperation is a social and cultural movement for mutual aid and to promote international peace among the various nations.

The word "cooperation" as used in the worldwide cooperative movement is a foreign ideology based on the teachings of Robert Owen, who is quoted as the father of the cooperative and labor movement, the Rochdale pioneers, Beatrice Potter and Sidney Webb, the Fabian Society, Karl Marx, Engels, Lenin, and other famous European socialists.

"Cooperation" is defined as follows, in official publications of the International cooperative movement:

1. "Therefore all true forms of cooperation tend to influence the distribution of the wealth of the nations in favor of the working classes."

2. "Cooperation must be talked up as a comprehensive movement, as a means of social regeneration, not as a mere moneysaving device."

3. "Cooperation means the elimination of every unnecessary middleman."

4. "Cooperation is the most radical movement ever known in history."

5. "Cooperation is socialism in action."

6. "Socialism is cooperation on a grand scale."

7. "Communism is socialism in working clothes."

8. "Consumer cooperation is an anticapitalist, revolutionary movement aiming toward a radical social reconstruction based on an all-inclusive collectivism."

9. "It is a principle—and a dominant aim—of the International Cooperative Alliance, a world organization, to transform the capitalist profit-seeking system

into a cooperative social order, in other words, into a Socialist order of society. This is the aim of every Communist worker. But the means which we propose differ from those which the cooperators of other political creeds advocate as the correct ones. We believe that if this aim, the elimination of the capitalist profit-seeking economy, which is the aim of the International Cooperative Alliance is to be achieved, we must be quite clear that it can only be realized if the whole working-class movement does away with those who, as the factors of power of the bourgeoisie in every part of the world, continually threaten the workers. This we cannot achieve by travelling along the smooth road of evolutionary development, but we must wring it from the possessing classes by fighting against them."

10. "Cooperation is the very antithesis of imperialism. It is, in short, anarchism rationalized."

11. "The words of Lenin, that the social order which we have to support is the cooperative order, are realized in the Soviet Union."

12. "The end of cooperation is world federation, a united state of the cooperatives of all nations."

"We are working for the realization of the Cooperative Commonwealth." Persons who believe in the profit system, our form of government, national security and, are opposed to the teachings of cooperation are known as Fascists, capitalist savages, imperialists, warmongers, war criminals and industrial anarchists—all mortal enemies of leaders in the cooperative labor movement.

Leaders in the national and international cooperative movement were quick to take advantage of the chaos created by the depression which started in the late twenties, with the result that extensive propaganda and educational programs pertaining to the transition period of destroying capitalism in the United States and our form of government, commenced to function, as best explained in the following quotations from page 15 of the 1930 Yearbook of the Cooperative League of the United States:

"The hour is at hand when conditions suggest that a carefully planned national cooperative policy of propaganda, education and supervision should be devised, and vigorously, persistently and systematically carried out throughout the United States and Canada.

"Individual societies should be encouraged to make every possible financial sacrifice to that end, for their own welfare, as well as for the general good of the movement. It is only by so doing we can expect to defeat the prevailing anti-social trends, and well and truly lay the foundations of a Cooperative Commonwealth.

The bloodless revolution which took place in our country at the elections of 1932 swept into political power a President and other high government officials who were sympathetic to promoting this conspiracy against the people of the United States with the result the full financial and political resources of the executive, legislative and judicial branches of the United States Government, including the armed services in World War II, have been and are being used to promote and finance this conspiracy, internally and, via foreign aid programs, in other nations throughout the world.

The following statement published on page 18 of the 1936 Yearbook of the Cooperative League of the United States speaks for itself.

"The Roosevelt administration gave us much help and also showed a more than friendly attitude toward the cooperative movement. It protected cooperation and set up many agencies for assistance to the cooperatives. This is the first Federal Administration this country has ever had that aggressively promoted cooperation and continued to favor cooperation in the face of the hostility of the special interests. . . . The Cooperative League has been consulted, referred to, and assisted up to the present time by many departments of the Government."

That quotation is one of many thousands documented and listed in a 540-page report I have with me which report I prepared for the use of Members of the 83d Congress, the Federal Bureau of Investigation and the Director of Intelligence of the United States Treasury.

I also have with me a 200-page cross index to prove my case.

Because officials of the Federal and State Governments, including members of the Congress knowingly or unknowingly provided income tax and other legislative favoritism to promote and finance this movement or cause, many of the small, puny, struggling cooperatives of 1933 are today financial giants controlling unexcelled influence, not only in both political parties in our State and Federal

Governments, but also in the economic, educational, financial, labor, religious and social systems of our country.

The first Yearbook of the Cooperative League of the United States of America, published in 1930, is one of several of their publications which contains considerable information regarding the early history and un-American activities of the cooperative movement in the United States.

On page 70 of this book the name of L. E. Woodcock is listed as leading their campaign for income-tax exemption. Today Mr. Woodcock, as a successor to Murray D. Lincoln of Columbus, Ohio, is the representative of the International cooperative movement in the United Nations.

Also on page 70, the name of a member of the United States Senate is listed as an early collaborator.

Pages 92 to 94 inclusive list names of organizers of the Cooperative League of the United States of America, The Industrial Workers of the World and the Communist Party of the United States of America.

The following quotations from pages 172, 173 and 175 regarding the United States Supreme Court speak for themselves:

"UNITED STATES SUPREME COURT ON COOPERATIVES

"The legal relationships of human beings are in a constant flux, depending on changes both in the social and economic world, and in the ideology of the legislator and Judge.

"There is probably no greater prerogative exercised by the President of the United States than when he makes the appointment of a Judge to this Court. The general outlook, the social consciousness of the appointee, and the economic doctrines he has absorbed in his private or public life, before such appointment, will play a more important part of his decision than his learning in the law.

"It is refreshing to see such language and attitudes in decisions of our highest Court, even though they be the language for the time being of a minority. Slowly the dissenting minority is making itself felt; here and there is a yielding by the majority. The process is slow. The minority opinion of today may be the majority opinion of tomorrow."

Pages 247 and 325 list the names of Communist training camps used by co-operative leaders.

Pages 340 to 352 in the 1930 Yearbook and pages 248-255 in the 1932 Yearbook advertise first-brand cereals, canned and dried fruits, coffee, motor oil, etc., as sold in cooperative stores under the label of the hammer and sickle.

Page 38 of the 1930 Cooperative League Yearbook states: "It is likely that cooperatives will have to watch the legislative halls of the State and Nation more carefully in the future, since we must be prepared for the rising tide of reaction against the movement, which reaction may register itself in all kinds of laws harmful to our cause."

Page 155 of the same yearbook states:

"For 32 years, or since its origin, the Farmers Union has proposed the abolishment of the profit system. In order to aid in abolishing the profit system, the union has been busy through these years organizing cooperatively owned buying and selling agencies, * * * we here today pledge each other to be loyal to these principles, loyal to our Farmers Union cooperative business activities, and that we will keep our minds centered on the one supreme task, which is the peaceful overthrow of the capitalist or profit system, and the establishment of the cooperative commonwealth."

Prior to the Roosevelt administration the Russians appealed to headquarters of the cooperative-labor movement in London to use their influence to reestablish trade and diplomatic relationship with the United States. Mr. M. Litvinoff was leader of the Russian delegation that went to London to plead their case.

In 1933 Mr. Litvinoff was in Washington completing the details of attaining their objectives and also in 1933, the first Communist training school, widely publicized as the Harold Ware cell, was established in our Government via the Department of Agriculture.

While notorious "traitors" were being trained in that cell to infiltrate and seize control of the major departments of our Government, the President of the United States was issuing Executive orders for leaders in the cooperative movement to instruct high officials of the United States Government in the teachings of "cooperation." As a result of some of these Executive orders the Tennessee Valley Authority was organized by co-op-IWW leaders.

There are four major tentacles of the politically powerful tax-favored cooperative movement in the United States whose influence in the executive, judicial, and legislative branches of our State and Federal Government supersedes the influence of representatives of the people of the United States who believe in the profit system and our form of government.

These four tentacles comprise agricultural, insurance, credit union, and banking cooperatives. In these groups there are a great many local and national educational and trade associations collaborating with each other to influence legislation to promote the cooperative movement. A few of these organizations are—American Farm Bureau, American Mutual Alliance, American Institute of Cooperation, the National Grange League Federation, Cooperative Health Federation of America, Cooperative League of the United States, Cotton Producers Association, Credit Union National Association, Florida Citrus Exchange, National Cooperatives, Inc., National Cooperative Finance Association, National Cooperative Milk Producers, National Association of Mutual Insurance Companies, National Association of Mutual Savings Banks, National Cooperative Refinery Association, National Cooperative Mutual Housing Association, National Council of Farmer Cooperatives, National Farmers Union, National Federation of Grain Cooperatives, National Live Stock Producers Association, National Milk Producers Federation, North American Students Cooperative League, National Rural Electric Cooperative Association, Rochdale Institute, Sunkist Growers, Texas Federation of Cooperatives, United Cooperatives, Inc., United States Savings and Loan League.

A Federal investigation of this cooperative movement will disclose that leaders representing members in cooperative enterprises conceal information regarding the true objectives of their association, movement or cause from shareholders, Members of the Congress of the United States, and other Federal officials, including those in the Department of Justice, the Treasury, and Internal Revenue Service.

Americans for Democratic Action, the Congress of Industrial Organization (CIO), the National Education Association, the National Council of Churches and many other groups are actively collaborating with cooperative leaders to promote this conspiracy against the people of the United States.

Co-op publications state many leading "cooperators" are employees or consultants in many departments of our Federal Government, including the Department of Justice.

Leading "cooperators" in this movement state the life and death struggle to destroy capitalism is being fought on the economic platform of the world, and that carefully selected, well trained, educated leaders will function under veiled form and work in the "blood stream" of the profit system like a cancer and these persons will not declare their radicalism during the transition period of destroying capitalism, as socialization or nationalization of the various nations can be accomplished without informing the public.

The following quotations from cooperative publications speak for themselves:

"Cooperation as an economic institution influences other social relations * * *. It has to make the world anew. It must inevitably possess a law, a system of government, and a morality of its own."

"Consumers' cooperation is subject to laws of its own."

"In its first stage cooperation merely eliminates the private trader and his profit."

"The second vital law of cooperation is juristic; it determines the method of control and the rights of the consumer in the society."

"The third cooperative rule or organic law of cooperation relates to trading; it is that sales are made at current commercial prices or slightly less * * *"

"Cooperation through its third law, adapts itself to existing society in order to bring out of it a new economic order in conformity with its own characteristics."

"The fourth rule of cooperative organization * * * is principally a rule of finance. The surplus assets of cooperative societies belong to the societies and none of their members have any right to them."

"There is at the very beginning a reserve that is compulsory by law, but cooperative societies are hardly ever content with that. They create special and extraordinary reserves and development funds * * * these sums, which, taken out of the surpluses, represent the sacrifice of the present to the future, * * *"

"* * * there is absolutely no contradiction between the two basic ideas of Marxism and those which develop from a study of the cooperative movement * * *."

"To achieve socialism it is necessary to wield political power, that is, to gain control of the State and its organization. Government is the first step. The Communist Manifesto, the modern socialists' breviary, says: 'The immediate aim of the Communists is the same for all working-class parties, the organization of the working class as a political party, the overthrow of bourgeois tyranny, the conquest of political power by the working class.' A little later the aim is further defined: 'The working class will use its political supremacy to dispossess the bourgeoisie of all its capital in order to concentrate it under the control of the State.'"

"What would the State become if the cooperative republic were established in its entirety? . . . the whole set of attributes and functions belonging to the State as an organization for governing men will disappear."

"The cooperative republic . . . would appear as a State within the State, or rather as an economic society within the political framework of the nation."

Cooperative publications state faculty members at Harvard University were the pioneers in promoting cooperation in our educational system and it was during the depression that social, economic, and other teachers in many of our finest educational institutions were led into the movement and that laws were enacted in many States making it mandatory to finance the teaching of cooperation in all schools, colleges, universities, etc.

Thereafter religious, labor, and social leaders joined the crusade to promote this cause. Officials of the Treasury Department issued income-tax rulings and members of the Congress enacted legislation to finance the movement. Justices of many State and Federal courts rendered decisions which assisted cooperative leaders to promote their cause.

Cooperative leaders in the United States who attend international congresses of this conspiracy as delegates and members of the central and executive committees and other persons knowingly promoting this conspiracy in our country are acting as foreign agents and should be registered as such with the Department of Justice.

Cooperative leaders state the success of their movement will depend on income tax and legislative favoritism and how the housewife and other persons including business executives spend their money to promote a cooperative nonprofit economy in the United States.

It is estimated commercial cooperative organizations affiliated with the movement escape the payment of approximately \$1 billion per year in Federal income taxes.

Cooperative organizations knowingly or unknowingly affiliated with this movement that do not inform the Government of the true objectives of their association when applying for letters of exemption are guilty of improper filing of Federal income tax returns, which is committing fraud against the Government of the United States, as the internal security laws deny tax favoritism to subversive organizations.

Foreign cooperative publications state the heart of the American cooperative movement is in agriculture. They also publish—and I quote:

"By the end of 1949 cooperative insurance was coming of age as a key factor in the future development of all kinds of cooperatives in the United States."

In most countries, however, and especially those that have entered the orbit of the Communist empire in Europe and in China, cooperative organizations known as thrift or credit societies and credit unions have been used as the spearhead to lead the people into communism.

The Credit Union National Association representing the international credit union movement are active collaborators as members of the Cooperative League of the U. S. A. and the International Cooperative Alliance in influencing legislation to promote this conspiracy.

The American Institute of Cooperation promotes the teachings of cooperation through the National Education Association, American Teachers Federation, land grant colleges, universities, women's and youth organizations, club and trade associations, and department of the Federal Government. Secretary of Agriculture Benson, formerly chairman of this organization and an old time co-op organizer, told "cooperators" attending their 25th convention in 1953—and I quote:

"I sincerely hope to see the cooperative movement vastly strengthened in the years to come. For this movement is vital to America. It is a young movement. It has unlimited potentialities."

The United States tentacle of this conspiracy is often referred to in co-op publications as a young movement needing guidance from their European masters.

The National Council of Farmer Cooperatives is a top legislative lobbying front. It is associated with the American Institute of Cooperation, and has been an active member of the International Federation of Agriculture Producers whose representatives are active in the International Cooperative Alliance.

The National Association of Mutual Insurance Companies, a major tentacle of the American Mutual Alliance, has been actively identified with the American Institute of Cooperation and has direct ties to the International Cooperative Alliance.

Another of the leading segments of co-op educational programs is handled through international cooperative women's guilds who state they work with their brothers in the movement as they have access to women's and youth organizations closed to men "cooperators."

Co-op leaders are instructed to conceal their radicalism, be "regular guys" and active "joiners" in various types of civic, social, service, trade, religious, patriotic, and political organizations where they should attain positions of influence so as to promote the cause or suppress publicly or legislation unfavorable to their movement.

The Federal Bureau of Investigation is classified in international co-op publications as a terrorist organization, "scaring hell" out of educators and other persons who are dedicated to a cause of overthrowing our Government.

Cooperators publish their relationship with the Government is safest by avoiding election contests because leading politicians would not publicly accept support of the movement. They also state they will defeat at elections Members of Congress opposed to their cause.

In many nations, including the United States, the profit and nonprofit, co-op labeled, mixed systems of economy are now locked in mortal combat to survive.

Analysis of the pattern used in the international cooperative Communist movement to capture trade and commerce and the peoples and governments of other nations in Europe, Asia, Africa, and Latin America indicates a rebellion in the United States is now being organized.

A study of this plot indicates that if a rebellion in the United States is a success, our country is to be divided into four police districts and the Southern States may become a colored republic or State in the one-world government and will be policed by Soviet troops stationed at Mobile, Ala.

When Japan, as a capitalist nation, tried to stop the Soviet Union from communizing China, co-op and Communist leaders throughout the world, including in the United States were instructed to retaliate by spreading propaganda to destroy Japanese trade and commerce and influence their respective governments to assist Red China. This may explain a part of the controversy regarding the Institute of Pacific Relations.

Co-ops publish we are war criminals that invaded Korea and Formosa.

A study of publications issued by congressional committees and departments of the Federal Government regarding Communist infiltration in the United States indicates that Federal officials and members of the Congress have been uninforming regarding ramifications and objectives of the cooperative-labor movement to seize control of our Government and communize our people via peaceful infiltration or by the use of force and violence.

My study of this conspiracy indicates that contributions of United States taxpayers' money to the United Nations, UNESCO, the International Labor Office and other specialized agencies of the United Nations promoting a one-world government, is not only violation of the internal security laws of the United States but it is also financing the destruction of our national security.

If our country is to become a state in the one-world cooperative commonwealth of nations, there will be no wages and no profits for labor. All funds and profits derived from the sale to other cooperatives of surpluses produced by various types of workers will belong to the movement. Our children will belong to the state and will be raised in institutions until they are able to work. We and our children will be told when, where, and how to work to produce the bare necessities of life, as there will be no trade or emigration barriers between nations. People of various nations including labor will be moved from one country to another as directed with the result that the present standard of living of the bourgeoisie and the laboring man in the United States will be destroyed.

The disintegration of our assets, our homes, our business, the future of our families, our flag and our country is taking place and unless drastic action is taken immediately by officials of the Government including Members of the Congress to protect our national security, the United States of America will become a vassal state in a one-world, communist dominated empire and this—the

rainbow flag of the cooperative commonwealth will supersede the flags of all nations including the Stars and Stripes.

Public exposure of this conspiracy has been suppressed in Washington and by business executives and other persons sympathetic to or capitalizing upon this movement or cause since April 1953 when I made my first request to Government officials for a Federal investigation of this conspiracy against the people of the United States.

I am prepared to document for your committee, in chronological order, 1902 to date, the ramifications of this foreign conspiracy to seize control of the executive, legislative and judicial branches of our Government so as to lead our people into communism, peacefully or by the use of force and violence.

Thank you gentlemen for this opportunity to serve our country.

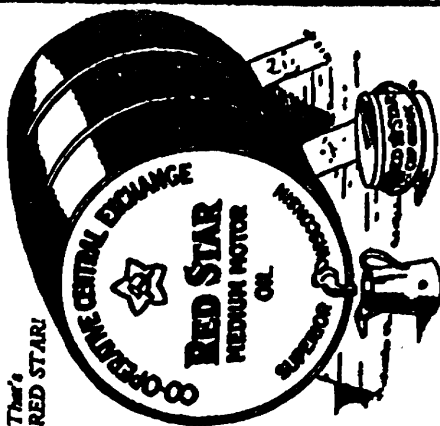
Are there any questions?

FIRST YEARBOOK—CLUSA / 1930

—there are hundreds of different quality OILS—but only one

Red Star Quality

Your oils do much more—the oil that has been tried and tested—one that will insure you of correct lubrication ALWAYS—



SOLD BY ALL CO-OPERATIVE STORES

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EXHIBIT

#2

C.L.U.S.A.

1930

CO-OPERATIVE LEAGUES OF THE UNITED STATES

FIRST YEARBOOK—CLUSA / 1930

Treat Yourself!

Perhaps you have never really tasted Coffee such as RED STAR! Specially blended and prepared for a race of coffee-lovers, RED STAR possesses that distinctive flavor so sought by those who really appreciate a fine Coffee.



All of the flavor of RED STAR "reaches home"—it is ALWAYS fresh—for the goodness is sealed in the vacuum can!

Make RED STAR Your Regular Coffee!

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Senator BUTLER. Do you have any questions?

Mr. SOURWINE. I have just one question. I would like to know what that piece of colored cloth is that he has lying on the table.

Mr. FLETT. This flag is the flag of the cooperative commonwealth of nations which is to supersede the flag of all nations, including the flag of the United States.

Mr. SOURWINE. It is a little bit like the U. N.

Mr. FLETT. This is to supersede the United Nations. The United Nations is only during the transition period to obtain the cooperative commonwealth.

Mr. SOURWINE. I have no other questions.

Senator BUTLER. I see you have as an appendix to your statement two products advertised under the hammer and sickle.

Mr. FLETT. That is right.

Senator BUTLER. Can they be bought today in America?

Mr. FLETT. No, sir.

Senator BUTLER. When were they discontinued?

Mr. FLETT. They were discontinued about the time this movement went underground.

Mr. SOURWINE. That was apparently some time subsequent to 1930.

Mr. FLETT. As near as I can find out in checking their publications, they sold those products for several years during the late twenties and early thirties.

Senator BUTLER. Did you ever purchase any of them?

Mr. FLETT. No, sir.

Senator BUTLER. Do you know anybody that did?

Mr. FLETT. I have known people who have seen them. I have known people who have seen the flag of 30 years ago. I have known people who have bought their products.

Senator BUTLER. Is this Cooperative Central Exchange at Superior, Wis., still in existence?

Mr. FLETT. Yes, sir. Its name was changed.

Senator BUTLER. What is its present name?

Mr. FLETT. Its name is the Central Cooperative Wholesalers, Superior, Wis. When I ran across that book I made a study of it and I went to see John Malone, a special agent, Federal Bureau of Investigation, Chicago, Ill. I said, "Mr. Malone, if you get out of this book what I get out of it, my name is Austin Flett. My office is across the street. I am going to bring it out. I have been working on it since November 1952. That book is wonderful. And then when you piece that together with the international books that go back, that I have, to 1902, and the latest one is August 1957, I can give you the name of every citizen of the United States who has attended these congresses. And they are all foreign agents, pledging allegiance to the rainbow flag of the cooperative commonwealth."

Senator BUTLER. Thank you, Mr. Flett. I think that we have no further questions.

Mr. FLETT. O. K.

Senator BUTLER. That concludes the hearings of today.

Mr. SOURWINE. This communication has just been received. This is a letter from the Attorney General of the United States addressed to the chairman of the committee. He starts out:

"Because of the importance of the subject, I am taking the liberty of stating my views on the bill S. 2646."

This seems to ignore the fact that the Attorney General was requested by letter on February 6 to appear and testify on the bill. Nevertheless, this two and a half page letter purports to be the views of the Attorney General and I think perhaps you may want to put it in the record.

Senator BUTLER. Yes, I would. It will be made a part of the record. (The document referred to is as follows:)

MARCH 4, 1938.

HON. JAMES O. EASTLAND,
*Chairman, Committee on the Judiciary,
United States Senate, Washington, D. C.*

DEAR SENATOR: Because of the importance of the subject, I am taking the liberty of stating my views on the bill (S. 2646) to limit the appellate jurisdiction of the Supreme Court in certain cases, on which hearings are being held by the Subcommittee on Internal Security.

The bill would add a new section to chapter 81 of title 28 of the United States Code to be designated "section 1258." Chapter 81 relates to the jurisdiction of the Supreme Court. The proposed section would withdraw from the Supreme Court appellate jurisdiction in any case where there is drawn into question the validity of the following: (1) congressional investigations and contempts of Congress; (2) executive action by the Federal Government relating to the removal of employees on security grounds; (3) State statutes or executive regulations dealing with subversive activities within the State; (4) local school regulations concerning subversive activities within a teaching body; and (5) State requirements for admission to the bar, or any action taken thereunder.

In the first place, it is clear that this proposal is not based on general considerations of policy relating to the judiciary. It is motivated instead by dissatisfaction with certain recent decisions of the Supreme Court in the areas covered and represents a retaliatory approach of the same general character as the Court packing plan proposed in 1937. I disapproved of such an approach then and I do now.

Only once in our history has Congress enacted any legislation of this kind. This occurred in 1868 during the troublous days of reconstruction when jurisdiction was withdrawn from the Supreme Court in cases arising under the Habeas Corpus Act. Because it realized that this was a mistake Congress reversed itself, restoring the jurisdiction in 1885.

If this legislation should be enacted, constitutional questions in the fields dealt with in the bill would be left for decision to the 11 Federal courts of appeal and the highest appellate court for each of the 48 States. The law would differ in various parts of the country and the rights, privileges, and immunities of individuals would vary according to their addresses. One litigating in the courts of New York State might be treated differently from one litigating in the courts of the State of California. Likewise, a litigant in the United States Court of Appeals for the Fifth Circuit might be found to have different rights from one litigating in the Court of Appeals for the Seventh Circuit and from the litigants in the New York and California State courts as well. Chief Justice Hughes made this point in a letter to Senator Wheeler in connection with the unsuccessful proposal of 1937, to which I have adverted, to increase the number of Supreme Court Justices. He stated that review by the Supreme Court "should be for the purpose of resolving conflicts in judicial decisions between different circuit courts of appeal or between circuit courts of appeal and State courts where the question is one of State law; or for the purpose of determining constitutional questions or settling the interpretation of statutes; or because of the importance of the questions of law that are involved."

Full and unimpaired appellate jurisdiction in the Supreme Court is fundamental under our system of government. In delivering his recent Oliver Wendell Holmes lectures at the Harvard Law School, Judge Learned Hand stated that without authority in the Supreme Court "to keep the States, Congress, and the President within their prescribed powers" this Nation's form of government "would almost certainly have foundered." He added that "the courts were undoubtedly the best 'department' in which to vest such a power, since by the independence of their tenure they were least likely to be influenced by diverting pressure." I am convinced that in the absence of some final arbiter the maintenance of the balance contemplated in our Constitution as among the three co-

ordinate branches of the Government and as between the States and the Federal Government would soon disappear.

This type of legislation threatens the independence of the judiciary. The natural consequences of such an enactment is that the courts would operate under the constant apprehension that if they rendered unpopular decisions, jurisdiction would be further curtailed. Indeed, if the principle of this legislation should be approved, similar punitive enactments might be threatened against other Federal courts.

With the above considerations in mind, and having followed the arguments which have been made in support of and in opposition to this legislation, I am convinced that its enactment would be extremely detrimental to the proper administration of justice and harmful to our balanced system of government based on the separation of powers among the three great branches of our Government. Therefore, I urge that the committee report the bill adversely.

The Bureau of the Budget has advised that there is no objection to the submission of this report.

Sincerely,

WILLIAM P. ROGERS, *Attorney General*.

Mr. FLETT. Mr. Chairman, would you be interested in seeing that [indicating]?

Senator BUTLER. No. But from what you say I think—have you made all of this material available to the FBI?

Mr. FLETT. Yes, sir.

Senator BUTLER. Well, I think they would be better qualified.

Mr. FLETT. That was prepared for a Member of the Congress who decided not to bring it out. That report costs me about \$15,000.

Senator BUTLER. There being no further witnesses, this subcommittee will stand in recess until 10:30 tomorrow morning.

(Whereupon, at 4:40 p. m., the subcommittee recessed, to reconvene at 10:30 a. m. on Wednesday, March 5, 1958.)

LIMITATION OF APPELLATE JURISDICTION OF THE SUPREME COURT

WEDNESDAY, MARCH 5, 1958

UNITED STATES SENATE,
SUBCOMMITTEE TO INVESTIGATE THE ADMINISTRATION
OF THE INTERNAL SECURITY ACT AND OTHER
INTERNAL SECURITY LAWS, OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The subcommittee met, pursuant to recess, at 10:35 a. m., in room 424, Senate Office Building, Senator William E. Jenner presiding.

Present: Senator Jenner.

Also present: J. G. Sourwine, chief counsel; F. W. Schroeder, chief investigator; and Benjamin Mandel, research director.

Senator JENNER. The committee will come to order.

The first witness will be Clarence Manion.

Mr. SOURWINE. While Dean Manion is coming to the stand, I have several items to offer for the record.

First, here is a letter from the Defenders of American Education, requesting that it be inserted in the record.

Senator JENNER. It may go into the record.

(The letter follows:)

DEFENDERS OF AMERICAN EDUCATION,
March 1, 1958.

Senator JAMES O. EASTLAND,

Chairman, Subcommittee To Investigate the Administration of the Internal Security Act and Other Internal Security Laws, United States Senate, Washington, D. C.

DEAR SENATOR EASTLAND: The Defenders of American Education support Senator William E. Jenner's Senate bill 2646 to limit the appellate jurisdiction of the Supreme Court.

This is the only recourse the citizens have to protect the duly constituted lawmaking body, the United States Congress, and the States rights as guaranteed by the United States Constitution.

It is unfortunate that members of the Court are not selected for their qualifications and experience.

Perhaps at a later date the duly elected representatives of the people may take steps to outline the qualifications and avoid any further confusion and condition which would necessitate Members of Congress to take steps to curb the unconstitutional usurpation of power delegated to the Congress by the United States Constitution.

I would be grateful if this letter was included in the report of the hearings of the Senate Internal Security Subcommittee now being held on Senate bill 2646.

Sincerely,

Mrs. J. J. McLAUGHLIN,
Chairman Defenders of American Education.

Mr. SOURWINE. Next I have a letter in the nature of a statement, with attachments, from William R. Schneider, attorney of St. Louis. He asks that it become a part of the record.

Senator JENNER. It may be made a part of the record.
(The statement follows:)

ST. LOUIS, Mo., March 3, 1958.

Re Jenner Supreme Court bill.

Hon. J. G. SOURWINE,

*Senate Judiciary Committee Chief Counsel,
Washington, D. C.*

DEAR SIR: It is my desire to submit herewith a statement in support of the Jenner Supreme Court bill, my copy of which has been loaned and not returned, hence I do not give its number.

As to my qualifications to submit this statement, I am a 1911 graduate of the University of Michigan Law School, and have been in the general practice of law in St. Louis since that time. I have taught law, part time, in two St. Louis law schools; am now completing the final volume of my 12-volume third edition on the American workmen's compensation laws; have lectured professionally on political and economic subjects in many States, and in the discussion of such subjects appeared nationally on all the radio and television networks. My study of constitutional law very likely exceeds that of most lawyers since each of my three editions contain long chapters on constitutionality. The events of the past 25 years have caused me to examine the United States Constitution with considerable care and interest.

I have read with great interest the Georgetown Law Journal 1957 article entitled "Equal Justice Under Law" authored by my distinguished fellow townsman, Senator Thomas C. Hennings, Jr., from which article I quote the following:

"Two bills have been introduced (H. R. 408, H. R. 602, 85th Cong., 1st sess. 1957) which provide that inferior Federal courts and State courts 'shall not be bound by any decision of the Supreme Court of the United States which conflict with the legal principle of adhering to prior decisions and which is clearly based upon considerations other than legal.' I can think of few proposals which would do more to stagnate the progress of this Nation and make our Constitution unworkable."

In making that comment on the two House bills whose purpose is similar to the Jenner bill, Senator Hennings completely overlooks or disregards the Supreme Court decisions and other authorities quoted in my attached article entitled "Blind Samsons or Power Usurpers" which authorities conclusively show that what Senator Hennings thinks would stagnate the Nation has, on the contrary, been the law of the land for over 140 years, during which period the progress of this Nation was far greater than that of any nation on earth. Since it is quite likely that the article in the Sunday St. Louis Globe Democrat of March 2, 1958, in defense of the Supreme Court and in opposition to the Jenner bill will be filed with this committee, it may not be amiss to note that the above-mentioned authorities leave the mentioned article by the Law Quarterly editors in rather complete shambles.

The two mentioned House bills, as well as the Jenner bill, should, in my opinion, be so worded as to except from their intent and purpose Supreme Court interpretations of the common law, as noted in my mentioned attached Blind Samsons article. With that exception, the quotations in my said article, in the light of the recent Supreme Court decisions, including *Plessy v. Ferguson*, completely and emphatically support the need for the Jenner bill.

As to the Supreme Court decisions pertaining to questions of subversion, I am mindful that a Chicago Tribune editorial and the mentioned Law Quarterly editors criticize the Jenner bill on the ground a California law, and court, including Federal courts, might assess a 1-year penalty, while a Maine law, and court, might assess a 20-year penalty for the same offense. If that is to be considered a plausible argument against the Jenner bill, then it would follow logically that all State legislatures and State supreme courts and State sovereignty should be abolished, which is, of course, an utterly ridiculous argument against the Jenner bill, as such diversity in penalties has existed from the beginning of the Union of our separate sovereign States, even though it might for a time attract all the Communists to the 1-year penalty State.

In the light of the increasing and compelling climate of Communist subversion in the United States, and the recent Supreme Court decisions inadvertently giving enormous encouragement to that climate, I suggest, as a necessary accompanying measure to the Jenner bill, the congressional resolution mentioned in my second attached article entitled: "Seventeen Points For Survival" as the only completely adequate course provided by our Constitution (article I, sec. 8, par. 2) to meet the peril that confronts our Nation.

The two attached articles, which I submit as a part of my statement in support of the Jenner bill in addition to this letter, are obviously not intended to curry favor, for personal reasons or otherwise, with any of the three branches of our Federal Government, nor are they intended as an insult to any or all of them. They are intended to state frankly and correctly the unfortunate historic and present facts as they exist so the Congress, in giving them further consideration as one coordinated picture, may act accordingly and adequately to save the Nation from what portends.

Respectfully submitted,

WM R. SCHNEIDER, *Lawyer.*

BLIND SAMBONS OR POWER USURPERS

The Revolution Was is the title of a pamphlet written about 20 years ago by the eminent writer, Garrett Garrett. He referred to the inaugural address in which F. D. R. said: "We have had a revolution, and it is the eternal credit of American people that it was a bloodless revolution." The significance of that statement becomes apparent in part when we consider the following from F. D. R.'s 1930 speech as Governor of New York: "Wisely or unwisely, people know that under the 18th amendment Congress has been given the right to legislate on this particular subject, but this is not the case in the matter of a great number of other vital problems of government such as the conduct of public utilities, of banks, of insurance, of business, of agriculture, of education, of social welfare and of a dozen other important features. In these Washington must not be encouraged to interfere."

When he became President, attempts to interfere in those matters through the Agricultural Adjustment Act and the NIRA were promptly declared unconstitutional by the Supreme Court. Then much propaganda about the "nine old men," and the abortive attempt to pack the Supreme Court caused a frightened and later an eager Court to declare "Washington interferences" in local affairs to be constitutional. Though for 140 years such interferences had uniformly been declared by the Supreme Court as contrary to the intentions of the framers of the Constitution, as expressed in the Constitution, and in the Federalist Papers, prepared by some of the framers in 1788 to inform the people so they could vote intelligently on the rejection or adoption of the Constitution. It was the Constitution as so understood by the people, and no other constitution, that was adopted. The Federalist Papers were mentioned by Chief Justice Marshall in *McCulloch v. Maryland* as a superior source from which to ascertain the intention of the framers of the Constitution. He said: "No tribute can be paid to them which exceeds their merit." In Federalist Paper No. 53 Alexander Hamilton said, "The important distinction so well understood in America between a constitution established by the people, and unalterable by the government, and a law established by the government and alterable by the government, seems to have been little understood and less observed in any other country."

Now, without any amendment of the "people's" Constitution in the only legitimate manner provided or permissible, we now have a new law of the land, a new "constitution" which permits everything and more the 1930 Roosevelt address very correctly stated could not be done by the Federal Government.

Judge Thomas M. Cooley recognized for the past 75 years as the outstanding authority on the Constitution, said long ago in his eighth edition on Constitutional Limitations, p. 124: " * * * a court or legislature which should allow a change in public sentiment to influence it in giving a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty." The Supreme Court, in the *Dred Scott Case* (60 U. S. 393, 426), said: "If any of its (the Constitution's) provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. * * * Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day."

James Madison, one of the important framers of the Constitution, in a letter to Henry Lee, June 26, 1824, said: "I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the Nation. In that sense alone it is the legitimate Constitution."

Judges and lawyers as well as others generally understand that the courts have the right to change their opinions and judgments as to the meaning of the common law. But many do not know or are confused about why that is not true as to court opinions and judgments as to the meaning of the various provisions of the Constitution. Once the intent of the framers of the Constitution has been ascertained and established by the court judgment, that then becomes a part of the Constitution itself, namely, what the particular clause means and was intended to mean. Such judgment may then be changed only by amendment by the people in the manner prescribed by the Constitution.¹ It cannot then, as Hamilton stated and the Supreme Court itself stated, be legally or legitimately changed by "the government," the court. A court change thereafter would be as Judge Cooley said: "A reckless disregard of official oath and public duty." This sound fundamental principle was further emphasized in the 1935 case of *Blutck v. Scheidt* (293 U. S. 471). There the Supreme Court said: "The common law is * * * flexible and upon its own principles adapts itself to varying conditions. But here we are dealing with a constitutional provision. * * * To effectuate any change in these rules is not to deal with the common law * * * but to alter the Constitution. The distinction is fundamental and has been clearly pointed out by Judge Cooley in volume 1, Constitutional Limitations, eighth edition, page 124."

In the light of what has happened since the quoted Roosevelt speech of 1930, in the light of such Presidential statements as: "This bill should be enacted into law regardless of how reasonable may be any doubts of the Members of the Congress as to its constitutionality"; in the light of the actions of the Congress, all the Presidents, and the Supreme Court since 1937, have not we, the people, become the victims of blind Samsons who have pulled down the keystone of our temple, "a government by the consent of the governed," or are we the victims of power usurpers who, as Judge Cooley would put it, have manifested a "reckless disregard of official oath and public duty"? Most of the foregoing is very fully developed in a recent book entitled "Usurpers—Foes of Free Men," by Hamilton A. Long, of the New York bar, 4 West 43d Street, New York City.

To the extent the actions of the three departments of our Federal Government contravene the above-mentioned fundamentals, they exceed the powers granted to the Federal Government by the people. Such actions are, therefore, null and void and of no effect, other than as arbitrary, unwarranted, and illegal seizures of power residing exclusively in the States and the people. According to 40 Corpus Juris Secundum, pages 878 and 879, "a judgment is void on its face where the invalidity appears on the face of the record * * * It is a nullity and has no force or effect." Thus, where on the face of the record of any case before the Supreme Court, it acts without jurisdiction, acts in a field "not delegated to" it, but "reserved to the States, respectively, or the people," as is true in the matters above mentioned, then such judgment is void on its face and the lower courts are not required to follow it or to compound the behavior or usurpation of power that produced such judgment. (See 40 C. J. S., pp. 824 and 825.) In *Valley v. N. F. & M. Ins. Co.* (254 U. S. 348), the United States Supreme Court said: "Courts are constituted by authority, and they cannot go beyond the power delegated to them. If they act beyond that authority, and, certainly, in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply void, and this even prior to reversal."

Two additional quotations appear pertinent here: One from Felix Morley's *Power in the People*: "Regardless of the sanctity attributed to the dictates of the State (the Supreme Court), political authority has never been safely absolute. From the days of the Hebrew prophets to the present time, brave men and women have reserved to themselves the right to appeal from such dictation to the higher authority of conscience and morality. And when the occasion has appeared appropriate, they have not hesitated to say: 'If this be treason, make the most of it.'"

In October 1932, Calvin Coolidge and Alfred E. Smith jointly issued the following statement: "All the cost of Federal, State, and local government must be reduced without fear and without favor. Unless the people, through unified action, arise and take charge of their Government, they will find that their Government has taken charge of them."

¹ It required less than a year to adopt amendment XXI.

The signers of the Declaration of Independence complained bitterly, eloquently, and effectively against such usurpations of power over the people, as herein mentioned, even before they had our opportunity to behold the enormous advantages and unprecedented success of a government by the consent of the governed. How do we now compare in our vigilance, courage, and foresight with those patriots?

WILLIAM R. SCHNEIDER.

St. Louis, Mo.

RE 17 POINTS FOR SURVIVAL.

"We can ready our defenses and arm our allies, but still lose the struggle," said Senator Hennings in a recent report from Washington.

A group of children on a raft, drifting toward, but still a half hour away from the Niagara Falls, would not cause most of us average citizens to stop our ears and close our eyes, even with no responsibility for their safety other than humanitarian reasons. Yet, with complete responsibility for our safety, that is precisely what most of our "responsible" press and our Congress are doing about the real situation that has caused Senator Johnson's committee to promulgate "17 points for survival." All of them, commendably, pertain to strengthening our military potential. But none of those points take into account the very fundamental keystone fact that the world's mightiest military establishment will not save the nation that has it, if, like France in World War II, it, or the war potential behind it, is infested with internal subversion.

Such subversion was demonstrated in connection with the nullification of the acts of our Congress to save China from communism. Similar subversive activities caused us to lose the Korean war, with its 140,000 American casualties. Such subversion placed Alger Hiss behind Roosevelt at Yalta, and placed Hiss at San Francisco, to help organize the U. N. for the superior advantage of Russia (3 votes to our 1); placed Harry Dexter White where he could give our money printing dies and tons of money paper to the Russians, etc., etc. Our present internal subversive climate is so compelling it causes much of our press to laud the election of a national church leader and says nothing about his long and continuous record of Communist-front activity. A press that condemns, always for reasons other than anticommunism, any public figure that becomes effective against world communism, and never questions who in our mighty Army promoted Perez, condemns anyone who questions General Zwicker or anyone as to who at Fort Monmouth sends out sacks and sacks of secret scientific material for evaluation in Moscow by a Russian scientist recently defected. Nothing is said in most of our "responsible" press about the compelling subversive climate behind and around our mighty war potential, which makes even the Members of our Congress so fearful of political reprisal by domestic communism and its stooges that the ghost of the experience of Martin Dies, Velde, Matthews, and McCarthy stalks through the Halls of Congress like a frightful Colossus of Rhodes, and causes a retired rear admiral to comment: "From fear of political reprisal, not a single United States Senator nor Representative has the guts to stand on his feet and tell the American people the truth about communism and the United Nations and who's behind it."

When those in charge of our Government and our supposedly responsible free press are so beholden to the local influence of world communism, is there still hope for our "children on the raft"? Or will those who still could save them continue to stop their ears and close their eyes and shiver with fright and fear of reprisal?

Congressman Francis E. Walter has introduced H. R. 9937 as an amendment to the Internal Security Act. It is excellent, as far as it goes, and should be enacted promptly. But it is not sufficient to make successfully effective our mighty war potential in the light of the existing active subversion. Congressman Walter delivered an address before the Catholic War Veterans of Baltimore, June 1, 1957, on the mentioned Communist subversion. He is chairman of the Un-American Activities Committee of the Congress, and knows whereof he speaks. He said: "It is later than you think. It's 5 minutes to midnight."

Since our survival and the enslavement of those who live is at stake, shall we, nevertheless, foolishly continue to be frightened by the Communist line: "We must never do what Russia would do; endanger democratic freedoms, even of conspirators conspiring to destroy us. We must even refuse to take advantage of the very provision of our Constitution intended to protect us from such survival emergency?"

If the Congress is to act as a responsible body for the purpose for which it was elected, it will ignore completely that Communist and fellow traveler's line and adopt promptly a resolution to effect that the existing Communist conspiracy constitutes organized rebellion against the Government of the United States within the meaning of paragraph 2, section 9, article 1, of the United States Constitution. Then place Congressman Walter or J. Edgar Hoover in charge of the followthrough. That would promptly and constitutionally destroy the effectiveness of the Kremlin-directed, domestic, communistic conspiracy. Other free-world countries will then be likely to follow our lead and the lead of the several small nations that still have the courage to refuse diplomatic and trade relations with Russia. The Kremlin leaders would then soon be overthrown by their own people, instead of having their sagging fortunes at home bolstered by our naive desire to comply with their requests for summit conferences. But more immediately important is the fact that no aggressor can advance successfully against a powerful nation, if the aggressor does not have an effective fifth column in the nation under attack. "It is 5 minutes to midnight," but, with a responsible press and Congress, it need not be.

Very truly yours,

WM. R. SCHNEIDER.

Mr. SOURWINE. Here is a letter and statement from Aaron M. Sargent, representing the American Society of the Sons of the American Revolution.

Senator JENNER. That may be made a part of the record at this point.

(The statement and letter follow:)

THE NATIONAL SOCIETY OF THE SONS OF THE AMERICAN REVOLUTION,
Washington, D. C. March 3, 1958.

Subject: S. 2040.

Hon. JAY G. SOURWINE,
Senate Committee on Judiciary,
Senate Office Building, Washington, D. C.

DEAR JAY: Enclosed herewith is the original and a carbon copy of my statement on the above measure. Am sorry that the time available was too short to permit me to give you anything further, of an official character.

I congratulate the authors of this measure on doing an extremely good piece of legal drafting. There is no doubt in my mind as to the validity and constitutionality of the measure.

Very best regards.

Sincerely,

AARON M. SARGENT.

THE NATIONAL SOCIETY OF THE SONS OF THE AMERICAN REVOLUTION,
Washington, D. C., March 3, 1958.

Subject: S. 2040, Supreme Court jurisdiction.

Hon. JAMES O. EASTLAND,
Chairman, Senate Committee on Judiciary,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: Because of the limited time available to prepare and file this statement, there will be no opportunity for me to submit the specific provisions of the above bill to the proper committee of my organization. I am therefore commenting on the matter in an individual capacity and will present the text of certain resolutions which bear on the general subject.

At the last annual meeting of the National Society, Sons of the American Revolution, the following resolution was adopted, protesting the action of the United States Supreme Court in upholding the right of Communists to practice law:

"Whereas, the Supreme Court of the United States, in one of its latest decisions, lent its prestige and dignity in support of the proposition that the board of bar examiners of a State may not find and determine that a former member of the Communist Party is morally unfit to practice law.

"We think it is time to direct public attention to this latest example of false philosophy on the part of the justices of our highest court: Now, therefore, be it
"Resolved, That we do hereby exercise our unalienable right to criticize the

Supreme Court of the United States, and the several Judges thereof whenever such action appears justified. We suggest to other organizations, that they do likewise. We remind the Justices of that Court of their solemn oath to support and defend the Constitution of the United States."

Ever since your committee rendered a unanimous adverse opinion rejecting the court-packing plan of 1937, I have been concerned with the dangerous results likely to follow from the application of that principle. The deterioration in the Federal Judiciary and judicial processes brought about by our High Court, as now constituted, has created an emergency calling for some immediate corrective action. Congress, the executive branch of the Federal Government, and the States have all been so greatly hampered by recent decisions as to make it almost impossible to effectively control subversion and deal with conspiracies intended to overthrow the Government by unconstitutional means.

In the *Watkins* case, the radical element received almost carte blanche authority to subvert our institutions at will. Effective investigation and exposure became impossible. The most serious result likely to follow the Court's overthrow of the Smith Act is that there has been, by that decision, a general grant of amnesty such that prosecution will be impossible under a subsequent statute enacted to meet the Court's decision.

Without doubt, there has been conduct amounting to a want of good behavior on the part of certain of the Supreme Court Justices. There is constitutional power to bring about the removal of such Justices, and the Senate will, by an effective use of the power to grant or withhold confirmation, force the appointment of successors who are prepared to uphold and support the Constitution of the United States according to its true intent and purpose. That is true, but we do not have time to await the result of that long drawn out process. The situation demands immediate action that will be effective in the interim. In my judgment, this should be by enactment of H. 2610, removing from the Supreme Court jurisdiction cases in those areas where the greatest and most serious paralysis has resulted.

Section 1 of this bill restores to Congress its rightful and independent prerogative to conduct and control its own investigations.

Section 2 gives to the executive branch the authority it must have in respect to the employment and dismissal of Government employees.

Section 3 recognizes what should be the unquestioned right of the States to control subversive activities within their boundaries.

Section 4 restores the proper authority of local school boards and trustees in regard to subversive activities in the educational field.

Section 5 enables the legal profession to act independently in cleaning house and in keeping its house clean in respect to the denial to Communists of the right to practice law.

In each of these areas, wholly unsound Supreme Court decisions have made it impossible for these respective authorities to function, and the decisions in question amount to judicial legislation and excess of the authority conferred on the Court by the Constitution.

By enactment of this bill there will still remain the right of any aggrieved party to apply to the Federal district courts, to the courts of appeal in the several judicial circuits, and to courts of competent jurisdiction within the State. The protection of fundamental rights may safely be entrusted to these judicial bodies. It will be time enough to restore jurisdiction in respect to these cases to the United States Supreme Court after there has been a full-scale investigation, conducted for the purpose of determining why this thing has happened, and after there has been a full presentation of the facts to the people of the United States.

I strongly urge your committee to approve this bill without amendment, and to recommend its passage by the United States Senate.

Respectfully submitted.

AARON M. SARGENT,
Chancellor General.

Mr. SOURWINE. That is all I have to offer at this time.

STATEMENT OF CLARENCE MANION, SOUTH BEND, IND.

Senator JENNER. Dean Manion, you have a prepared statement?

Mr. MANION. I do have, Senator.

SENATOR JENNER. Are you here representing yourself as an individual or some organization?

MR. MANION. Just as an individual, Senator.

SENATOR JENNER. All right. You may proceed.

MR. MANION. I am Clarence Manion. For more than 25 years, I was professor of constitutional law at the University of Notre Dame, and for 11 years, I was dean of the University of Notre Dame Law School. At present, I am a practicing lawyer with offices in the St. Joseph Bank Building, South Bend, Ind.

The purpose of this statement is to support Senate bill 2616 introduced July 26 (legislative day July 8), 1957, by Senator William E. Jenner of Indiana. I believe that the appellate jurisdiction of the Supreme Court should be limited in the cases described and set forth in this bill.

The proposed legislation will restore constitutional powers to the Congress and to the State which the Supreme Court has usurped, destroyed and/or impaired by certain of its recent decisions and particularly by the 15 decisions cited in the report by a committee of the American Bar Association, called the committee on Communist tactics, strategy, and objectives. The full text of this committee report was placed in the record of this hearing during the course of testimony by Senator Jenner himself. The text will appear at page 241 of the printed hearings.

The Constitution of the United States established a government of laws, as distinguished from a government by men. In the first section of its first article, the Constitution declared that these laws are to be made by Congress and by no other body.

All legislative powers herein granted (says the Constitution at the very outset) shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives (Constitution of the United States, art. I, sec. 1).

The Constitution does not give the Supreme Court, or any other court, the power to make laws or to make "law." The Supreme Court itself has frequently held that "the laws" which are to be executed by the President and interpreted in the course of litigation in the courts are the acts of Congress and of Congress alone. For instance, the Supreme Court has said in the Steel seizure cases, and I quote:

* * * The Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that "All legislative powers herein granted shall be vested in a Congress of the United States * * *." After granting many powers to the Congress, article I goes on to provide that Congress may "make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof" * * * The founders of this Nation entrusted the lawmaking power to Congress alone in both good and bad times (says the Court). It would do no good to recall the historical events" the fears, of power and hopes of freedom that lay behind their advice. (*Youngstown Sheet and Tube Company v. Sawyer*, 343 U. S. 579, 585).

This conclusion is a constitutional commonplace. For practical purposes, nevertheless, in any proper case, a court of last resort interprets the law for everybody when it interprets the law for the parties before it. Thus, the law that is made by the legislature becomes the law as it is interpreted by the Court. When the Court's interpretation does violence to the intention of the legislature, the

effective result is judicial legislation which is enforced upon everybody until the legislature is willing and able to repudiate the Court's interpretation of the legislative will. A limited amount of this so-called judge-made law is inevitable. It is indigenous to our litigious society. However inconvenient and unjust this modicum of temporary and reversible judicial legislation may be, the prudent and conservative American tradition will dictate that a long-established practice of ultimate and final judicial review by the Supreme Court should not be changed for light and transient causes. But when a long train of judicial abuses and usurpations pursuing the same object threatens to reduce the constitutional powers of the legislative arm to impotence in the face of threatened Communist despotism, it is the duty of the Congress to throw off the misused mechanism of judicial usurpation and provide new guards for the security of its constitutional powers and for the protection of the country.

The record of the Supreme Court during the past 2 years in all cases affecting Communists and communism is a history of usurpations and invasions of the constitutional powers of Congress and the reserved rights and responsibilities of the States of the Union. Taken together, the 15 cases cited in the indicated report of the American Bar Association committee contain examples, not merely of judicial legislation, but of resulting anarchy where Congress and the States are left powerless to detect and/or correct the evil of Communist subversion which is thus immunized by a barricade of strange judicial constructions, often fabricated from the wreckage of the Court's own previous decisions.

In the Nelson case (350 U. S. 497), decided April 2, 1956, the Court concluded that the Federal Smith Act which prohibits the knowing advocacy of the overthrow of the Government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act which prescribes the same conduct. The language of section 3231 of title 18 of the United States Code, in which title the Smith Act appears, declares:

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

In spite of this explicit direction by Congress, the Supreme Court concluded that the administration of such State acts would conflict with the operation of the Federal plan. The effect of this decision was to render the antisedition laws of 42 States and those of Alaska and Hawaii unenforceable.

A few weeks later, April 30, 1956, the Supreme Court reversed the order of a Federal circuit court of appeals which had found that the Communist Party was a Communist-action organization and as such was subject to the registration provisions of the Federal Subversive Activities Control Act (*Communist Party v. Subversive Activities Control Board*, 351 U. S. 115). The most severe criticism of this decision is found in the dissenting opinion of Justice Clark. Said he:

[The majority] refuses to pass on the important questions relating to the constitutionality of the Internal Security Act of 1950, a bulwark of the congressional program to combat the menace of world communism * * * the Court here disregards its plain responsibility and duty to decide these important constitutional questions. I have not found in any case in the history of the Court where important constitutional issues have been avoided on such a pretext.

This decision left the Communist Party free to apply its subversive trade without effective restraint by State or Federal law. The Federal Anti-Communist Smith Act, for the benefit of which the Court had preempted the anti-Communist power of the States in the Nelson case, was eviscerated by the Supreme Court on June 17, 1957, when it decided the case of the *Fourteen California Communists v. the United States* (Yates v. U. S., 354 U. S. 208).

In its circuitous concern for the civil liberties of these sworn enemies of all liberty, the Court decided that teaching and advocating the forcible overthrow of our Government, even with "evil intent," was not punishable under the Smith Act as long as it was "divorced" from any effort to instigate action to that end. As one commentator observed at the time, "The Court's criteria would make it hard to convict anyone of any kind of subversion unless he were caught throwing a bomb." (Why Not Investigate the Court? Burnham, National Review, July 20, 1957.)

The Court's decision in the case of the 14 Communists, when added to its order in the case of the Subversive Activities Control Board and then combined with its conclusion in the Nelson case equals a "no-man's land" where the deadly Communist conspiracy now flourishes free from effective interference by State or Federal authorities.

This is the cumulative effect of but 3 of the 15 offending Supreme Court decisions that are cited and criticized by the indicated committee of the American Bar Association.

The Constitution empowers Congress to provide for the common defense of the United States and pursuant to this power, Congress is currently providing more than \$40 billion a year for the common defense against communism. The Constitution likewise empowers Congress to make all laws which shall be necessary and proper to carry this tremendous expenditure into effective execution. Nevertheless, while Congress can and does conscript and spread millions of our men and billions of our money through 70 nations to check the activities of Communists and communism throughout the world, Congress is presently stripped of its power to check Communists and communism within the United States itself. This condition is what the opponents of your bill, Mr. Chairman, will defend as the "separation-of-powers" principle in American constitutional law. It is indeed a striking example of the separation of powers: The separation of anti-Communist powers from Congress and the States by judicial usurpation—leaving the country defenseless against its sworn and deadly enemies. This supreme judicial "check and balance" was not directed at Congress merely, but at all branches of State and Federal Government including the State courts and inferior Federal courts, the decisions of both of which were pulverized indiscriminately in the Supreme Court's eagerness to protect the civil liberties of all those accused of Communist subversion. In a speech which you gave over the radio, Senator Jenner, you have summarized this sweeping subordination of all other judgments to the Supreme Court's own capricious will, and I think it deserves repetition. From Senator Jenner's speech:

If the Court had erred only once or twice, reasonable men could find excuses for it. But what shall we say of this parade of decisions that came down from our Highest Bench on Red Monday after Red Monday? The Senate was wrong. The House of Representatives was wrong. The Secretary of State was wrong.

The Department of Justice was wrong. The State legislatures were wrong. The State courts were wrong. The prosecutors, both Federal and State, were wrong. The juries were wrong. The Federal Bureau of Investigation was wrong. The Loyalty Review Board was wrong. The New York Board of Education was wrong. The California bar examiners were wrong. The California Committee on Un-American Activities was wrong. The Ohio Committee on Un-American Activities was wrong. Everybody was wrong, except the attorneys for the Communist conspiracy and the majority of the United States Supreme Court (Mundon Forum Broadcast 151, August 18, 1957).

The Senator might have added that the proponents of the Communist conspiracy are seldom, if ever, wrong when they appeal to the Supreme Court asking protection for Communist agents and punishment for the enemies of communism. When these enemies of the Communist conspiracy appeal to the Supreme Court for protection, a different construction of civil liberties is in order. For instance, last January 20, in the case of *Karadzule v. Artukovic* (No. 462, October term, 1957), the Supreme Court granted certiorari, reversed the lower courts, denied the writ of habeas corpus which had been granted to the defendant, Artukovic, and effectively handed this anti-Communist over to Tito's government for deportation and ultimate death in Yugoslavia.

The best summation of the broad Communist coverage afforded by some of the listed decisions came in a touching tribute to the Supreme Court from the Communist Daily Worker. Said this official organ of the Communist Party:

The Court delivered a triple-barrelled attack on (1) the Department of Justice and its Smith Act trials; (2) the free-wheeling congressional inquisitions; and (3) the hateful loyalty-security program of the Executive. Monday, June 17, is already a historic landmark . . . the curtain is closing on one of our worst periods (editorial, Daily Worker, June 19, 1957).

In a recent case, four judges of the Federal Court of Appeals in Washington went on record with the belief that in its "triple-barreled attack" the Supreme Court on June 17, 1957, had destroyed the House Committee on Un-American Activities altogether. Five of their colleagues disagreed and so the House committee is thus saved by an eyelash while an appeal is pending to the Supreme Court to see which group of Federal judges is right about the Supreme Court's "triple-barrelled attack," not upon communism, but upon a committee of the House of Representatives.

The Supreme Court decision in question is *Watkins v. United States* (354 U. S. 178). Abraham Lincoln said of the Supreme Court decision in the Dred Scott case, that it was "based on assumed historical facts which are not really true." The same may be said of the Watkins decision which torpedoed the House Un-American Activities Committee.

The Chief Justice's opinion in *Watkins* points to the "Royal Commissions of Inquiry as something to be imitated by congressional committees because of the Royal Commission's success in fulfilling their fact-finding missions without resort to coercive tactics" (*Watkins v. United States*, 1 L. ed. 2d 1273, 1286).

The report of the Canadian Royal Commission, which was created on February 5, 1946, to investigate the subversion disclosed by Igor Gouzenko, and the report of the Australian Royal Commission, which was created on May 3, 1954, to investigate the subversion disclosed by Vladimir Petrov, reveal the following differences between the meth-

ods used by Royal commissions and the methods used by congressional committees investigating subversion (report of the Canadian Royal Commission, June 27, 1946, pp. 640-684, and English authorities there cited; report of the Australian Royal Commission, August 22, 1955, pp. 437-453).

1. Royal commissions can arrest and jail witnesses. Congressional committees have no such power.

2. Royal commissions can hold witnesses without bail and incommunicado for many days and until after they are questioned. Congressional committees have no such power.

3. Royal commissions can compel witness to testify and impose sanctions for refusing to testify. They do not recognize a "fifth amendment" or privilege against self-incrimination, as do our congressional committees.

4. Royal commissions can have their police agents search witnesses' homes and seize their papers. Congressional committees have no such power.

5. Royal commissions may forbid a witness to have his lawyer present at the hearing. Congressional committees permit a witness to have his lawyer present, and even to consult with him before answering each specific question.

6. Royal commissions can require all concerned in the inquiry, including witnesses, to take an oath of secrecy. The questioning by the commissions can be secret and since only selected excerpts from the testimony are then made public, it is impossible to know whether a fair selection was made. Most congressional committee hearings are public and open to the press.

7. Royal commissions are not subject to or under the control of the courts, Parliament, or the Cabinet, and a commission "is the sole judge of its own procedure." Congressional committees are completely subject to Congress, and they need the assistance of the courts in dealing with contemptuous witnesses.

Just as footprints reveal the animal which passed by, so do the footnotes in the Watkins case reveal the source of the Court's error as to the powers of royal commissions. As the Chief Justice relied on a book written by a Swedish Socialist in deciding *Brown v. Board of Education* (347 U. S. 483, 494 (1954)), so does the Chief Justice twice cite an article written by a British Socialist, for the assumed historical fact which is not correct, namely, that "Seldom, if ever, have these commissions been given the authority to compel the testimony of witnesses" (18 Chicago L. Rev. 532). The article is replete with derogatory references to congressional committees. The two royal commissions most nearly comparable in purpose to the House Un-American Activities Committee often used their authority to compel the testimony of witnesses.

Another assumed historical fact in the Watkins majority opinion which is not true is the statement:

In the decade following World War II, there appeared a new kind of congressional inquiry unknown in the prior periods of American history.

The majority of the Court is referring to the House Un-American Activities Committee hearings. Had the majority read the history of this committee for the years 1938-48, written by its chief investigator during the decade, or the committee's annual reports, it would

have realized that the hearings held by Chairman Martin Dies in the period 1938-44 were no different in subject matter, scope, and methods than the hearings held in the decade following World War II (Stripling, Robert E., *the Red Plot Against America*, Drexel Hill, Pa., Bell Publishing Co., 1949).

During the 10 years of vigorous activity by the House Un-American Activities Committee prior to the Watkins decision, the committee's actions had never been criticized by the Supreme Court and, on 4 occasions, the Court refused to set aside contempt convictions imposed on witnesses who balked at testifying before this committee (*Hisler v. United States*, 170 F. 2d 273 (1948), appeal dismissed 338 U. S. 189, 196; *Barsky v. United States*, 167 F. 2d 241, 246 cert. denied, 334 U. S. 843 (1948); *Lawson v. United States*, 176 F. 2d 49, cert. denied, 339 U. S. 934 (1950); *United States v. Josephson*, 165 F. 2d 82, cert. denied, 333 U. S. 838 (1948)).

In none of the enumerated 15 cases involving communism do the majority members of the Court give any indication that they are informed on the subject of communism, or that they have in any way studied either the writings of the Communist leaders, the numerous exposures of the Communist conspiracy from the inside which began with Ben Gitlow's I Confess, or the authoritative reports on Communist espionage and subversion written by congressional committees and by the head of the FBI, and including the reports of this committee, the subcommittee before whom we are this morning.

Salus populi suprema lex. Our present Chief Justice did not hesitate to approve the order putting thousands of American citizens of Japanese ancestry into concentration camps in 1942 when he thought this was necessary to protect his native State of California from subversive activities. Those in favor of this move argued that the fact there was no evidence of sabotage or intended sabotage on the part of the Japanese-Americans in California proved that they were well organized and would hold back until they could strike with maximum effect (U. S. Department of the Interior, War Relocation Authority, *Wartime Exile: The Exclusion of the Japanese Americans From the West Coast*, Washington, Government Printing Office, pp. 113, 126).

Mild by comparison are the steps taken by Congress and the States (which these 15 cases now forbid) to protect our country from Communist subversion, which presents a far greater clear and present danger to our country's security. We are spending more to equip and defend ourselves and our allies from Communist aggression than we ever spent to stop Japanese aggression. The Japanese were unable to steal any of our military secrets, but the Communists have stolen many of our military secrets, including all the secrets of our atomic and hydrogen bombs which were known to Dr. Klaus Fuchs and Dr. Bruno Pontecorvo. The Communist aggressors control more than 10 times the population and land area than the Japanese had. The 137,000 casualties we sustained trying to stop communism in Korea are equivalent to the casualties we sustained in any equal period of time in the Japanese war.

There is ample precedent and authority for the means to be used by S. 2646 to accomplish its purpose. Article III, section 2, of our Constitution provides that—

the Supreme Court shall have appellate Jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

Congress has on a number of occasions deprived the Federal courts of all jurisdiction to hear certain cases and these jurisdictional regulations have always been upheld. Thus in the 1930's when liberals thought the Federal judiciary was leaning too far to the right, they sponsored and won approval of legislation which took away the jurisdiction of the Federal courts in important fields. Proponents of this legislation argued that the Federal judiciary was either misinformed or misinformed on the subjects of labor disputes, State tax laws, and public utility rates. The two leading liberal members of Congress sponsored the Norris-LaGuardia Act (29 U. S. C. A. 102-109) (reported in the press as having been drafted by a present member of the Court), which deprived all Federal courts of jurisdiction to issue injunctions in most labor disputes. In 1931, the Congress passed legislation which deprived the district courts of jurisdiction to enjoin the assessment or levy of State taxes (28 U. S. C. A. 1341), and also to interfere with public utility rates fixed by a State (28 U. S. C. A. 1342), notwithstanding the fact that Federal constitutional rights may have been violated. None of these laws has been repealed and all have been sustained by the courts.

Passage of S. 2646 will stop the Communists' boast that as a result of the recent Court decisions they don't have to tell Federal or State investigators anything but that the FBI has to tell the Communists everything. Passage will serve notice to both sides of the Iron Curtain that America's internal security is adequate to meet all Soviet subversion.

The constitutional provision for the enactment of this bill is crystal clear. Much has been said about the separation-of-powers principle. I want to emphasize that no express provision of the Constitution provides for the "separation of powers" or for the "independence of the judiciary" principles which are now advanced as arguments against S. 2646. On the contrary, Congress is expressly authorized to do what this bill proposes to accomplish. No such provision of the Constitution can be regarded as surplusage. No such provision has ever been so regarded by Congress or the courts.

Nevertheless, in my judgment, the fact that this bill is well supported by historical and legal precedent is secondary to the realities of our war against communism. The Rockefellers, the Gaithers, and others are reporting to us that the United States is threatened with annihilation by the Communists. The President confirms this and so does the Defense Department. Senate bill 2646 presents us with a condition rather than a theory. Strong as we are and strong as we may become in our anti-Communist military bastions here and around the world, the fact remains that the immunities which these Supreme Court decisions extend to our enemies here, behind our own lines, will still obtain when and if our cold war with communism and Communists suddenly gets hot. Can Congress provide for the common defense in spite of the interdictions of the Supreme Court? The Constitution says that Congress can and your bill, Mr. Chairman,

proposes that it do so. In my opinion the issue before this committee is just as simple as that.

Senator JENNER. I certainly want to thank you, Dean Manion, for a splendid statement.

Are there any questions, Mr. Sourwine?

Mr. SOURWINE. I would like to ask the dean 2 or 3 questions, if I may.

Senator JENNER. Proceed.

Mr. SOURWINE. Dean Manion, what do you think of the argument that article III, paragraph 2, clause (2), of the Constitution, giving the Congress authority to make restrictions and regulations respecting the Supreme Court's appellate powers, must be construed as, first, a grant of absolute power and then a grant of minor authority to the Congress to be exercised with respect to the prior grant of absolute power, thus leaving Congress in a position to make only minor regulations?

Mr. MANION. Well, I think that is rather specious and completely unjustified. There is no judicial precedent putting that kind of a conclusion on this grant, and this bill, if that in substance be admitted, does not violate it. The jurisdiction of the Supreme Court is not being swept aside, the appellate jurisdiction of the Supreme Court at all, and nobody has a vested right to appeal to the Supreme Court, Mr. Sourwine. Any lawyer who has tried to get a certiorari for a taxpayer knows it is next to impossible to get the Supreme Court to consider all cases that come up from lower jurisdictions. They regulate their own appellate jurisdiction very seriously and in a far more sweeping way than Senator Jenner's bill proposes to regulate it or restrict it, but if I might underscore one point, which it seems to me is not sufficiently emphasized, as you know as counsel for this committee, and as Senator Jenner well knows, all of the men officially connected with this subcommittee in its magnificent work during the past years, this Communist menace is a pervasive thing. We are not fighting Hitler, or Caesar, or Napoleon. We know that every country that has been captured by communism since the end of World War II has been taken by its fifth column. They took China with Chinese. They took Czechoslovakia with Czechs. They took Hungary with Hungarians. And they propose to take America with Americans. These decisions in cumulative effect gives them the right to do that without interference.

The Supreme Court, in my judgment, makes the same mistake that so many commentators and editorial writers make on the subject of communism. They recognize there is a Communist menace in the Middle East, and that there is something about East Germany which is wrong. They fail to recognize that the Communist who operates in Washington operates under the same directives that the Communist operates under in Moscow, and that there is no difference between the line of authority between Khrushchev and his Moscow minions who carry out his will over there.

Mr. SOURWINE. In the Dennis case, Dean Manion, the Supreme Court did recognize that communism was a conspiracy and that it was aimed at the security of the United States. In some of the more recent decisions, especially the Yates-Schneiderman cases, which you characterize as the 14 California Communist cases, there appears to be a reversal of the decision there.

Mr. MANION. Yes.

Mr. SOURWINE. The Communist Party is just treated as another political party.

Mr. MANION. That is what alarmed me; yes, sir.

Mr. SOURWINE. What do you think of the argument that since the Supreme Court is given original jurisdiction over cases to which a State is a party, and since original jurisdiction necessarily comprehends appellate jurisdiction, the Congress cannot take away from the Supreme Court its appellate jurisdiction over any case to which a State is a party?

Mr. MANION. Well, I take exception to the minor premise, Mr. Sourwine. I do not think that the grant of original jurisdiction to the Supreme Court in State cases contemplates appellate jurisdiction in State cases. Any State which desires to file a suit of any kind in the Supreme Court of the United States has a constitutional right to do it, and neither Senator Jenner's bill nor any other bill can deprive it of that right because it is written unequivocally into the Constitution, but Congress has the same right to put exceptions upon appeals by States through lower courts if they elect to start down there that it has to interfere with the appellate jurisdiction of the Supreme Court in any case in which the individual may be involved.

Mr. SOURWINE. In other words, you are saying unequivocally that original jurisdiction does not comprehend appellate jurisdiction, but they are two different things?

Mr. MANION. Entirely, it seems on the face of it the reason the Supreme Court is given original jurisdiction in cases involving States goes back to the dignity of the State. It was understood by the men who framed the Constitution that it should not be dragged up through appellate courts, but should be able to go to headquarters and get a final answer at that point, but if any State was going to work its way up through the lower courts that was invoking appellate procedures which the Constitution gave the Congress the right to regulate.

Mr. SOURWINE. Will you comment, Dean Manion, on the argument that under the line of cases which began with Mr. Story's doctrine that the Supreme Court's appellate power is constitutionally granted, the Congress actually does not have the power to strip the Supreme Court of its appellate jurisdiction in toto or of any substantial segment of it?

Mr. MANION. Well, I don't know exactly what authority there is for that conclusion. The Constitution in many cases gives full grants of power and then subsequently puts checks upon the exercise of that power. For instance, in the case of Congress. Congress is empowered in section 1 to do certain things and then in section 9, I believe it is, but no direct tax and so forth shall be passed, and all of these general powers are subsequently qualified by restrictions. So a general grant of power which is followed by a grant to Congress of the right to restrict it in certain ways, it seems to me, is pretty clear.

Mr. SOURWINE. Dean Manion, it is true, is it not, that all of the line of cases following the Story doctrine and taking the position that the appellate power is constitutionally granted arrive at the same result as the other line of cases by assuming that whenever Congress has in terms presumed to grant appellate authority, what it has actually been doing is by implication—that is, by leaving them out—indicating the areas in which it was restricting authority?

Mr. MANION. That is right.

Mr. SOURWINE. So that both that line of cases and the majority line of cases which hold that unless Congress grants appellate authority the Supreme Court has none, so that both of those lines of cases arrive at the same result so far as it concerns affirmance of the right of Congress to regulate and restrict appellate authority?

Mr. MANION. That is true. I might point out in that connection, Mr. Sourwine, that Justice Douglas himself in his latest book, *We, the Judges*, states unequivocally, and I can supply the page number for the record later, that Congress has complete control over the jurisdiction of the courts. This is a very recent statement by one of the involved Justices himself.

I have never seen that control of appellate jurisdiction seriously questioned until this bill was dropped into the hopper.

Mr. SOURWINE. Have you ever run across a case which held that there was a basis for questioning the right of the Congress to regulate or make exceptions to the appellate jurisdiction?

Mr. MANION. I never have, and it was always my judgment as a constitutional law teacher that ever since the *McCardle* case, where Congress lifted the consideration of this case out from under the Supreme Court right while they were debating it, and the Supreme Court unanimously agreed that Congress had the right to do so, it would seem to me that that was an all-time affirmance of the power.

Mr. SOURWINE. I would like to ask you some questions about the impact of congressional amendments upon this provision. You have said in effect that the clause of the Constitution granting the power is necessarily affected—that is, granting the appellate power—is necessarily affected by the portion of the same clause which gives the Congress the power to regulate.

Mr. MANION. That is right.

Mr. SOURWINE. It has been contended here that either of 2 amendments to the Constitution might affect that grant of power in article III, clause (2), paragraph 2. With respect to one of them, the 14th amendment, would you have any comment? Does the 14th amendment constitute in any way a prohibition upon the Congress, or is it solely a prohibition upon the States?

Mr. MANION. It has always been held unequivocally to restrict the States and not Congress at all.

Mr. MANION. From that standpoint then would you say the 14th amendment can or cannot have any impact upon the grant of authority to Congress to regulate the appellate jurisdiction of the Supreme Court?

Mr. MANION. Well, in all of my reading of cases and comments I have never heard that argument made before, Mr. Sourwine.

Mr. SOURWINE. It has been made here.

Dean Manion, the argument has also been made here that the 5th amendment has an impact upon the congressional authority to regulate and restrict the appellate jurisdiction of the Supreme Court, and that if any of the classifications in Senator Jenner's bill are unreasonable there is a lack of due process which might render the bill unconstitutional. The witness who made this statement did not contend that any of the provisions were unconstitutional, but he suggested that a court might find them so, and that this was a serious constitutional problem. Would you comment on that?

Mr. MANION. Well, again, I think that is a very farfetched argument. It is like some of the testimony I read on the train where one of the witnesses raised the possibility that the Supreme Court might hold this bill unconstitutional and go ahead and entertain appellate jurisdiction anyhow.

Well, if the Court isn't going to obey Congress, then the justification for legislation even more drastic than Senator Jenner has suggested would seem to be in order. I cannot imagine that any judicial interpretation would reach into the fifth amendment to take from Congress a power that is given to it in the most express language, the power to make exceptions to the appellate jurisdiction of the Supreme Court.

Mr. SOURWINE. Even assuming, Dean Manion, that there is such a constitutional problem, would you have a judgment on whether the classifications in Senator Jenner's bill are reasonable?

Mr. MANION. Well, I think they are entirely reasonable.

Mr. SOURWINE. There are none of those classifications which come down to a particular individual, is there?

Mr. MANION. Oh, no.

Mr. SOURWINE. There is nothing that would rest especially upon a particular class of individuals?

Mr. MANION. No, and, Mr. Sourwine, everybody is so sensitive about the possible violation of civil liberties by Communists and the fact that a man who is pushed around in a State court or in a Federal court should have a right to go to the Supreme Court and have his case looked over again. How about murderers and embezzlers and others who go to the State court for a decision which is final and certiorari is denied, and that is it? There are hundreds of precedents which deny the right of individuals to appeal to the Supreme Court of the United States whenever in their judgment due process of law has been denied.

Mr. SOURWINE. One more point, Dean: There has been considerable made during the testimony on this bill on what opponents of the bill say is a serious threat of lack of uniformity of decisions if the bill becomes law. What has been your observation with respect to the tendency of the Supreme Court to grant certiorari in cases for the purpose of producing uniformity in the decisions of the various circuits?

Mr. MANION. They haven't been at all good, and it all depends on whose ox is being gored. I know, for instance, the farmers in Indiana and Ohio who have been trying for 10 years to my knowledge to challenge the constitutionality of the Agricultural Adjustment Act, which forces them to make crop allotments and penalizes them if they do not. None of those men have ever been able to get their cases entertained by the Supreme Court, although some of them have mortgaged their farms in order to make the appeal.

No concern is shown for the taxpayers. I can point out circuit courts of appeal where a certain rule with respect to tax valuation applies, and the Bureau of Internal Revenue goes ahead on the rule that if you want the circuit court to decide that, go ahead and pay the money for the appeal. There is no great passion for uniformity, Mr. Sourwine, in taxpayers' cases. It seems to me these taxpayers should be entitled to the same vigilance, according to the Constitu-

tion, and they do not get the same care and scrutiny that the litigants in the 14 cases got.

Mr. SOURWINE. The witnesses here have also deplored what they say will be a loss of uniformity of decision among the State courts of last resort if this bill should pass. Would you have a comment on the present state of uniformity among the State courts of last resort?

Mr. MANION. There is the widest kind of disparity. Nobody is disturbed about it. Various criminal codes are variously interpreted. If any litigant feels the 14th amendment is being violated he can ask for certiorari and maybe he will get it and maybe he doesn't. The fact that there is an attempt to make a uniform determination on these things has never been serious.

Mr. SOURWINE. The lack of uniformity is part of the genius of our form of government.

Mr. MANION. It has always been recognized as such. It is contemplated under the 10th amendment that the State shall be the final arbiter on matters which reside within its jurisdiction. Nobody has questioned that before. As a practical matter it seems to me the cases involving congressional investigation, the venue will be in Washington, D. C., in 99 cases out of 100, so you will have a uniform interpretation. The circuit court of appeals in this District will be the final judge, and the fact they can't run over to the Supreme Court will not cause any lack of uniformity in these cases, in my judgment.

Senator JENNER. There are no further questions, Dean Manion. We certainly appreciate your being here and giving us the benefit of your long experience.

The next witness is Leonard Boudin, Emergency Civil Liberties Committee.

Mr. SOURWINE. Is Mr. Boudin in the room?

He is not here.

Mr. Chairman, I do not have it with me, but I will ask permission to place in the record at this point the correspondence and communications we have had with the Emergency Civil Liberties Committee, of which Mr. Boudin was to represent.

(Mr. Boudin later appeared and testified at the afternoon session of this day.)

Senator JENNER. They may be made a part of the record.

(The correspondence follows:)

EMERGENCY CIVIL LIBERTIES COMMITTEE,
New York, N. Y., February 19, 1958.

Senator JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee,
Senate Office Building, Washington, D. C.

DEAR SIR: Will you please permit the Emergency Civil Liberties Committee to testify against S. 2646, hearings on which I understand have been started before your committee?

We would like to have our general counsel, Leonard B. Boudin, testify and would prefer Thursday, March 6, if the hearings last that long. If not, we would like to be called as near the end as possible.

I will appreciate your notifying me when it would be possible for Mr. Boudin to appear.

Very truly yours,

CLARK FOREMAN, *Director*.

P. S. Would you also please send us a copy of the bill, S. 2646 and a copy of the hearings to date?

FEBRUARY 21, 1958.

Mr. CLARK FOREMAN,

Director, Emergency Civil Liberties Committee, New York, N. Y.

DEAR Mr. FOREMAN: Senator Eastland has turned over to me your letter of February 19 requesting time for testimony by your general counsel, Leonard B. Boudin, on the bill S. 2646. You specify you prefer Thursday, March 6, if the hearings last that long, and if not, would like to be called as near the end as possible.

Present plans of the subcommittee are to close the hearings on March 5. Time is being allotted to you on Tuesday, March 4. The hearing will convene at 10:30 a. m. in room 424, Senate Office Building.

I tried twice to reach you by telephone today, at about noon and at about 3 p. m., to see if this would be satisfactory; but the report in both instances was that you were out to lunch. If this date is not satisfactory, it may be possible to allot time for an appearance by Mr. Boudin on an earlier day; but I'm sure you will realize that if you want another date you should let me know as speedily as possible, as the hearing schedule is rapidly filling up.

Your attention is called to the committee rule requiring the statement of a witness to be submitted at least 24 hours in advance of his testimony.

Sincerely,

J. G. SOURWINE, *Chief Counsel.*

EMERGENCY CIVIL LIBERTIES COMMITTEE,

New York, N. Y., February 25, 1958.

Mr. J. G. SOURWINE,

*Chief Counsel, Committee on the Judiciary,
Senate Office Building, Washington, D. C.*

DEAR Mr. SOURWINE: Thank you for your letter of February 21.

Mr. Boudin will communicate with you by telephone in order to avoid the conflict with his appearance before the Supreme Court.

Yours sincerely,

CLARK FOREMAN, *Director.*

Memo for file: Mr. Boudin phoned, asked change time for his testimony from March 4 to March 5. This was agreed to.

J. G. B.

Senator JENNER. The next witness is Arthur J. Freund, St. Louis, Mo.

STATEMENT OF ARTHUR J. FREUND, ST. LOUIS, MO.

Senator JENNER. You have a prepared statement?

Mr. FREUND. Yes.

Senator JENNER. Are you here as an individual or representing some organization?

Mr. FREUND. I am representing no organization.

Senator JENNER. You may proceed.

Mr. FREUND. I appear before this Subcommittee on Internal Security at the invitation of Senator Thomas C. Hennings, Jr., of my State and Hon. J. G. Sourwine, chief counsel for the subcommittee, to express my views on S. 2646. My position may be stated simply and without qualification. I am unalterably opposed to the enactment of this measure.

It is now a matter of public record that the board of governors of the American Bar Association has expressed disapproval of S. 2646, and that the house of delegates of the association, its official governing body, in Atlanta, Ga., on February 25, 1958, voted its disapproval of the measure in a formal resolution which is by now before you.

Mr. SOURWINE. I would say to the witness that the full text of the resolution and the full text of the transcript of the house of delegates

at the time it was adopted have been placed in the record of these hearings.

Mr. FREUND. I concur in this action of the association, of which I am a member; it has my wholehearted personal approval. It should be unnecessary to discuss the constitutionality of S. 2046, because the proposal should be defeated upon its substantive demerits. However, it is highly questionable that the measure would have any legal effect if, by some misfortune, it should be enacted into purported law. For article III of the United States Constitution provides, among other things, that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as Congress may establish, and, further, that the Federal judicial power shall extend to all cases arising under the Constitution, the laws of the United States, and its treaties.

Mr. SOURWINE. Mr. Freund, may I interrupt? Are you saying, or perhaps I misunderstand you, are you saying that that section of the Constitution should be read as though it gave all of the judicial power to the Supreme Court?

Mr. FREUND. All of the judicial power? No; not all of the judicial power. It gives the supreme judiciary power to the Supreme Court.

Mr. SOURWINE. It gives the judiciary power of the United States to the Supreme Court and the inferior courts.

Mr. FREUND. To the inferior courts, as Congress may establish.

Mr. SOURWINE. In such proportions as the Congress may direct, except the jurisdiction which is, by the Constitution, conveyed to the Supreme Court; is that not right?

Mr. FREUND. I would say it was right, if it were not too general. I mean if we are talking about such matters as special reviews by special courts, such as tax courts, or the limitation of jurisdiction and diversity cases, yes, but what I have in mind are these fundamental rights given to individuals under the Bill of Rights.

Mr. SOURWINE. I didn't mean to sidetrack you, sir.

Mr. FREUND. No; that is perfectly all right. These are only my opinions, and I appear solely to express the extent of my feeling on this subject, with my limited knowledge. In each of the five categories wherein S. 2046 would withdraw cases from the jurisdiction of the Supreme Court, it is inevitable that, in almost very such case, some right given to a person under the Constitution would be drawn into question.

Mr. SOURWINE. If you pardon me, may I ask another question, Mr. Freund?

Mr. FREUND. Certainly.

Mr. SOURWINE. Do you, yourself, challenge the constitutionality of the provision of section 2 of article III which gives the Congress authority to regulate the jurisdiction of the Supreme Court and make exceptions to it?

Mr. FREUND. You can't challenge the constitutionality of a constitutional provision. I think what you do is to determine how a particular case fits into a specific category of the Constitution with respect to the whole instrument.

Mr. SOURWINE. But the phrase you just read, sir, appeared to indicate that you felt this bill was a challenge to the Constitution.

Mr. FREUND. I do.

Mr. SOURWINE. But, since this bill only seeks to utilize an authority which is specifically granted by the Constitution, how can it be a challenge to the Constitution?

Mr. FREUND. I think it is a challenge to the Constitution, probably, not in its actual legal verbiage, but in its effect upon individual rights guaranteed under the Constitution that I anticipate would be affected.

Mr. SOURWINE. You mean that by this bill, if Congress passed it, Congress would be doing something which the Constitution authorizes it to do, but would be doing it with an unconstitutional effect or in an unconstitutional way?

Mr. FREUND. I would accept that.

Mr. SOURWINE. That is what you mean?

Mr. FREUND. Yes.

Senator JENNER. Proceed.

Mr. FREUND. It is my view that the attempt to circumvent or defy the Constitution by S. 2046 would be a legislative nullity. My concern with S. 2046 and my opposition to it do not rest solely upon the ground that it is probably invalid as in conflict with article III of the Constitution. I approach the problem from concerns that stem from our political philosophy and our way of life. Any objective appraisal of American political history will demonstrate that the integrity and uniformity of judicial review and the independence of the judiciary are vital to our system of government and that they constitute one of the greatest political achievements of man. These characteristics are essential to our cherished ideal of equal justice under law as we have developed it in our system. It is the hope of mankind everywhere. S. 2046 would impair and imperil individual and human freedom as set forth in our Bill of Rights. The maintenance of those rights under law is essential to our form of government and, if they are destroyed, our Nation falls with them. The establishment of individual rights under law is the most notable distinction between our democratic society and the Communist system. Should we fail our own people and those in other countries who maintain these democratic concepts, we have surrendered to a system we oppose and despise.

S. 2046 would create legal chaos, because it would destroy legal uniformity. It would destroy equal justice under law, because what is law would be left for final decision to courts of inferior jurisdiction, with no final determination by the Supreme Court of the United States. These inferior courts, despite the high quality of their judicial personnel and their zeal to uphold the Constitution, would certainly differ in their views, so that what was law in one part of our country would not be applicable in another. Indeed, with panels of judges sitting in our United States courts of appeals, there may on occasion be different rules within the same circuit, depending upon the judges who review a specific case. The same contrariety of opinion as to the protection of the individual could exist among the highest courts of each of the States, and it is unthinkable that there should be no final, authoritative, judicial voice.

I should not want it thought that I would condemn criticism of the opinions of the Supreme Court by any member of my profession or by any informed person. As individuals, we are entitled to our own views of the soundness of any opinion or series of opinions by the Court. But, regardless of our individual views as to particular

decisions, we must be dedicated to the support of the Court as an institution in its role of final and conclusive judicial authority.

The Constitution is our supreme law, intended, as Mr. Chief Justice John Marshall declared, "to endure for ages to come." In cases of disagreement, we have established the judiciary to interpret the Constitution and the laws of the United States. The Supreme Court is the embodiment of judicial power, but S. 2646 is intended to jeopardize the very institution of judicial review in some of the areas most critical to the protection of human rights.

Mr. SOURWINE. Begging your pardon, sir; you are not suggesting that the term "judicial review" is equal with the term "Supreme Court review," are you?

Mr. FREUND. Yes.

Mr. SOURWINE. Well, we can have judicial review without ever going to the Supreme Court, can't we?

Mr. FREUND. Yes, but not in the sense that I am using it.

Mr. SOURWINE. You are using it as meaning only as being synonymous with Supreme Court review?

Mr. FREUND. I am viewing it in the context that I mentioned here; that the Supreme Court is the embodiment of judicial power.

Mr. SOURWINE. You mean of all judicial power?

Mr. FREUND. Yes; I should think so. I mean we get into a philosophy there on which we could agree and disagree, depending upon the circumstances.

Mr. SOURWINE. There is a vast reservoir of judicial power in the district courts and circuit court.

Mr. FREUND. Oh, yes.

Mr. SOURWINE. They do have power to review the actions of the Executive or to review matters that come up from States?

Mr. FREUND. That is correct. You are talking about the district courts now?

Mr. SOURWINE. Yes.

Mr. FREUND. Which is not reviewable?

Mr. SOURWINE. Well, the point I am trying to get at is you can have judicial review without ever going to the Supreme Court.

Mr. FREUND. You can have judicial power; you can have the exercise of judicial power without ever having the exercise of judicial review, but, when you take away the right of judicial review from the Supreme Court of the United States in its largest sense, then I think you have affected the institution in its embodiment of judicial power, if I make myself clear.

Mr. SOURWINE. I was simply trying to clarify what you mean, Mr. Freund. I take it you meant that judicial review is synonymous with appellate review by the Supreme Court.

Mr. FREUND. Yes; I think in these certain areas that I have in mind.

Mr. SOURWINE. Yes.

Mr. FREUND. Affecting rights guaranteed under the Constitution of the United States.

Mr. SOURWINE. Yes.

Mr. FREUND. That is the thing I am concerned with.

Mr. SOURWINE. With regard to rights guaranteed under the Constitution of the United States, using the term judicial review as being synonymous with appellate review by the Supreme Court.

Mr. FREUND. Yes, for the purpose of my remarks.

Mr. SOURWINE. Now, tell me, Does any person have a constitutional right to judicial review in the sense that he has a constitutional right to appellate review by the Supreme Court?

Mr. FREUND. In that sense perhaps no, except if you again use it in the terminology that if he is denied a right guaranteed to him, let us say, under the Bill of Rights, I think that under our system as it exists today he is entitled to judicial review by the Supreme Court of the United States, assuming that he fulfills all of the procedural steps.

Mr. SOURWINE. You mean he has a right to have his case determined by the Supreme Court of the United States?

Mr. FREUND. The Supreme Court has the right to consider it, put it that way.

Senator JENNER. That is different entirely.

Mr. SOURWINE. That is a different thing entirely.

Mr. FREUND. No; I don't think so, because I think the two come together; namely, if the Supreme Court upon the review of the record before it is satisfied that the man has been denied a constitutional right they have the authority to accept that case and to determine that right. The right of the individual, however, goes only to the extent, and I think it is a right, of presenting it to the Supreme Court for that determination.

Mr. SOURWINE. You are saying that an individual has a constitutional right to file an application for certiorari with the Supreme Court if his case involves asserted denial of a constitutional right?

Mr. FREUND. In essence, yes.

Mr. SOURWINE. Well, where in the Constitution does that right stem from?

Mr. FREUND. Well, I think that has been—I mean, I think that goes as a matter of procedure. I mean, I think what we are talking about are broad procedural matters, which, of course, are very important in affecting the determination of individual rights. So that we get into, I think we are getting into, at least that brings us to a morass of impracticalities, if I may say so.

Mr. SOURWINE. I am trying to keep us out of a morass of impracticalities and on a firm ground where the record will show exactly what we are talking about.

Mr. FREUND. What I am talking about is essentially that if a person has been denied a right guaranteed to him under the Constitution of the United States—and I am using the Bill of Rights as my premise for that—I think that as a matter of right, as a matter of constitutional right under our Constitution and laws of the United States, he has a right to proceed with that cause up to the Supreme Court of the United States.

Mr. SOURWINE. You say he has a constitutional right, and then you say under the Constitution and laws.

Mr. FREUND. Yes; I think because under the provision of the Constitution which I mentioned before, namely, that the judicial power of the United States shall be vested in one Supreme Court and such other inferior courts as Congress may establish, and that the Federal power shall extend to all cases arising under the constitutional laws of the United States in its treaties.

Mr. SOURWINE. Now, the leading case out of this is *McCardle*, isn't it?

Mr. FREUND. Yes.

Mr. SOURWINE. And in the McCardle case, did not the Supreme Court itself recognize that Congress had the right to withdraw its jurisdiction, and was not there involved there a habeas corpus case where the liberty of a man was the issue?

Mr. FREUND. I think what the Supreme Court did was probably sidestep the issue—in deference to what it believed, probably. I mean, I was not there.

Mr. SOURWINE. Neither was I.

Mr. FREUND. I know that. Not only that, we never will be.

Mr. SOURWINE. The Supreme Court did say definitely in that case, did it not, that it had no jurisdiction except as granted by the Congress?

Mr. FREUND. That is probably—I have not the exact text of the opinion before me.

Mr. SOURWINE. Well, the text of the opinion has been put in this record.

Mr. FREUND. I suspect it has.

Mr. SOURWINE. Do you know of any case which overrides that concept?

Do you know of any decision by the Supreme Court which holds that Congress does not have the right to restrict or regulate the jurisdiction, appellate jurisdiction, of the Supreme Court?

Mr. FREUND. It has never come up in this way before, where a right guaranteed under the Bill of Rights has been affected, so far as I know. I am not—

Mr. SOURWINE. Well, there are some briefs in the record on that subject. I simply wanted to know if you knew of any case to the contrary.

Mr. FREUND. No, I have no knowledge.

Senator JENNER. Proceed.

Mr. FREUND. And whether the McCardle case would be right today is, of course, something we cannot answer.

Mr. SOURWINE. By "right," you mean whether the present Supreme Court would arrive at the same decision?

Mr. FREUND. No, I do not mean that. No. I mean just what I said: if it would be considered to be a proper interpretation of the Constitution.

Mr. SOURWINE. Considered by whom?

Mr. FREUND. By the Supreme Court of the United States.

Mr. SOURWINE. That is what I said.

Mr. FREUND. Whether that would be considered the proper one. I think it would depend a good deal on the circumstances under which the facts arose. After all, that is how most of these cases are decided.

Mr. SOURWINE. They are decided on the facts and not on the law?

Mr. FREUND. On the facts under the law, yes. At least that is what I have been taught has been done.

Senator JENNER. Proceed, Mr. Freund.

Mr. FREUND. The Supreme Court is the embodiment of judicial power, but S. 2646 is intended to jeopardize the very institution of judicial review in some of the areas most critical to the protection of human rights.

The privilege of criticising a decision of the Supreme Court carries with it a corresponding obligation—a duty to recognize the decision as the supreme law of the land so long as it remains in force.

Mr. SOURWISE. Who has that duty, Mr. Friend?

Mr. FRIEND. The duty of our people in our legal profession.

Mr. SOURWISE. Does the Supreme Court have that duty?

Mr. FRIEND. I think it does, and I think it exercises it.

Mr. SOURWISE. What do you think of the Supreme Court when it reverses itself on precedents of 40, or 50, or 80 years?

Is it violating the duty it has under the Constitution?

Mr. FRIEND. I think not, because "it is its duty to interpret the Constitution," as Chief Justice Marshall said, "as a document that is to endure for all ages."

Mr. SOURWISE. You mean the Supreme Court has the right to change the meaning of the Constitution if times change?

Mr. FRIEND. That is always—yes; I think it has. I think it not only has the right, but it has the duty to do it.

Mr. SOURWISE. All right, sir. I wanted to get clear what you thought.

Mr. FRIEND. That is what it has always done from its beginning.

S. 2646 does not seek to achieve a change in our constitutional interpretations through the amending processes provided to that end.

For the forthright method of constitutional amendment or statutory change, it would substitute, by indirection, disrespect for law as a result of the confusion and chaos which will be inevitable upon the elimination of the Supreme Court as the final judicial authority. The objective and success sought by those supporting S. 2646 would be ephemeral, for in their shortsighted zeal to reverse some of the opinions of the Supreme Court by a devious means they will have destroyed far more than they intended.

I shall not attempt to discuss each category of S. 2646, withdrawing from the Supreme Court jurisdiction to review cases which might otherwise come before it. That has been done thoroughly and effectively by others. There are sections, however, to which I would like to advert.

Those are sections (3) and (4), which withdraw from the jurisdiction of the Supreme Court any case where there is drawn into question any statute or executive regulation of any State the general purpose of which is to control subversive activities within such State and any rule, bylaw, or regulation adopted by a school board, a board of education, or any similar body governing educational institutions concerning subversive activities in its teaching body.

I shall not dwell upon the ambiguity of the term "subversive" and the possibility of the multitude of interpretations that might be given to that vague adjective.

In a case wherein the principles would probably be affected by the sections (3) and (4) it is said:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait-jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in

the social sciences, where few, if any, principles are accepted as absolute. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study, and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Mr. SOURWINE. Doesn't that say, Mr. Freund, that passage you just quoted--doesn't that say, in effect, it is very important who teaches our children and, therefore, we should not have any rules about who does it?

Mr. FREUND. I think it is pretty self-explanatory. I suppose that any reader, like any reader of any other instrument or work of literature or law, whether it be the Bible, Shakespeare, or opinions of the Supreme Court--and I think this ranks pretty high with the other two categories that I mentioned--they are subject to interpretations, depending upon the attitude of the child who reads them.

Mr. SOURWINE. It does say, doesn't it, it is very important who teaches our children?

Mr. FREUND. Well, shall I read it? I mean----

Mr. SOURWINE. I mean it does convey that idea, doesn't it?

Mr. FREUND (reading):

Teachers and students must always remain free to inquire----

Mr. SOURWINE. Go back just a little.

Mr. FREUND (reading):

No field of education is so thoroughly comprehended by man that new----

Mr. SOURWINE. A little bit back of that.

Mr. FREUND (reading):

To impose any straitjacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.

Mr. SOURWINE. That means we should not put any restrictions on new teachers, doesn't it?

Mr. FREUND. That is too broad a statement. No; I would not say that is what that said. I should say--well, as I say, we can have our own interpretations, depending on who the scholar is, and I am not a scholar.

Mr. SOURWINE. Well, the sentence before that does convey the idea that it is very important who teaches our children, doesn't it?

Mr. FREUND. Of course, everyone agrees to that. [Reading:]

Equally manifest as a fundamental principle of a democratic society is political freedom of the individual. Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the first amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the mediums of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who, innumerable times, have been in the vanguard of democratic thought and whose programs were ultimately accepted.

Mr. SOURWINE. Mr. Freund, do you think the Communist Party fits that description?

Mr. FREUND. Do I?

Mr. SOURWINE. Yes.

Mr. FREUND. Well, I think, I mean, you are asking again——

Mr. SOURWINE. I want to know whether you include the Communist Party or exclude the Communist Party.

Mr. FREUND. I am not including anything. I am reading this, as to what was said. [Reading:]

Mere unorthodoxy or dissent from the prevailing mores is not to be condemned.

Mr. SOURWINE. The point is, the Supreme Court, when this decision was handed down, was deciding a case that involved a Communist. If a Communist falls within this category, if the Communist Party is merely a political party, if the activities of the Communist Party as a minority group are good for the country, then these words were applicable to the case. But, if those things are not true, then these words were not applicable to the case being decided.

Mr. FREUND. I am not sure whether that is so or not. That, again, is a question of opinion and ——

Mr. SOURWINE. You cannot know what was in the mind of the Supreme Court, so I was merely asking you, when you read here this excerpt from the Supreme Court's opinion, do you think that that opinion is applicable to the Communist Party of the United States of America?

Mr. FREUND. Well, when you are speaking of the Communist Party, as we understand it—and, as I take it, Dean Munion referred to it—as a Communist Party, certainly, the answer would be “No.” That is a party dedicated to the overthrow of the Government by force and violence.

Mr. SOURWINE. That is right.

Mr. FREUND. And, certainly, an active participant in a movement of that type is not comprehended by the words I have read.

Mr. SOURWINE. Of course. That is all I wanted——

Mr. FREUND. On the other hand, there may be some of these people, with whom I totally disagree, who may feel that in the long run, the Communist political philosophy, insofar as ownership of all of the instrumentalities of production and transportation and services, shall be controlled by the state. Political philosophers of that kind—we have had them in every country. We have had that group of people in Oneida, N. Y.

Community Silver, after all, was named after a group, as you know, in New York, who got together and manufactured silver and divided up the profits among them. That is how Community Silver got its name. They believed in the abolition of private ownership. Now, that is different from the Communists as we understand the term today. Philosophical communism.

“Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society.” These noble words were written by Mr. Chief Justice Warren in the case of *Sweezy v. New Hampshire* (1957) (354 U. S. 234, 250), argued before the Supreme Court just a year ago today. Can anyone who cherishes our institutions cavil with the philosophy which our great Chief Justice states so eloquently?

Yet, S. 2646 would prohibit the Supreme Court from reviewing any case where these principles are involved.

I urge this subcommittee to return an unfavorable report upon S. 2646, the bill before you.

Mr. SOURWINE. That Sweezy case was the case in which the Supreme Court said that the first-amendment freedoms applied with extra force to members of the teaching profession, isn't it?

Mr. FREUND. Yes, generally.

Mr. SOURWINE. Can you agree with the concept that the first amendment freedoms apply with extra force to any person, or any class of persons in the United States?

Mr. FREUND. Well, again, I mean when you get into generalities—I think it is extremely important that in the teaching profession, I mean, that was before the Court at that time.

I suppose that if you or I were before the Court in reference to our testimony today, or your appearance here, or mine, the Court would say that it applied equally to you and to me.

Mr. SOURWINE. I hope they would.

Mr. FREUND. I am sure they would.

I think the emphasis is on the matter which is before the Court. I mean, after all, if we have a case in our office involving an automobile accident, we do not think about the sinking of the *Andrea Doria* very much. We are concentrating upon the particular case which is before us.

Mr. SOURWINE. I have just one more question.

I would like to have the witness point out where, in the first amendment, freedom of association is mentioned.

Mr. FREUND. Freedom of association?

Mr. SOURWINE. Yes, sir.

Mr. FREUND. I did not get the question.

Mr. SOURWINE. Where in the first amendment is freedom of association mentioned?

Mr. FREUND. Well, I do not know whether it is mentioned by name, but it is certainly implied in the general freedoms that are given under the Bill of Rights.

I do not think that—

Mr. SOURWINE. It has never been suggested that freedom of association was a first amendment freedom until the recent decision of the Supreme Court which said so.

Isn't that true?

Mr. FREUND. I think it has always been considered that. I mean, it is just a part of our fundamental human liberties that we have the right to associate with such people as we wish in our ordinary pursuits of life. Now, that does not give us the right to associate, you and I at least, to go out and associate with the people in the Alcatraz Penitentiary, because they are confined. But I think in the ordinary social affairs of our life that freedom of association is one of the things that is fundamental to our democratic concepts. It is our way of life.

Mr. SOURWINE. Do you know of any court case in any court in the United States which held that freedom of association was the first amendment freedom prior to the recent Supreme Court decision which said so?

Mr. FREUND. As I say, I am not a constitutional scholar to that extent.

Senator JENNER. You do not know, then, in other words?

Mr. FREUND. I do not know any for or against. I just do not know.

Mr. SOURWINE. Would you say under the recent Supreme Court decision with regard to freedom of association, that a man in this country is no longer to be known by the company he keeps?

Mr. FREUND. Well, again, that is a generalized statement. It all depends on what he is known as, and to what extent he is known. Naturally you do, in making your appraisal of individuals, think of their friends, and you think of their enemies, too, at times.

Mr. SOURWINE. That is right.

Mr. FREUND. It has both a positive and negative aspect.

Mr. SOURWINE. Does freedom of association, Mr. Freund, go so far as to constitute a freedom to conspire?

Mr. FREUND. Well, that all depends, again, on what you mean by "conspiracy".

If it means you and I conspire to go out tonight and tell our wives that we are going to a Senate meeting, that might be a conspiracy in a sense, but it would not be a very serious one—at least as far as my wife is concerned.

Mr. SOURWINE. Well, is there, sir, under freedom of association—and leaving our wives out of the question—is there, under this new freedom of association, any right to conspire for the overthrow of the Government of the United States by force and violence?

Mr. FREUND. No; of course not.

Mr. SOURWINE. All right, I have no more questions.

Senator JENNER. Thank you very much for your views.

Is Mr. Leonard Boudin here yet?

(No response.)

Senator JENNER. Mr. Marshall, I see you are in the room. Would you just as soon testify this morning as in the afternoon session?

Mr. MARSHALL. Yes, sir.

Senator JENNER. All right, you may come forward.

STATEMENT OF HARRY H. MARSHALL, OF ALTON, ILL., REPRESENTING HIMSELF AS AN INDIVIDUAL

Senator JENNER. Mr. Marshall, are you appearing here as an individual or are you representing some organization?

Mr. MARSHALL. As an individual.

Senator JENNER. You may proceed with your statement.

Mr. MARSHALL. My name is Harry H. Marshall. My business address is First National Bank Building, Alton, Ill. I graduated from Northwestern University in 1947, and from the St. Louis University Law School in 1951. I have been engaged in the practice of law since 1951.

Mr. Chairman, the first part of my prepared statement consists of an enumeration of the 15 cases which I am sure have been covered time and time again in this record, so, with your permission, I will omit them.

Senator JENNER. All right, but they may go in the record and become a part of the record.

Mr. MARSHALL. In 1956 and 1957, the United States Supreme Court decided 15 cases which directly affect the right of the United States and of the 48 States to protect themselves from communism:

1. *Communist Party v. Subversive Activities Control Board*. The Court refused to uphold or pass on the constitutionality of the Sub-

versive Activities Control Act of 1950, and delayed the effectiveness of the act.

2. *Pennsylvania v. Steve Nelson*. The Court held that it was unlawful for Pennsylvania to prosecute a Pennsylvania Communist Party leader under the Pennsylvania Sedition Act, and indicated that the antisedition laws of 42 States and of Alaska and Hawaii cannot be enforced.

3. *Yates v. United States*. The Court reversed 2 Federal courts and ruled that teaching and advocating forcible overthrow of our Government, even "with evil intent," was not punishable under the Smith Act as long as it was "divorced from any effort to instigate action to that end," and ordered 5 Communist leaders freed and new trial for another 9.

4. *Gale v. Young*. The Court reversed two Federal courts and held that, although the Summary Suspension Act of 1950 gave the Federal Government the right to dismiss employees "in the interest of the national security of the United States," it was not in the interest of the national security to dismiss an employee who contributed funds and services to a not-disputed subversive organization, unless that employee was in a "sensitive position."

5. *Service v. Dulles*. The Court reversed two Federal courts which had refused to set aside the discharge of John Stewart Service by the State Department. The FBI had a recording of a conversation between Service and an editor of the pro-Communist magazine, *Amerasia*, in the latter's hotel room in which Service spoke of military plans which were "very secret."

Earlier the FBI had found large numbers of secret and confidential State Department documents in the *Amerasia* office. The lower courts had followed the McCarran amendment which gave the Secretary of State "absolute discretion" to discharge any employee "in the interests of the United States."

6. *Slochower v. Board of Education of New York*. The Court reversed the decisions of three New York courts and held it was unconstitutional to automatically discharge a teacher, in accordance with New York law, because he took the fifth amendment when asked about Communist activities. On petition for rehearing, the Court admitted that its opinion was in error in stating that Slochower was not aware that his claim of the fifth amendment would ipso facto result in his discharge; however, the Court denied rehearing.

7. *Sweezy v. New Hampshire*. The Court reversed the New Hampshire Supreme Court and held that the attorney general of New Hampshire was without authority to question Professor Sweezy, a lecturer at the State university, concerning a lecture and other suspected subversive activities. Questions which the Court said that Sweezy properly refused to answer included: "Did you advocate Marxism at that time?" and "Do you believe in communism?"

8. *United States v. Witkovich*. The Court decided that, under the Immigration and Nationality Act of 1952, which provides that any alien against whom there is a final order of deportation shall—

give information under oath as to his nationality, circumstances, habits, associations, and activities and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper—

¹ Senate committee hearings on Charges of Disloyalty in the State Department, June 26, 1950, pp. 1391 ff., especially 1404; cf. *United States v. Jaffe*, 98 F. Supp. 191, 194 (1951).

the Attorney General did not have the right to ask Kitkovich:

Since the order of deportation was entered in your case on June 25, 1953, have you attended any meetings of the Communist Party of the U. S. A.?

9. *Schwartz v. Board of Bar Examiners of New Mexico*. The Court reversed the decisions of the New Mexico Board of Bar Examiners and of the New Mexico Supreme Court which had said:

We believe one who has knowingly given his loyalties to the Communist Party for 6 to 7 years during a period of responsible adulthood is a person of questionable character.

The Supreme Court substituted its judgment for that of New Mexico and ruled that--

membership in the Communist Party during the 1930's cannot be said to raise substantial doubts about his present good moral character.

10. *Konigsberg v. State Bar of California*. The Court reversed the decisions of the California Committee of Bar Examiners and of the California Supreme Court and held that it was unconstitutional to deny a license to practice law to an applicant who refused to answer this question put by the bar committee: "Mr. Konigsberg, are you a Communist?" and a series of similar questions:

11. *Jencks v. United States*. The Court reversed two Federal courts and held that Jencks, who was convicted of filing a false non-Communist affidavit, must be given the contents of all confidential FBI reports which were made by any Government witness in the case even though Jencks--

restricted his motions to a request for production of the reports to the trial judge for the judge's inspection and determination whether and to what extent the reports should be made available.

12. *Watkins v. United States*. The Court reversed the Federal district court and six judges of the Court of Appeals of the District of Columbia, and held that the House Un-American Activities Committee could not require a witness who admitted:

I freely cooperated with the Communist Party---

to name his Communist associates, even though the witness did not invoke the fifth amendment. The Court said:

We remain unenlightened as to the subject to which the questions asked petitioner were pertinent.

13. *Raley, Stern and Brown v. Ohio*. The Court reversed the Ohio Supreme Court and lower courts and set aside the conviction of three men who had refused to answer questions about Communist activities put to them by the Ohio Un-American Activities Commission.

14. *Flaxer v. United States*. The Court reversed two Federal courts and set aside the conviction of Flaxer of contempt for refusing to produce records of alleged Communist activities subpoenaed by the Senate Internal Security Subcommittee.

15. *Sacher v. United States*. The Court reversed two Federal courts and set aside the conviction of Sacher of contempt for refusing to tell the Senate Permanent Investigations Subcommittee whether he was or ever had been a Communist.

Also, with your permission, I would like to start my statement by again quoting from the Communist Daily Worker describing the effect of those 16 decisions of the Supreme Court, and I quote:

The Court delivered a triple-barreled attack on (1) the Department of Justice and its Smith Act trials; (2) the freewheeling congressional inquiries; and (3) the hateful loyalty-security program of the Executive. Monday, June 17, is already a historic landmark * * *. The curtain is closing on one of our worst periods.¹

Although the majority opinions in these 16 cases cite many non-legal statements, ranging from the contempt expressed for congressional investigations by a British Socialist² to the Progressive Party vote for Henry Wallace in 1948,³ there is not a single citation or reference to any of the standard works on the Communist conspiracy, and its menace to our American institutions. It would appear that a majority of the Supreme Court is completely unaware of the authoritative, documented exposures of Communist subversion published by this very committee, by the House Un-American Activities Committee,⁴ the Canadian Royal Commission,⁵ the Australian Royal Commission,⁶ the West Germany Supreme Court,⁷ et cetera.

A recent article in the American Bar Association Journal by the draftsman of the Court-approved Maryland Subversive Activities Act of 1949, suggests that the Supreme Court's change of position in regard to the Communist conspiracy is due to the change in its Chief Justice.⁸

For 35 years the Supreme Court had been blessed with Chief Justices who were aware of the menace of internal subversion by communism. Chief Justice Hughes had, as Secretary of State, firmly resisted all pressure to recognize the Communist Government of Russia. His successor, Chief Justice Stone, was extremely well-informed on the subject of communism. His documented dissent in *Schneiderman versus United States*⁹ in which he said:

A man is known by the ideas he spreads as well as by the company he keeps-- is a brilliant exposé of Communist doctrines. It is especially noteworthy because it was written at the height of the propaganda that Soviet Russia was a peace-loving democracy, and when American Ambassador Joseph Davies was telling us that--

The word of honor of the Soviet Government is as safe as the Bible * * * The Soviet Union stands staunchly for international morality.¹⁰

Chief Justice Stone was succeeded by Chief Justice Vinson, who wrote the opinion upholding the Smith Act and sustaining the convictions of the 11 top Communists in the United States. His opinion,¹¹ and especially the concurring opinion of Mr. Justice Jackson in *American Communications Associations v. Douds*,¹² contain many scholarly references to anti-Communist authorities.

¹ Editorial, Daily Worker, June 10, 1957.

² *Watkins v. United States*, 1 L. ed. 1273, 1286 n. 17.

³ *Sweeney v. New Hampshire*, 1 L. ed. 1311, 1320 n. 7.

⁴ See The Web of Subversion, by Prof. James Burnham.

⁵ Report of the Canadian Royal Commission, June 27, 1946.

⁶ Report of the Australian Royal Commission, August 22, 1955.

⁷ Supreme Court of West Germany, 375-page opinion outlawing the Communist Party rendered August 17, 1956.

⁸ Communism and the Court, Frank B. Ober, 44 ABA Journal, 35, 89.

⁹ 320 U. S. 118, 170-207 (1943).

¹¹ February 1942 at Chicago Stadium.

¹² *Dennis v. United States*, 341 U. S. 494 (1951).

¹³ 330 U. S. 382, 423-445 (1950).

Prof. Harrop A. Freeman has stated to this committee:

It has never been determined that Congress has a right to take away from the Supreme Court any part of its necessary appellate jurisdiction, and that article III of the Constitution is intended:

* * * to permit Congress to so regulate the procedures for taking appeals that the appellate jurisdiction may be effective.

These statements are in error.

In *Ex parte McCordle*,¹⁴ the Supreme Court held that Congress could take away its necessary appellate jurisdiction. As retired Supreme Court Justice Roberts described this case under the heading "Appellate Jurisdiction Depends on Congressional Legislation":

The case had been briefed, argued, and submitted, and was ready for a decision when the Congress removed the appellate jurisdiction of the Supreme Court in that specific class of case. The Chief Justice wrote a short opinion in which he said that the jurisdiction was subject to regulation by Congress and that the Court had lost the power to deal with that case.¹⁵

The *McCordle* case has been affirmed many times. The Constitution of the United States, a volume prepared for the Senate by the Legislative Reference Service, Library of Congress, states:

Unlike its original jurisdiction, the appellate jurisdiction of the Supreme Court is subject to control by Congress in the exercise of the broadest discretion. * * * The power of Congress to make exceptions has thus become, in effect, a plenary power to bestow, withhold, and withdraw appellate jurisdiction, even to the point of its abolition. And this power extends to the withdrawal of appellate jurisdiction even in pending cases. * * *

"The constitutional requirements are all satisfied if one opportunity is had for the trial of all parts of a case. Everything beyond that is a matter of legislative discretion."¹⁶

Supreme Court Justice Douglas, referring to the power vested in Congress by the Constitution, wrote in one of his earlier books:

Congress, therefore, has power to deny and to grant appellate jurisdiction; to withdraw it, as well as to confer it.¹⁷ and in his latest book Justice Douglas says:

The power of Congress over the appellate jurisdiction of the Supreme Court is complete.¹⁸

Professor Freeman bases his disagreement with the interpretation of article III, section 2, of the Constitution given by the Supreme Court itself on "my writings" and on articles by two other professors. An examination of these articles shows that they support the Court's own conclusion that its appellate jurisdiction is controlled by Congress.

In a case decided in 1799, when most of the framers of our Constitution were still alive, the Supreme Court said:

* * * the political truth is that the disposal of the judicial power (except in a few specified instances) belongs to Congress. If Congress has given the power to this Court, we possess it, not otherwise * * *.¹⁹

Professor Freeman also contends that because Congress is given power only over the appellate jurisdiction of the Supreme Court that

¹⁴ 7 Wall. 506 (1869).

¹⁵ 35 American Bar Journal 1, 3 (1949).

¹⁶ S. Doc. No. 170, 83d Cong., 2d sess., Edward S. Corwin, editor, pp. 614-615. The last two sentences are from the Supreme Court's opinion in *The Francis Wright*, 103 U. S. 381 (1882).

¹⁷ Douglas, William O., *An Almanac of Liberty*, p. 280.

¹⁸ Douglas, William O., *We the Judges*, p. 72.

¹⁹ *Turner v. Bank of North America*, 4 Wall. 8, note 1.

"subsections (3), (4), and (5) of Senate bill 2646 are most clearly unconstitutional" because they involve cases in which the State shall be a party and in which the Supreme Court has original jurisdiction.

This statement is also most clearly erroneous.

In *State of Missouri v. Missouri Pacific Railway*,²⁰² the Supreme Court held that Congress could take away the Court's appellate jurisdiction in cases in which a State is a party.

Professor Freeman has overlooked amendment XI, which makes it impossible for citizens to sue a State in the Supreme Court. No State is required to bring an original suit in the Supreme Court, and would prefer its own courts in subversion cases. In such cases the Supreme Court has appellate jurisdiction "with such exceptions, and under such regulations as the Congress shall make."

The New York Times reported last February 26 that:

* * * after numerous speakers had attacked recent cases . . .

the ABA . . .

house of delegates voted to oppose the Jenner bill as contrary to the maintenance of the balance of powers set up in the Constitution.

The balance of powers was upset when the Supreme Court deprived the States of the right to punish subversion, to bar Communists as teachers and lawyers, and to investigate subversion, and when the Supreme Court deprived Congress of its right to investigate communism as fully as it investigates businessmen and labor unions. The purpose of S. 2646 is to restore the balance of powers.

Senate 2646 is no more contrary to the balance of powers than is a Presidential veto. The uniqueness and greatness of our Constitution is its ingenious system of checks and balances, not only on Congress and the President, but also on the Supreme Court. The principal check on the judiciary is the power of Congress to make exceptions to the jurisdiction of the courts. To deny this power to Congress is to say that the Constitution is unconstitutional.

There are some American Bar Association lawyers who think that the Constitution is right in putting checks and balances on Congress and on the Executive but wrong in putting any check and balance on the life members of the Supreme Court. Resolutions for constitutional amendments to eliminate the check on the Supreme Court provided by section 2 of article III have been proposed in Congress from time to time. All have failed of passage.

Those who favor retaining the constitutional check on the judiciary may be mindful of what Thomas Jefferson predicted in 1821:

* * * the germ of dissolution of our Federal Government is in the constitution of the Federal judiciary; * * * advancing its noiseless step like a thief, over the field of jurisdiction until all shall be usurped from the States, and the government of all be consolidated into one.

To this I am opposed, because when all government, domestic and foreign, in little as in great things, shall be drawn to Washington as the center of all power, it will render powerless the checks provided * * *

Passage of S. 2646 will restore the balance of powers provided in the Constitution by demonstrating that section 2 of article III, which gives Congress a check on the Supreme Court, is not a dead letter but, as in the past, has life and meaning.

²⁰² 202 U. S. 13 (1934).

Passage of S. 2616 will stop the Communists' boast that as a result of the recent Supreme Court decisions they don't have to tell Federal or State investigators anything but that the FBI has to tell the Communists everything. J. Edgar Hoover warned us last fall:

The influence of the subversive conspiracy has been almost unbelievable--reaching deep into practically every walk of life. To gauge the effectiveness of this campaign, we need only to note the widespread and vociferous clamor raised whenever our Government attempts to deal firmly against the subversive threat * * *

To dismiss lightly the existence of the subversive threat in the United States is to deliberately commit national suicide. In some quarters we are surely doing just this. It would be the worst kind of folly to allow the spy and subversive immunity through technical rather than logical interpretation of the law, while they plot the destruction of our democratic form of Government."

Passage of S. 2616 will end the Supreme Court treatment of agents of the 33-million member Red conspiracy, which controls one-third of the world, as little Red Riding Hoods who must be protected from the big bad wolf of a public investigation. Passage will serve notice to both sides of the Iron Curtain that America's internal security is adequate to meet all Soviet subversion.

Senator JENNER. Thank you, Mr. Marshall, for appearing before the committee and giving us the benefit of your research and study on this very important question.

I will ask that the entire statement with footnotes and references be incorporated in the record.

Mr. MARSHALL. Thank you, Mr. Chairman.

Senator JENNER. Thank you.

Mr. SCHWARTZ. I have one thing to offer for the record.

Mr. Freund requested that if this article was not already in the record it might be inserted. I do not know whether it is in the record. Mr. Freund thought Senator Hennings may have put it in.

It is an article from the St. Louis Globe-Democrat of Sunday, March 2, under headline, "Law Quarterly Editors Defend Supreme Court."

Senator JENNER. If it is not in the record, it may go into the record and become a part of the record.

(The document referred to is as follows:)

[From the St. Louis Globe-Democrat, March 2, 1958:]

LAW QUARTERLY EDITORS DEFEND SUPREME COURT--POWER AND PRESENT ACTIVITY OUTLINED, CRITICISM OF DECISIONS BERATED

The following articles by members of the staff of the Law Quarterly of the School of Law of Washington University was written in reply to a recent criticism of the Court entitled "The Runaway United States Supreme Court" which appeared in the Globe-Democrat. Jules B. Gerard, editor in chief of the Law Quarterly, presents this article as a "precise statement of the Court's powers and present activity."

On Sunday, February 9, 1958, the Globe-Democrat reprinted a lengthy editorial entitled "The Runaway United States Supreme Court." The editorial purported to prove that the present Supreme Court is acting illegally "to drastically alter the shape of the American Government."

The writers feel that this attack will impart a false impression of the powers, functions, and present activities of the Court to persons unfamiliar with the law. They have consequently undertaken to answer the editorial's charges, which they consider to be untrue and unfair.

* Speech of the National Convention of the American Legion, September 1957.

The first charge made by the editorial is that the Court is illegally "making law." The argument runs thus: (1) The Constitution does not give the Court power to make law; (2) the Constitution does not give the Court power to rule on whether acts of Congress, or lower court decisions violate the Constitution; (3) consequently, the Court cannot "make law" by exercising judicial review.

SUPREME LAW

(1) Article VI of the Constitution provides: "The Constitution, and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land." From this wording the editorial concludes, "No mention at all is made of the Supreme Court. The law is what the Constitution says it is and what Congress, acting within constitutional limits, says it is."

But article VI not only fails to mention the Supreme Court. It also fails to mention Congress. If the decisions of the Supreme Court are not "law" because the Court is not mentioned in article VI, are the enactments of Congress also not "law" for the same reason?

The obvious answer is "no" because Congress is given express power to legislate in article I. Absence of power under one article does not mean absence of power altogether.

The editorial next asserts that Congress can limit the appellate jurisdiction of the Court and thus determine the kinds of cases which the Court will hear. This is true. But what bearing has this on the constitutional validity of the cases properly brought before the Court under existing law? The fact that Congress can, but does not, limit the appellate jurisdiction of the Supreme Court does not prove that the Court's decisions are illegal. If anything, it proves that Congress is satisfied with the decisions the Court renders.

JUDICIAL REVIEW

(2) Much is made of the fact that the Constitution does not specifically give the Supreme Court power to decide whether an act of Congress is constitutional. Even if it is assumed there is no such power—and very few learned persons have ever taken this position—that fact does not justify an attack upon the present Court.

For if judicial review is unconstitutional, then it has been unconstitutional ever since it was begun 155 years ago. The persons to criticize are John Marshall and the members of his Court, and every other Justice since 1803. This includes men like Oliver Wendell Holmes, Louis Brandeis, Harlan Fiske Stone, and William Howard Taft. Each and every one of them must share the blame for an unlawful seizure of power if judicial review is denied.

(3) If judicial review is valid, does the Court "make law" every time it decides a case? According to last week's editorial, "no Federal court has any authority or right to change the Constitution by so much as one word, either by 'interpretation' or subterfuge. To do so is as illegal as armed robbery. * * *"

INTERPRETATION VITAL

Many terms of the Constitution are not clear to everyone and need some group to interpret them. For example: What constitutes "due process of law"? What is an "ex post facto law"? What is a "bill of attainder"? What powers are "necessary and proper" for implementing laws passed by Congress?

Article I, section 9 of the Constitution prohibits Congress from passing a "bill of attainder." This prohibition would be meaningless unless some group had the power—and the duty—to determine whether a given statute was a bill of attainder or not. Need it be added that that group ought not to be the same one which enacted the statute in the first place?

What body should interpret the meaning of terms in the Constitution? The answer to this question seems obvious. Conflicting interpretations invariably arise out of some kind of controversy. Resolving conflicts is an exercise of judicial power.

Article III of the Constitution provides that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish." By express provision of the Constitution, then, judicial power is given to no other branch of the Government than the judiciary.

Furthermore, section 2 of article III provides that "the judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the

Laws of the United States, and Treaties * * * There is no room for doubt that judicial power was to include the power to decide constitutional questions properly presented to the Court. Hence there is little validity to the argument that the Court is usurping power when it decides a constitutional issue.

VALID POWERS

So if judicial review is valid, then it is also valid for the Court to interpret the Constitution. Otherwise one would be forced to the conclusion that the Court could determine whether a given act was constitutional, but could not determine what the Constitution means. This is obviously ridiculous.

Two conclusions are possible: (1) the Court does not "make law" when it interprets the Constitution; (2) the Court is authorized to "make law." As a practical matter it doesn't make any difference which alternative is chosen because in either situation the Court would be exercising valid power in interpreting the Constitution.

How, then, can the editorial logically conclude that the Court "has on its side the dehard popular belief which is false as a china nest egg, that the law is what the Court says it is"? It can't.

The second major charge leveled by the editorial is that the Court has "repeal(ed) by ossification" and made law "in direct opposition to the 10th amendment." The charge is "proved" by detailing the purported holdings in a number of Supreme Court decisions.

MISSTATEMENT

In almost every instance, however, the decision attributed to the Court is a blatant misstatement of the actual holding. To make the following discussion understandable, it will be necessary to describe briefly the manner in which the holding of a case is determined. This can best be done by considering an example.

Suppose that a 10-year-old child, playing on the sidewalk, is struck by an automobile backing out of a driveway because the driver is not watching what is directly in back of the car, but is looking up and down the street for approaching vehicles. Suppose also that a jury awards the child \$10,000 for the injuries suffered, and that the driver appeals to the Missouri Supreme Court. Suppose the court upholds the award because the driver was negligent in not determining that the child was in back of the car.

Surely, no reasonable person could interpret this case as standing for the proposition that any 10 year old struck by an automobile can recover \$10,000 from the driver, whether or not the driver is negligent, was on a main highway or a residential street, etc. But it is this kind of interpretation which the editorial largely places upon the cases it analyzes.

For example, the editorial discusses *Schware v. Board of Bar Examiners of New Mexico* and *Konigsberg v. State Bar of California*. The editorial says these cases hold "that the States cannot be permitted to determine that Communist or Communist-front activities reflect on the moral character of an applicant to practice as an attorney."

The *Schware* case concerned a person who had quit the Communist Party more than 15 years before applying for admission to the bar. Since that time he had led a model life and had even explained his Communist past to the dean of his law school before he was admitted.

THE FACT

What the Supreme Court actually held was that the New Mexico Supreme Court's determination, that a person who had knowingly belonged to the Communist Party could never subsequently have a good moral character under any circumstances, was so unreasonable and arbitrary that it violated the due process clause of the Constitution. Surely this is not the least bit similar to the holding attributed to it by the editorial.

The editorial also discusses *Pennsylvania v. Nelson*, in which an antisediton law of the State was struck down because Federal legislation had preempted the treason field. About the *Nelson*, *Konigsberg*, and *Schware* cases the editorial says, "There is nothing in the Constitution to justify this invasion of rights which historically belonged to the States."

On the contrary, the Constitution contains two provisions which precisely justify the action taken by the Court in these cases. Section I of the 14th amendment provides in part that no State shall "deprive any person of life,

liberty, or property, without due process of law." It has because the decisions in the *Schwabe* and the *Konigsberg* cases were found by the Court to violate the due-process clause that they were overturned. The decisions of the State courts, no less than the statutes enacted by Congress, must comply with the Constitution.

"This Constitution, and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." This clause of article VI gives rise to the so-called preemption doctrine used in the *Nelson* case. It is based on the theory that acts of Congress are the supreme law of the land, a fact recognized by the editorial, and that therefore State legislation cannot be tolerated where Congress has preempted a given field.

1912 PRECEDENT

The doctrine of preemption has been firmly established as a part of United States constitutional law for a long time. In 1912, for example, Chief Justice White said that the "power of the State over the subject matter ceased to exist from the moment that Congress exerted its paramount and all-embracing authority over the subject." Consequently, the "Warren court" did not make a novel decision in applying the doctrine, nor did it exceed its constitutional powers by declaring the statute invalid. It was merely doing what many courts had done in the past: Invalidate State legislation in a field preempted by "the supreme law of the land."

Next discussed by the editorial is *Schooner v. Board of Education of New York*. The controversy in this case was whether a person's claim of a constitutional privilege in collateral proceedings warranted his summary dismissal from a teaching position—a subject too elaborate for brief discussion. It will therefore be passed without comment except to notice that the editorial said the "State law" was reasonable, whereas the Court found this procedure unreasonable and an unconstitutional violation of the due-process clause.

The editorial moves on by saying that *Sweezy v. New Hampshire* held that the attorney general of a State "did not even have the right to question a college professor about subversive activities" and that it "prohibited the States from even investigating treason."

This is a complete misstatement of the case. What the case actually held was that a college professor could not be punished for contempt when he refused (not under the fifth amendment) to answer (1) questions that were not pertinent to the inquiry that the legislature had authorized, and (2) that concerned a lecture he had given to college students.

CLEAREST EXAMPLE

But perhaps the clearest example of the method used by the editorial writer is illustrated by the discussion of *Raley v. Ohio*, which, the writer says, "held that the State had no right at all to punish contemptuous refusal to answer a State legislature's questions about subversion." To answer this contention, the entire *Raley* opinion, except case citations, is here reprinted:

"The judgment of the Supreme Court of Ohio is vacated and the case is remanded for consideration in the light of *Sweezy v. New Hampshire* * * * and *Watkins v. United States*. * * * Mr. Justice Burton would note probable jurisdiction and set the case for argument. Mr. Justice Clark dissents from this disposition of the case for the reasons stated in his dissenting opinions in (the) *Sweezy* and *Watkins* (cases)."

The Court did not even reverse the Ohio court, but merely sent the case back to that court for reconsideration. The precise holding was simply this: Insofar as the case was inconsistent with the *Sweezy* and *Watkins* decisions, it would have to be reconsidered.

The editorial concludes:

"The danger of communism is grave enough, but it may be that a graver danger yet exists in a court which attempts to use one phrase of the Constitution to amend the rest of it, and ends by concluding that there is no Constitution at all except what the court writes."

TWO CONCEPTS

The reference to amending the Constitution with one of its phrases is directed at the apparent conflict between the "supreme law of the land" clause of article VI and the States rights provision of the 10th amendment.

It cannot be denied these two provisions conflict if both are carried to their logical extremes. On the other hand, any dispute how much article VI restricts powers reserved to the States must necessarily be decided by the courts, if for no other reason than the fact that all controversies are decided by courts. Surely it is unfair to accuse the Supreme Court of "amending" the Constitution when it draws the line between two conflicting provisions, both of which are part of the Constitution.

What the writer meant by the statement that no Constitution exists except that which the Court writes is beyond our comprehension. As has been pointed out, all of the cases he criticizes preceding his conclusion were decided either on the supremacy clause of article VI or the due-process clause of the 14th amendment. They therefore were based on the Constitution as it is written and not on a constitution that the Court wrote.

INCREDIBLE

The editorial then criticizes the Court for its decisions limiting Federal powers. "In one of the most amazing rulings ever handed down," it says, the Court attacked "Federal administrative authority" by holding "that the Secretary of State could not discharge his own employee * * * In the face of an act of Congress empowering the Secretary to fire any employee within his sole discretion."

This is an incredible description of the Court's holding. The decision in *Service v. Dulles* was based, not on 1 act of Congress, but on 2 statutes which set out partially conflicting procedures. What the Court said was that the Secretary had followed the wrong procedure. Congress had made no clear statement which statute it intended to be followed.

The editorial mentions *Jencks v. United States*, which it says "Congress hastened to undo * * * with a law which partly nullified the Court's opinion."

Nothing could be further from the truth. Congress not only did not "nullify the Court's opinion," but it worked its statute to conform to the opinion in most major respects. What the statute nullified was some absurd interpretations placed upon the case by certain newspapers throughout the country.

Since the *Jencks* case received so much publicity, it might be educational to pinpoint the evil at which the Court struck. The evil can be highlighted by asking these questions: What would be the feeling of the reader if he were about to be convicted of a crime on the testimony of a person who the reader knew was lying? What would be the feelings of the reader if he could prove the witness was lying, but the proof happened to be contained in the files of the FBI? Would the reader be in favor of a rule that opened those files so that the lie could be exposed?

CONGRESS WRONG?

Finally, the editorial criticizes the *Watkins* case as "an all-inclusive demonstration of illegal judicial lawmaking founded upon error and ending in a blatant attempt to put into the Constitution something which is not there."

As seen by the editorial writer, the *Watkins* case held that congressional committees cannot conduct investigations unless they know in advance what legislation the investigations will show to be necessary. This rule, says the writer "The Court virtually created" and it "can nowhere be found in either the Constitution or Federal statutes."

First, the *Watkins* case held only that a witness before a congressional committee cannot be compelled to answer until the committee informs him of the nature of the subject being investigated.

Second, the Constitution nowhere expressly grants Congress the power to investigate anything. If anything was illegal because not in the Constitution, it was the investigation itself.

Third, Congress has the constitutional power to investigate only because the Supreme Court has said the Constitution impliedly grants this power under a certain condition. The condition is that the investigation be for the purpose of enabling Congress to enact laws or to check the executive branch of the Government more efficiently.

To criticize the Court for curtailing this power when it violates the very condition on which the power was granted, and to charge the Court with acting illegally, is not only unfair but fallacious. Congress is the party acting illegally, if any party must be charged with violating the Constitution.

Finally, the editorial charges that the Court has exceeded its powers (1) by altering the structure of our Government, and (2) by overruling previous decisions of the Supreme Court.

(1) Our system of government consists of three separate powers: executive, legislative, and judicial. Every schoolboy knows that a necessary concomitant of separate powers is that each branch of the Government must act as a check upon the other two.

When the Supreme Court strikes down a statute as unconstitutional, far from altering the Government, it is performing the precise function for which it was created. It is acting as a check on Congress, just as Congress acts as a check on the executive with its investigating committees.

(2) "The Court is in fact exceeding its own powers under the Constitution when it attempts to say that a law which meant one thing yesterday must mean another today," says the editorial.

What the writer meant by this is not clear. The Constitution, of course, does not give the Court specific power to change its mind. Neither, however, does it specifically grant the power of judicial review.

But if the Court has power to review statutes and decisions, it most certainly has power to overrule past Supreme Court decisions. It is true that lawyers and judges endlessly debate the wisdom of overruling past decisions, but none deny the power of the Court to do so.

FALSE CHARGES

If the Court decided it could not overrule past decisions, the only other way of changing them would be by amending the Constitution. This is a burdensome process requiring the agreement of three-fourths of the States. Is this change desirable?

In summary, the charges that the Supreme Court has acted illegally, has nullified the Constitution, and is in the process of altering the basic structure of our Government, are absolutely false. Does this mean that all must agree with the Court's decisions?

It does not.

It is possible for reasonable men to differ about the correctness of every decision discussed in the editorial. It can be argued, for example, that denying Schwab a license to practice law was not a denial of due process; that the Pennsylvania sedition statute was not a proper case for the application of the preemption doctrine; that the Court has drawn the line between Federal supremacy and States rights too far on the side favoring the Federal Government; that no matter what the rule ought to be in regard to "normal criminals," the FBI files should not be opened for an alleged Communist, even if he is convicted by lies; that although the power to investigate was granted to Congress only upon condition that investigations have legislation as an objective, this condition should no longer be imposed because of the danger of the times (and who would be "changing the Constitution" if this position were taken?).

But certainly honest disagreement among reasonable men should not call forth the vituperative attack upon individual Justices that was contained in the editorial. Certainly such honest disagreement does not justify the charge that the Court "has twisted the Constitution and the law into individual social philosophies of some Justices."

We agree with the writer that what the Supreme Court does should be everybody's business. But surely what the Court does should be set down accurately so that citizens will have an adequate basis for judgment.

Much is made of the fact, for example, that works of sociologists are cited in some recent cases. "The reliance of the Supreme Court on sociology instead of law makes a mockery of the law."

AUTHORITIES

This statement is utter nonsense. When the Court unanimously reversed *Plessy v. Ferguson* (the "separate but equal" case) it did so on the basis of the Constitution, not on the basis of sociology. The sociologists were cited to indicate why the Justices believed that there was, in fact as opposed to theory, no

such thing as "separate but equal." The same result could have been reached without citing any authority whatsoever except the Constitution.

All courts must necessarily depend upon nonlegal authorities at times. In the case posed earlier about the child struck by the automobile, for example, what "legal" authority could be found that would tell the court how serious the child's injuries were?

PROPOSED REMEDIES

A number of proposals are discussed which would "offset the Court's assault upon the balance of American Government." A bill proposed by Senator Jenner would restrict the appellate jurisdiction of the Supreme Court in five specific areas. The effect of this bill would be to make the constitutional interpretations of the 11 circuit courts final. It might, in other words, create 11 constitutions. It might also establish 40 additional "supreme courts"—1 in every State and in the District of Columbia. Is this desirable?

The most ridiculous proposal the editorial writer believes ought to be adopted is that of Representative Huddleston. This bill provides, according to the editorial, that no court "shall be bound by any decision of the Supreme Court of the United States which conflicts with the legal principle of adhering to prior decisions and which is clearly based upon considerations other than legal."

Under present laws, enacting this proposal would mean that the Supreme Court would determine whether a lower court was justified in ignoring a previous Supreme Court decision—in other words, the Supreme Court would itself decide whether it had departed from prior precedent and had based its decision "upon considerations other than legal." As an attempt to restrict the power of the Supreme Court, the proposal is meaningless.

The faulty logic of the editorial as a whole can be demonstrated with particular clarity by noting the two ways it uses the case of *Marbury v. Madison*.

In column 2 it criticized this case for announcing the "dangerous doctrine" of judicial review. In column 5 the same case is cited with approval as stating "the goal that must be sought." Is this not the ultimate absurdity?

FOOLISH TALK

By far the most grievous aspect of the editorial, however, is the action it urges upon the citizens. "We are, all of us, as morally bound to resist usurpation of power of the Supreme Court, or any other court, as we are to resist any other violation of the law." Decisions that change the Constitution through interpretation, we are told are "illegal as armed robbery, and deserve no more respect."

This is the counsel of anarchy. It is foolish talk calculated to incite disregard, contempt, and reckless disobedience of an integral component of our Federal Government. If change is desired, the Constitution provides lawful means for effecting it through constitutional amendment. None of the outspoken critics of the Supreme Court, however, has yet had the courage of his so-called convictions to suggest that the functions performed by the Supreme Court be destroyed by resort to constitutional amendment.

The Constitution of the United States has guided our country for more than 165 years. It has survived the strains of a devastating civil war and two giant world conflicts. It has served as a model for several of the constitutional democracies of Western Europe, and throughout the world it has gained the respect of eminent jurists and political scientists. It has provided a fundamental basis of law that has helped make the United States one country in the world where the phrase "freedom and justice for all" still has some meaning.

If our Nation is to remain true to the ideals in its Constitution, how can its citizens be advised to "resist" the decisions of the Supreme Court? In a democracy as ours such advice has no place. It should be rejected with every bit of the contempt it deserves.

JULES B. GERARD,
GERHARD J. PETZALL,
MARTIN SCHIFF, Jr.,
JEROME F. RASKAS,

Members, Washington University Law Quarterly.

Mr. SOURWINE. I also have a letter, forwarded to the subcommittee, giving the views of Hon. Thomas D. McBride, attorney general of Pennsylvania; a letter and statement by Frank J. Donner, general

counsel of the United Electrical Workers; a letter from Robert G. Chandler of Shreveport, La., a previous witness, providing some information requested of him when he testified, and an editorial from the Shreveport Times; a letter from G. E. Sipple, of Menominee, Wis., a national executive committeeman of the American Legion; and a statement of the Women's International League for Peace and Freedom.

Senator JENNER. They may go in the record.

STATEMENT OF THE WOMEN'S INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM,
UNITED STATES SECTION, ON S. 2646

The United States section of the Women's International League for Peace and Freedom submits herewith this statement in opposition to S. 2646, a bill limiting the appellate jurisdiction of the United States Supreme Court and requests it be placed in the record.

A concern with this proposed legislation is not in any way foreign to the purposes of this organization, which is pledged, as its name indicates, to the principles of freedom. In our country, for the United States section of this organization, belief in freedom means support for the Bill of Rights and the other constitutional guarantees of liberty. These guarantees are directly threatened by S. 2646.

As this committee well knows, the bill is designed to nullify a series of recent decisions by the United States Supreme Court with which certain persons, including Senator Jenner, are in disagreement. We believe that these decisions have supported constitutional rights and have done much to advance the cause of human freedom.

But even if we believed these decisions to be wrong, we would still oppose taking from the Supreme Court its power to determine ultimately all cases arising under the Constitution. Such power is essential to the preservation of constitutional government as we presently know it.

If the Supreme Court is not to hear and determine cases arising in the five areas enumerated by S. 2646, who then is to decide what is the supreme law of the land as applied to these fields? With jurisdiction removed from the Supreme Court, constitutional rights will mean one thing in Maine and another in Texas, since each of the 48 State supreme courts will have the final word in its own jurisdiction.

Superimposed upon these varying views will be the holdings of the Federal courts of appeal, whose decisions, no matter how contradictory they may be, can never be unified by a final appellate body. A litigant's fundamental rights should not depend upon the accident of geography or the technicalities of State or Federal jurisdiction.

This legislation would not only create confusion as to fundamental rights in the areas affected by it; it would also go far toward destroying the independence of the judiciary. If Congress says, by passing this bill, that courts will be permitted to decide cases only if they decide them the "right" way, the judiciary must inevitably become subservient to the legislative branch of government.

The United States Supreme Court has, for the most part, proved a vallant defender of our most cherished freedoms. We support its right to continue in this role, and therefore oppose the passage of S. 2646.

Respectfully submitted.

MARJORIE H. MATSON,
Civil Liberties Chairman.

COMMONWEALTH OF PENNSYLVANIA,
OFFICE OF ATTORNEY GENERAL,
Harrisburg, February 26, 1938.

HON. EDWARD MARTIN,
Senate Office Building, Washington, D. C.

HON. JOSEPH S. CLARK, JR.,
Senate Office Building, Washington, D. C.

DEAR SENATORS: I regret that my commitments at Harrisburg prevent me from appearing personally before the Senate Internal Security Subcommittee and expressing verbally my views on S. 2646. However, since I find this bill so

injunctive to our constitutional heritage and so destructive of fundamental virtues in our system of government, I would appreciate your submitting this statement to the subcommittee on my behalf. I cannot possibly deal with every objectionable feature of the bill, but I think a few comments will exemplify my thinking.

The bill purports to amend title 28 of the United States Code by adding a section limiting the appellate jurisdiction of the United States Supreme Court. The first limitation would prevent the Court from reviewing the validity on jurisdictional grounds of any function of a congressional committee or any action against a witness charged with contempt of Congress. It is probably sufficient to point out that neither Congress nor any other agency of government has the inherent power to act in violation of individual rights. Ours is not a parliamentary system of government under an unwritten constitution but a tripartite system of checks and balances under a written Constitution which has specifically set up therein certain guarantees. The courts of our Nation, and ultimately the United States Supreme Court, quite properly stand under our Constitution as the protectors of those rights. This is a matter of constitutional doctrine, not a statutory grant to be withdrawn at the whim of the Congress. In my view it is beyond the power of Congress, despite the grant to it under article III, section 2, to fix "appellate jurisdiction both as to law and fact with such exceptions and under such regulations as the Congress shall make" to withdraw from the ultimate power of the Supreme Court authority to exercise that which is essentially the "judicial power of the United States" under article III, section 1.

Subsection (2) of the proposed bill attempts to withdraw the power of review where an executive employee is removed for security reasons. Again, constitutional protections which attach to the individual cannot be eliminated by legislative action; and it is the responsibility of the courts to decide such questions when they arise. The old saw that a man has no "constitutional rights to be a policeman" received a death-blow by the Supreme Court which held in effect that a public employee may not be removed under circumstances reflecting upon his character for arbitrary or discriminatory reasons.

Subsection (3), which would withdraw power of review over State antisubversive laws, would contribute more toward chaos in our fight against subversion than toward success. Subversion is a national problem and should be treated by national action. If each State were free to act on its own, each State's attorney general could go off on tangential investigations which contribute little toward effective action and which could hamper such action. In Pennsylvania the problem is even more apparent since the attorney general is not the primary prosecuting officer. Each of Pennsylvania's 67 counties has its own elected district attorney who is the prosecutor in that county, the attorney general exercising only limited supervisory powers. I think the impossible situation which could result from having 67 elected district attorneys conducting 67 separate antisubversion investigations in Pennsylvania alone is sufficiently apparent that no more need be said.

The last two subsections are designed to limit review of regulations of school boards and similar bodies involving subversion among teachers and review of State bar admission proceedings. I can add little more to my discussion of subsections (1) and (2) except to reemphasize that constitutional protections are not subject to limitation by congressional action. If a State school board or board of law examiners acts oppressively, its action should be voided by State courts. But it must never be forgotten that although State and Federal courts alike enforce Federal rights, the ultimate preservation of those rights must be in the Federal courts even if for no better reason than uniformity in the interpretation of rights which persons have as citizens of the United States rather than of a particular State.

It is no answer to say that this bill limits only the review powers of the Supreme Court and that lower courts remain available for whatever protection is needed. The United States Supreme Court is the highest court of our Nation; its decisions in constitutional matters are of profound importance in our lives and to the legal system in which we operate. Transient dissatisfaction with particular decisions by the Court is a poor excuse for the promotion of inhibiting legislation which, I feel sure, would harm permanently our democratic institutions. The seeming inconvenience resulting from the decisions in such cases as *Jencks, Watkins, Service v. Dulles, Commonwealth v. Nelson, Slochower, Kontigberg, Sweeney* and *Cole v. Young* is just that; "seemingly." The permanent uplift to our best and most civilized traditions appears only after time for reflection occurs. Our Supreme Court stands as the greatest judicial tribunal in all the world; let us not indulge personal whim at the price of its greatness. I accept without

reservation the estimate the Supreme Court has made of its responsibility to the due-process clause when it said: "No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed, or persuasion."

Sincerely yours,

THOMAS D. MCBRIDE, *Attorney General.*

UNITED ELECTRICAL RADIO AND MACHINE WORKERS OF AMERICA,
New York, N. Y., March 3, 1958.

CLERK OF THE SENATE JUDICIARY COMMITTEE,
United States Senate, Washington, D. C.

DEAR SIR: Enclosed please find three copies of a statement on S. 2616, a bill to limit the appellate jurisdiction of the Supreme Court in certain cases.

Yours very truly,

FRANK J. DONNER, *UE General Counsel.*

STATEMENT OF FRANK J. DONNER, GENERAL COUNSEL OF UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE) ON S. 2616 TO LIMIT THE JURISDICTION OF THE SUPREME COURT IN CERTAIN CLASSES OF CASES

This statement is submitted in opposition to S. 2616 on behalf of United Electrical, Radio and Machine Workers of America (UE). We submit this statement because it is our conviction that the bill, if passed, would jeopardize the democratic rights of the people and disfigure their constitutional heritage.

In the first place, it is necessary to point out that this bill was inspired by the fact that its sponsor disagrees with certain decisions of the United States Supreme Court in five specific areas. It could hardly be denied that Senator Jenner would not seek to alter the jurisdiction of the Court if the decisions which inspired the bill went the other way. Senator Jenner, in effect, is in the position of a disappointed litigant who, having lost in the court, transfers his attack from his opponent to the tribunal which has rejected his claim. Wholly apart from the merits of the bill, we think that the judicial process is seriously threatened by any attempt to shrink or alter the jurisdiction of a court because one disagrees with its conclusions.

Our American judicial system could not operate on such a principle. It is a fundamental premise of the American democracy that when we entrust a decision to a tribunal we have a choice of either accepting it or appealing. When the highest tribunal in the land hands down its decision, that is the end of the matter. Whether we like it or not, as good citizens we must abide by the result. Our remedy is not to deprive the Court of jurisdiction in future cases, but to seek to change the law. It seems quite evident that Senator Jenner is unwilling to change the law with respect to the five areas in which he would have preferred a different result by the Supreme Court. He apparently has no confidence in his ability to persuade the Congress of the United States, for example, that there should be no judicial review of a conviction for contempt of Congress. Instead of proceeding in a democratic way of seeking a change in the law, he has sought instead to tamper with our judicial system.

We could hardly exaggerate the tremendous consequences which would flow from Senator Jenner's proposal. What would happen to our judicial system if it were possible to deprive a court of jurisdiction merely because of a disagreement with its decisions? This form of political blackmail would inject into the entire judicial process a consideration so hostile to fair adjudication as to disrupt the judicial process entirely. And what would happen to the confidence in our courts if a litigant knew that the vindication of his rights depended not only upon his ability to convince the judge that the law is on his side, but also upon his ability to convince Congress that it should not deprive the court of jurisdiction.

Indeed, if we accepted Senator Jenner's approach to the courts, our powerful corporations could ignore the laws restraining activities such as the antitrust laws and then obtain the passage of bills limiting or abolishing the jurisdiction of the courts to do justice to their victims. If America is to remain democratic, the courts must never be permitted to become the pawns of political maneuvers.

It cannot be too often repeated that the American democratic system functions through an apparatus of checks and balances. It has been true from the very beginning that our governmental process requires the complete and unimpaired functioning with equal strength and vigor of the legislative, the executive, and judicial arms of Government. Senator Jenner here seeks to strengthen one arm of the Government at the expense of another. For it cannot be denied that what Senator Jenner is doing in this proposed bill is not merely to weaken the power of our High Court, but to strengthen the power and discretion of the executive arms of the Federal and State Government to function without regard to full judicial scrutiny. Moreover, without Supreme Court review uniformly would be impossible. The state of the law would be different and diverse, depending upon accidents of geography.

This proposal would destroy our traditional structure of government in still another way. It would, for certain purposes, convert intermediate courts into courts of last resort. This not only violates our traditional court system, but is also quite irrational. If judicial review is proper to check arbitrary and unconstitutional executive action, then why is not full judicial review proper? Senator Jenner, in effect, is saying that he would like the courts to review executive action in the five indicated fields, but that he would withhold from such review the action of the Supreme Court. In other words, Senator Jenner would like a judicial review to the extent that he is hopeful it will be favorable to executive action, rather than hostile to it. But to permit judicial review without the final action of the Supreme Court is like the circus stunt of sawing a woman in half. Our system of judicial review contemplates an appeal to the Supreme Court as a final stage in the judicial process. No logic justifies cutting off judicial review at some stage short of that. And, of course, there is no logic in the Senator's proposal except the hope that by thus truncating judicial review, reactionary laws invasive of civil liberties will obtain judicial sanction. Senator Jenner wants to eat his cake and have it too.

Senator Jenner knows full well that if he made the logical proposal of withholding judicial review entirely from executive actions of the kind covered by his bill, that everyone with a common voice would denounce this proposal as grossly unconstitutional and as a step toward tyranny. Every schoolboy knows that under our American system, no man can be injured without an appeal to the courts. Senator Jenner knows this too. He therefore proposes that the executive actions which injure individuals be judicially reviewed, at least sufficiently to appear to satisfy the requirements of due process of law, but not sufficiently to do full justice or even to give the appearance of doing full justice. We think that any proposal which would deprive the highest court of our land of the power and jurisdiction to review Federal action or to enforce federally protected rights would require a constitutional amendment. More than this, it would be a retrogressive step of the most gross character and one which would shame us at home and belittle us abroad.

But when we consider the precise areas which would be affected by this bizarre proposal, we must readily recognize that its adoption would permanently disfigure our constitutional system. The first proposal, as we have indicated, deprives the Supreme Court of jurisdiction to examine the conduct, jurisdiction, or activities of congressional committees, or the validity of convictions for contempt. Here, on its face, is a flagrant violation of the principle of separation of powers. Under our system of government, the functions of the legislature, whether it takes the form of legislative investigation or a statute, have been historically subject to full judicial scrutiny. The mind of man has devised no better way for checking upon legislative tyranny than by subjecting the acts of the legislature to the scrutiny of courts in order to determine whether they conform to the requirements of the Constitution and of fair play. This proposal by barring the most respected tribunal in the land from examining legislative abuses at the investigative level, is a step toward legislative tyranny. More than this it reflects a curious lack of confidence in the willingness of the legislature to submit its actions to the review of a court.

The second portion of Senator Jenner's proposal in this area would deny an appeal to the Supreme Court by any individual charged with the crime of contempt of Congress. This can only be characterized as a monstrous proposal. Senator Jenner thinks that a congressional committee should have subpoena power and the power of exacting compulsory disclosure from witnesses who appear before it by threatening them with jail for refusal to comply with the directives of a congressional committee. He is ready to send a man to jail for refusing to obey a congressional committee, but he is unwilling to permit

the most important tribunal in the Nation to determine whether that contempt conviction is in full accord with the Constitution of the United States, and the mandate creating the congressional committee. In other words, Senator Jenner desires for congressional committees not only the right to act as judge, prosecutor, and jury, but the right to prevent the victims of this injustice from seeking relief elsewhere.

No one would seriously argue that an individual convicted under any other criminal statute should not have the right to seek relief in the Supreme Court. But why should a car thief, a drug purveyor, a person engaged in a conspiracy to use the mails to defraud, or a counterfeiter have the right to seek relief in the Supreme Court of the United States but not a man who refuses to submit to the abuses of a congressional committee? Under our system of law, does a narcotics seller have more rights than a witness in a congressional committee? Yet, this would be exactly the result of Senator Jenner's proposal. Here, as elsewhere, this measure constitutes a denial of equal protection of the laws.

The second area in which Senator Jenner would deny Supreme Court review covers discharge by the executive branch of the Government of employees for security reasons. An employee who is discharged for incompetence, for absenteeism, for drunkenness, or for forging expense vouchers, presumably continues to have a right to test the validity of his discharge through our court system to the highest Court of the land. But an individual who is discharged for "security" reasons is placed in a special category. This is absurd.

Employees who are discharged for security reasons are the very ones who have the greatest need of judicial protection. Everyone knows that security discharges are frequently based upon exaggerated charges, rumors, and the fatigued evidence of paid informers. One could hardly conceive of an area in which the judicial function has a more appropriate role. Besides, discharges of this sort characteristically involve an assertion by the employee of the protected freedoms. Innocent activities of speech, press, and assembly which have a preferred place in our constitutional system are frequently converted into evidence of seditious and disloyal activities by men who fall prey to panic, witch hunting, and hysteria. It is the function of the courts in cases of this kind to protect the individual against the denial of his fundamental rights.

As a matter of fact, the Supreme Court has a special responsibility in this area. The Supreme Court cannot be deprived of jurisdiction to determine whether an individual has been deprived of his protected freedoms without seriously jeopardizing the integrity of those freedoms. This is so for a number of reasons. In the first place, legislatures are the poorest judges of the necessity or justification for invading basic freedoms. The emotion engendered against unpopular minorities makes it imperative that some external agency such as the courts function vigilantly to see to it that the holding of minority views will be protected against emotion and fear. The Supreme Court is in an ideal position to serve this function because of its nonpolitical composition removed from the winds of controversy.

In addition, the fullest protection of human rights requires a tribunal which in its composition and geographical location is not affected by local insular prejudice. I very seriously doubt whether the whole struggle to achieve civil rights for the Negroes of this country could have been advanced to its present stage if the rights upon which this struggle depends were confided exclusively to local appellate courts. Only a court with a national outlook can completely free itself of passion and prejudice.

The third area in which Senator Jenner's proposal to shrink the jurisdiction of the Supreme Court would operate is that of State regulation of subversive activities within the various States of the Union. This proposal would not deny jurisdiction to the Supreme Court to review State regulations of car thefts, or grape marketing, wheat storage, or kidnapping. But the proposal singles out subversive activities from which to bar the review of the Supreme Court. Here again, Senator Jenner's proposal would be disastrous. Certainly an individual convicted for sedition in a State court is just as much entitled to have his conviction reviewed as a gangster indicted for kidnapping.

One of the most important areas for the exercise of the Supreme Court jurisdiction today is that of umpiring conflicts between the Federal and State Governments. As everyone knows, the Federal system could not flexibly respond to changing times without the periodic supervision by the Supreme Court of the relationships between State and Federal regulation. The difficulties which are posed by overlapping, concurrent and inconsistent regulations on the Federal and State levels fall uniquely within the province of the Supreme Court. Indeed, it

is indefensible to say that it is permissible for the Supreme Court to apply judicial therapy to conflicts between Federal and State marketing systems, but not to conflicts between Federal and State antissubversive systems. If one were to approach the problem logically, one would be forced to recognize that the control of so-called subversion imperatively requires the supervision of the Supreme Court not only for the avoidance of conflicts between Federal and State regulations, but for the protection of those precious rights of speech, press, and assembly by which we live as a people.

The fourth subdivision of Senator Jenner's bill would deprive the Supreme Court of jurisdiction to review any kind of action of a local school board or board of education or a related body dealing with subversive activities in its teaching body. In other words, the Supreme Court can go on, as in the past, reviewing all kinds of actions of a school board, but not those dealing with "subversive activities in its teaching body." Nowhere does the bill explain why a teacher charged with subversion has fewer rights against his employer than anybody else would have. It seems to be a premise of the bill that the mere charge of subversion is sufficient to remove a victim from the protection of the Constitution. In addition, under this proposal a school board could decide that a teacher who refused to teach pursuant to a religious creed was subversive. Although before the passage of this law the Supreme Court would hold that such a regulation to be violative of the separation between church and state, this provision would open the door to religious bigotry by denying the Supreme Court jurisdiction to determine its validity under the first amendment.

Finally, this bill broadly bars the United States Supreme Court from jurisdiction to examine or review any regulation pertaining to the admission of persons to practice law within a State. Under this provision, a State board of bar examiners could rule that all Catholics or all Jews are not eligible to practice law within the State. Such a regulation would today be promptly struck down by the Supreme Court as a gross invasion of protected freedoms. This bill would prevent the Supreme Court from requiring that the precious right to practice a profession be granted impartially and without discrimination and without invasion of rights protected by the Constitution. This undemocratic result should not be countenanced just because Senator Jenner is mad at the Supreme Court.

SHREVEPORT, LA., March 5, 1958.

Mr. J. G. SOURWINE,

*Chief Counsel, Senate Internal Security Subcommittee,
Senate Office Building, Washington, D. C.*

DEAR MR. SOURWINE: When I testified before the subcommittee on Friday last, you questioned me with reference to the power of the Congress to pass the Jenner bill. While there was then and is now no doubt in my mind that the power and authority to enact the bill exists, I had not studied the law bearing upon the point prior to giving my testimony.

Since returning to my office I have reread the Constitution and studied the law to some extent. In the first place where language is included in a Constitution it is presumed it is placed there for a purpose. Accordingly, the clause "With such Exceptions, and under such Regulations as the Congress shall make" has meaning and is just as much a part of the Constitution as any language in the section. A fair interpretation would be that the framers intended the Supreme Court to have the jurisdiction set forth in Congress but that freedom of action was given to the Congress to alter this jurisdiction. Presumably such authority was given because the framers thought that situations such as exist today might occur. Be that as it may, we find that the law as set forth in 33 C. J. S. Federal Courts, section 199, that the Court has only such jurisdiction as is affirmatively conferred by the Congress. The section reads in part as follows:

"Such appellate powers as are given to the Supreme Court by the Federal Constitution are limited and regulated by acts of Congress and must be exercised in accordance with such regulations, and no appellate jurisdiction in a given case can be exercised by the Supreme Court if Congress has made no provision therefor. By statute (28 U. S. C. A., secs. 344-350), Congress has specified the appellate jurisdiction of the Supreme Court, and the effect is to deny by implication all appellate jurisdiction which is not affirmatively conferred. Congress may give the Supreme Court appellate jurisdiction in respect of matters as to

which, under the Constitution, it has original jurisdiction, but jurisdiction granted as original cannot be exercised as appellate."

In support of the portion of the text above quoted, are cited several recent decisions of the Supreme Court of the United States.

On my return to Shreveport, I read an editorial which appeared in the Shreveport Times, Sunday, March 2. I enclose it herewith. If it is possible will you cause this letter and the editorial to be included in the record?

With kindest regards, I am

Very truly yours,

ROBERT O. CHANDLER.

[From the Shreveport Times, March 2, 1959]

THE COURT AND THE JENNER BILL

A bill by Republican Senator Jenner, of Indiana, to limit in certain respects the appellate jurisdiction of the United States Supreme Court is before the Senate Judiciary Committee. The Constitution specifically spells out power to Congress to establish the appellate powers of Federal courts.

The bill is being attacked by self-styled liberals and leftists of the press, air, and soapbox with great vim. To hear them talk, one would think that Senator Jenner had fired a whole flock of hydrogen missiles at American freedom with the intent of bringing about complete destruction.

The Washington Post says: "What it (the Jenner bill) means is that the Senator wishes to discipline the Court for handing down various liberal decisions with which he disagrees and to prevent it from deciding similar cases in the future."

The Denver Post, which is just as ultraliberal and off center in the West as the Washington Post is in the East, refers to the Jenner bill as: "• • • a measure designed to punish the United States Supreme Court for making decisions with which the Senator from Indiana does not agree."

The similarity of the phraseology used by the two Posts--Denver and Washington, entirely unrelated to each other--is striking. It shows the manner in which self-styled liberal thinking that usually is far from real liberalism always trickles down to the same level no matter how many may be the directions from which it flows.

The Jenner bill is in no way an effort by Senator Jenner to punish the Supreme Court or anybody for decisions with which he disagrees. The decisions which brought about the Jenner bill have been disagreed with by many of the most respected constitutional lawyers in the Nation as well as by bar associations and bar association committees making special studies of them.

These decisions are, particularly, decisions which have the effect of aiding and abetting underworld criminals such as rapists, and especially Communists and enemy agents seeking or advocating overthrow of the Government of the United States by force. They include also such decisions as the Nelson ruling, which deprived States of the right to establish laws protecting themselves from espionage and sedition.

Specifically, the Jenner bill would deprive the Supreme Court of appellate--appeal, review--authority in five types of cases as follows:

1. Congressional committee investigations where Congress itself has exercised its constitutional authority to investigate and to establish conditions under which the investigations should be held.

2. Cases in which the executive department of the Federal Government has established security procedures to protect itself, the Government, and the Nation against enemy infiltration or activities and has dismissed Government employees under these security regulations.

3. Cases in which a State has established laws to protect itself against treason and espionage.

4. Cases in which properly and constitutionally established local authority, such as school boards, have discharged schoolteachers under security regulations established by those authorities.

5. Cases in which States have established laws or regulations denying licenses to practice law because of Communist activities or sympathies of the would-be licensee.

All of these five categories could be kicked around considerably. But the fact remains that in a series of many decisions covering all five, and sometimes overlapping into others, the Supreme Court has weakened national security tremen-

dously, especially in the field of protection against Communist infiltration into the Government, which provenly became somewhat rampant during the Roosevelt and Truman administrations.

It also has weakened local police authority in a manner to aid and encourage crime.

Congress always has been reluctant to limit appeal and review authority of the Federal courts, although it did so in one case shortly after the Civil War. But a situation has been reached now where members of the Supreme Court itself have accused the Court of legislating when its duties constitutionally are confined to adjudicating, and of intruding also into the executive branch of the Government when each of the three branches of the Government are supposed to be separate and independent from the other.

The Court has been accused also by bar associations and similar groups, as well as by members of State and Federal bench, of amending the Constitution and rewriting it, an authority that rests solely with the people themselves.

If these accusations had come from one case or a few cases, they might be by-passed as no more than tepid tempests. But they have been coming in an ever-increasing stream for a number of years and even under a certain amount of changing personnel on the Court.

Probably Senator Jenner's bill should not be passed exactly as written. Rarely, indeed, can any bill of this type be looked on as subject to no change or alteration. But, since the Supreme Court will not restrain itself, the principle of the Jenner bill that Congress must compel restraint certainly is sound.

THE AMERICAN LEGION, DEPARTMENT OF WISCONSIN,
Menomonee, Wis.

Senator JAMES O. EASTLAND,
Chairman, Senate Internal Security Subcommittee,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: As national executive committeeman for the American Legion Department of Wisconsin, I would like to register my approval and support of Senate bill 2646, "To limit appellate jurisdiction of the Supreme Court," as introduced by William E. Jenner. As you know, the American Legion, by action of its national convention and otherwise is on record in support of this proposed legislation and we believe early action on the part of Congress is important.

May I respectfully suggest a possible amendment of Item (4) of the suggested paragraph 1258 by adding the words immediately following "In its teaching body" the following: "or otherwise to the full extent of the body's authority and jurisdiction."

We believe the amendment would strengthen the position that some educational bodies might take to combat subversive influence and propaganda.

Your consideration and that of your committee will be greatly appreciated.

Yours very truly,

G. E. SIPLE,
National Executive Committeeman.

Senator JENNER. We will stand in recess until 2 o'clock this afternoon.

(Whereupon, at 12:10 p. m., the committee recessed, to reconvene at 2 p. m., this same day.)

AFTERNOON SESSION

Senator JENNER. The committee will come to order.

Mr. John Crippen, executive secretary of the Anti-Communist League of America. Is he present? John Crippen?

(No response.)

Senator JENNER. Do you have anything from him?

Mr. SOURWINE. I understood Mr. Crippen would be here.

Senator JENNER. Do you have a statement or anything that you might put in the record?

Mr. SOURWINE. I must apologize. I have a telegram which just came in—I had not read it. Mr. Crippen says, "I deeply regret inability to be with you due to sudden attack of flu," and asks that his statement be put in the record.

Senator JENNER. All right. Mr. Crippen's statement will go in the record and become a part of the official record of this committee. (The document referred to is as follows:)

ANTI-COMMUNIST LEAGUE OF AMERICA,
Park Ridge, Ill., February 2, 1958.

Mr. SOURWINE: Please pardon the yellow pages. I worked on this almost all night Sunday, in order to fulfill my promise; but ran out of white paper during the night. I hope the committee will also, in this case, be a little lenient with my typing, which is hardly professional.

Kindest regards,

JOHN K. CRIPPEN, *Executive Secretary.*

STATEMENT BY JOHN K. CRIPPEN ON SENATE BILL S. 2046

I consider it an honor and privilege to be allowed to present my views on the Jenner bill, S. 2046, a bill to limit the appellate jurisdiction of the Supreme Court of the United States. I am here as a private citizen, and also as an officer of the anti-Communist League of America. This organization, though not large in itself, remains in close contact with a very large number of Americans through membership and participation in most of the larger right-wing organizations. Indirectly, therefore, the league may be said to be a large organization.

The directors are T. W. Miller, a Chicago attorney, Anna O. Nisbet of Binghamton, N. Y., G. O. Garshwiler of Fullerton, Calif., a publisher of right-wing educational material, Robert B. Taft, treasurer and, incidentally a cousin of the late Senator Taft, the Honorable John Unger, Judge of the probate court, Danville, Ill., our general counsel and chairman of one of our committees, and myself as executive secretary.

One of the primary purposes of the league is support of both State and National representatives of our Government, and of our security agencies. We place particular emphasis upon basic Americanism and, therefore, anti-Communism. The two terms are to us synonymous. We believe that it is not enough to be non-Communist in the present state of world turmoil; that a useful citizen must be definitely and completely anti-Communist in order to fulfill the requirements of good citizenship.

In addition to our American membership and affiliates, we have several foreign affiliates. One of these gentlemen, by the way, recently met and talked with several Members of Congress. He is from Munich, Germany, and is an international authority on communism—particularly as it affects the European scene. We also have affiliates on Formosa, and in other foreign countries. The functions of such affiliation and memberships is to exchange views, factual information, documentation and data on the world Communist conspiracy, and to aid in the proper utilization of such material, by placing it in the hands of those individuals whom we feel are doing the best job in their own particular fields of anticommunism.

We are strictly an activist organization, preferring to work with and through well-established groups, organizations, or units, publications, religious entities, publishers or columnists or others whom we have found to be consistently and effectively anti-Communist.

We have therefore followed with great interest the two current bills in the House and in the Senate—the so-called Walter omnibus bill, H. R. 9937, and the Jenner bill, S. 2046, in the Senate. I do not set myself up as a legal authority; we rely heavily upon legal opinions of others in our organization. But upon a query to many of our committee chairmen and our board of directors, I find an almost unanimous agreement upon the need for passage of these two bills, H. R. 9937, and the Jenner bill, S. 2046. Among the individuals named I find almost complete agreement and accord for the dire need for such laws, as well as agreement in the "letter and spirit" of them both. However, I shall here confine my further remarks to the Jenner bill, S. 2046—a bill to limit the appellate jurisdiction of the United States Supreme Court.

We have followed—that is most of the membership of the league—the progress of this bill, the reason for its being brought into existence, as these reasons were brought to light during lengthy hearings of this committee, and in the questioning and cross-examination of both friendly and unfriendly witnesses demonstrated the very great need for such a bill. In the near 20 months of Supreme Court decisions which gave us 10 major decisions (and many minor ones) pertaining to the Communist and subversive movements in America, or activities of the same, we have witnessed the development of certain patterns of subversion, as they were unfolded during the hearings. Each of the 10 major decisions, and particularly 3 of them, the Watkins, Jencks, and Steve Nelson decisions, were brought into the hearings through various and sundry statements of the witnesses and development of their attitudes in defying the Senate Internal Security Subcommittee.

The writer noted that a few bar groups have opposed the above bill. I also noted with great consternation that the Chicago Tribune—normally preponderantly right-wing—has voiced some opposition which I believe is based upon totally unfounded reasoning. This opposition—where we had hoped to find strong support for the needed measure—actually prompted my final decision to come to Washington in support of the measure. But, I assure you, that support will be received in many other quarters. I am by no means speaking as a lone individual. We need great strength in combating the leftward trend of our Supreme Court, which S. 2040 was formulated to combat.

Judge John Unger of Danville, Ill., general counsel of the league, engaged in a campaign for reelection on the Republican ticket, and therefore is unable to accompany me as he had wished to do. Nevertheless—busy a man though he is—he did some important legal research upon the subject of appellate jurisdiction which I believe, at this point, may well be stressed.

"The best help I can give the league on the Jenner bill from a legal standpoint," Judge Unger writes, "is the following which has the dual advantage of (1) being from an official Government publication: The Constitution of the United States, Analysis and Interpretation, United States Government Printing Office, Washington, 1953, 82d Congress, 2d session, Senate Document No. 170. Prepared by the Legislative Reference Service, Library of Congress, Edward S. Corwin, editor, 614 pages, the Appellate Jurisdiction of the Supreme Court and (2) it was written by Prof. Edward S. Corwin—the great authority, according to the liberals."

Before quoting the article by Corwin, cited by Judge Unger, I should like to insert parenthetically that the opinion he presents harkens back to a time when the modern Supreme Court had not gone so completely "modern," following the trend of so-called modern republicanism under Earl Warren.

Corwin, and other liberals, would not and in fact do not regard today the Supreme Court in exactly the same light as in 1953, nor accept the same view expounded by a more sober Corwin in 1953. Here I quote:

"Unlike its original jurisdiction, the appellate jurisdiction of the Supreme Court is subject to control by Congress in the exercise of the broadest discretion. Although the provisions of article III seem, superficially at least, to imply that its appellate jurisdiction would flow directly from the Constitution until Congress should by positive enactment make exceptions to it, rulings of the Court since 1796 establish the contrary rule.

"Consequently," continues Mr. Corwin, "before the Supreme Court can exercise appellate jurisdiction, an act of Congress must have bestowed upon it, and affirmative bestowals of jurisdiction are interpreted as exclusive in nature so as to constitute an exception to all other cases. This rule was first applied in *Wiscart v. Dauchy*, where the Court held that in the absence of a statute prescribing a rule for appellate proceedings, the Court lacked jurisdiction. It was further stated that if a rule were prescribed, the Court could not depart from it. Fourteen years later, Chief Justice Marshall observed for the Court that its appellate jurisdiction is derived from the Constitution, but proceeded nevertheless to hold that an affirmative bestowal of appellate jurisdiction by Congress which made no express exceptions to it implied a denial to all others."

Now follows the most important part of the article, derived from the famous *McCardle* case: "The power of Congress to make exceptions to the Court's appellate jurisdiction has thus become, in effect, a plenary power to bestow, withhold, and withdraw appellate jurisdiction, even to the point of its abolition. And this power extends to the withdrawal of appellate jurisdiction even in pending cases."

Illustrating the power of Congress to withhold and vary appellate jurisdiction, I quote: "In the notable case of *Ex parte McCardle*, a Mississippi newspaper edi-

tor who was being held in custody by the military authorities acting under the authority of the Reconstruction acts filed a petition for a writ of habeas corpus in the circuit court for southern Mississippi. He alleged unlawful restraint and challenged the validity of the Reconstruction statutes. The writ was issued, but after a hearing, the prisoner was remanded to the custody of the military authorities. McCordle then appealed to the Supreme Court, which denied a motion to dismiss the appeal, heard arguments on the merits of the case, and took it under advisement.

"Before a conference could be held, Congress enacted a statute withdrawing appellate jurisdiction from the Court in the appeal for want of jurisdiction. Chief Justice Chase, speaking for the Court, said: 'Without jurisdiction the Court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the Court is that of announcing the fact and dismissing the cause.'"

This is a good view, a basic, proconstitutional view. It stresses the fact that the Supreme Court cannot derive its powers from other than the jurisdiction which is vested in it by the Congress of the United States. This, in essence, it seems to me as a layman, is one of the important checks and balances which pervades both the letter and the spirit of our great Constitution. And it would further seem that at this particular time in our national history, beset with communism from within and from without, at this particular time it is imperative that Congress shall exercise its right to limit the appellate jurisdiction of the Supreme Court.

The Honorable William A. Jenner, author of S. 2646, has expressed the need in far better language than I could hope to do. A careful reading of his speech of August 7, 1937, before the Subcommittee To Investigate the Administration of the Internal Security Act and Other Internal Security Laws shows in poignant detail the urgent need for enactment of such legislation as S. 2646 provides.

Senator Jenner poignantly summarizes this need on page 3 of the record of the above hearing with these words: "By some of these decisions, antisubversive laws and regulations have been rendered ineffective. States have been denied the right to fight subversion, and have been denied the right to bar Communists from practicing law. Violators of Federal antisubversive laws have been turned loose on flimsy technicalities. Confidential files of the FBI and other investigative and law-enforcement agencies have been opened up to fishing expeditions by defendants and their counsel. The Court has challenged the authority of Congress to decide upon the scope of its own investigations and the right of a congressional committee to make up its own mind about what questions to ask its witnesses."

These are serious charges, gentlemen, and you who are charged with the deep responsibility of guarding those checks and balances which our Constitution provided against the subverting of our Constitution know that Senator Jenner's words by no means underestimate the seriousness of the situation today.

It will not be necessary to review here—as you gentlemen are very familiar, I assume, with the proposed law—the exact provisions of 2646. But, briefly, for the record, I believe it is germane to state that the five provisions of S. 2646 grew directly out of a prolonged and careful series of hearings, by this committee, and a studious review of the implications of testimony by witnesses before this committee, (as well as study of other factors and documents) which showed a direct correlation between the rulings of the Supreme Court and the behavior of Reds, pinks, and other witnesses during the hearings. These demonstrated conclusively the need of the five provisions set forth in the Jenner bill.

As you well know, these provisions include withdrawal of appellate jurisdiction in cases involving contempt of Congress; administration of programs involving elimination from services as employees to the executive branch of individuals whose retention may impair the security of the United States Government; statutes or executive regulations of any State pertaining to subversive activities within such State; laws and regulations concerning subversive activities in its teaching bodies; or laws, rules, or regulations of State boards of bar examiners pertaining to the admission of persons to practice law within such States.

In these cases, and only these cases, the Congress, in enactment of S. 2646 would simply say to the Supreme Court: These do not come within the scope of your jurisdiction. The law, I might add, in the opinion of numerous individuals and legal authorities, set forth in hundreds of rightwing journals such as National Review, is well written, simple, effective—and in fact is so simple that even the current "Warren Supreme Court" should be able to comprehend its meaning and its intent.

I doubt that many of the editors and profusive sob sisters who have rallied against S. 2040 have followed in great detail, as have most of the members of the league, for example, the Senate and House hearings which preceded the writing of this law by the eminent lawyer and Senator, the Honorable William A. Jenner. If they had, they would have seen that the great volume of testimony which resulted finally in this proposed law were aimed at correcting some of the most serious flaws in our present system in the prosecution of the Communist conspiracy.

They would have noted, as I and thousands of other Americans have noted, the growing contempt, arrogance, and insulting behavior of witnesses summoned before the Senate and House committees. They would have viewed with dismay the profligate quotations from late decisions, such as the Steve Nelson case, the *Serice v. Dulles*, the Slochower, Kohnsberg, Jencks, Watkins, and other famous—or infamous, as I prefer to call them—decisions.

Then, there has been a long parade of noncooperative witnesses and the open badgering of patriotic Americans who wished to testify against communism and Communists and "small-a Americans," by a new cult of "America lasters" which these Supreme Court decisions have favored. The ever-growing ranks of fifth amendmenters, and others who now invoke the first and second amendments as well, harkening to late Supreme Court decisions, and the crop of professional Red or Pink crybaby witnesses is enough to make the blood of any decent American hit near boiling point.

We are being taxed—almost beyond our ability to pay—to fight or "contain" communism, both here and abroad. What an irony, what a mockery if we continue to spend up to the very moon if we do not take the simple and elementary step of protecting ourselves against the decisions of our own Supreme Court—decisions which have, under "One-World-Warren"—been more helpful to the Communist Party than any other single series of acts within our generation.

My good friend, Dr. Fred Schwarz of Australia, has reminded you gentlemen, and our country, of the dire menace which faces us. Daily, over the radio, TV, and in all the newspapers and magazines, we are told of the need of combatting it. What a farce—if we gladly tighten our belts, and load our economy with billions for defense spending if our very laws are to be used to help the communist conspiracy gain greater momentum right within the very orbit of our national existence. I have long held—and thousands of Americans share this view—that we could greatly lower our cost of fighting communism, and do it far more effectively, if we would just simply take the offensive view against it. Their onslaughts in America are largely legalistic, as any expert will tell you; and what better place to secure those onslaughts than in the highest courts of our land.

A Supreme Court Justice once facetiously stated that law is what the Supreme Court says it is. Now, it would appear, we have in existence elements of the Warren court which takes this view all too seriously, contemptuous, it would seem, of the power vested in our Congress to right this serious injustice through the simple expedients of either impeachment proceedings against certain of the justices, or a law which simply takes out of their hands those cases involving subversion which they have proven themselves eminently unqualified to handle. The latter course, under S. 2040, is obviously the more direct and logical one today. It is simple, certain, and direct. We in the League like direct and effective measures.

Even a fourth grader should know that the Supreme Court has no other function than to determine the constitutionality of a case. But when that Court has, in case after case, taken unto itself the actual rewriting of our Constitution, has substituted itself for a jury, has rewritten law of the lower courts, in one case basing its decision upon the whimsy of an alien social scientist who has openly opposed the system of our country and its Government; when it has refused to review cases where an anti-Communist viewpoint might be served, but readily reviewed cases when the pro-Communist view is evident, and receives special treatment—then, indeed, it is high time that rapid and effective steps be taken to correct the flagrant and usurped power which a power-hungry Court has delegated to itself.

When the Supreme Court favors rummaging through FBI files by those very subversive individuals it is in existence to protect us against, when it clearly legislates against basic State sovereignty, when it rules that communism is not a crime until the conspirators are caught after successfully concluding their crimes, when it rules that the Justice Department and the FBI, the Attorney-

General, the House and Senate Committees fighting subversion, the State courts, and all others must bow to new rules and new regulations favoring communism—then, gentlemen, it is time that something be done, and done with all possible speed. It seems to me, and the others whom I represent, that S. 2040 is a logical and sensible answer to the Supreme Court's hungry and power-mad scramble for more power.

The arguments of those who oppose S. 2040 are to be expected in the leftwing press. And, make no mistake about it, that press and its sundry and varied stooges in America, is making an all-out effort to defeat S. 2040. These arguments are almost carbon copies of their arguments against the various anti-Communist measures such as the Smith Act, various registration and control acts and immigration acts written to guard us against both alien and domestic subversion. And they are heard in the leftwing press, and among its prolific stooges, with monotonous repetition.

But all these arguments—in view of the truly desperate need for such security as S. 2040 would provide—are silly when compared with the stark, cold fact that we need such an act to guard against further wiping away of our constitutional safeguards. These arguments seem ridiculous, against the background of the suits accomplished of our enemy which S. 2040 would guard against.

In reviewing a vast number of newspaper clips and writeups, both in the leftwing press and in some misguided rightwing journals as well, all of them can be summed up as follows: (1) That litigants in a dispute will, in specific cases involving subversion, "be deprived of the right to hear appeals from the decision of any public authority, Federal, State, or local, on any question concerning subversion"; and (2) "Who * * * can favor sacrificing the protection of a final appeal to the Supreme Court." And there is a third argument, which will be handled later.

The above two—believe it or not—are direct quotations from an editorial in, of all newspapers, the rightwing Chicago Tribune, from an editorial dated February 24, 1958, and headed "A Dangerous Bill." The third argument—consistently found in the leftwing press—is that removal of appellate jurisdiction in these cases (as though such had never been accomplished before) might set a dangerous precedent, so that in the future our citizens might be deprived of the protection of the Supreme Court.

The above constitutes practically the only case against S. 2040, and it is a flimsy case indeed. First of all, even if the above were conceded to be valid arguments, the dangers arising out of them would be infinitely less than the dangers of a continuing series of pro-Communist decisions in the highest court of our land.

A close look at the arguments, too, reveals their weaknesses. The first argument, that litigants may be "deprived of the right to hear appeals from the decision of any public authority" is negated by the fact that supreme courts in general, and this Court in particular, often do refuse to review cases, and they need to give no reason for such refusal. I have already mentioned that we know they have, for example, refused to review cases which might bear favorably upon anticommunism, and have selectively accepted cases whose decisions, as in the Steve Nelson case for example, have a far-reaching and adverse affect upon our costly struggle against the internal Communist conspiracy.

Further, as only constitutionality should be involved, as it has not in the Warren court, it follows that in those cases involving subversion the individual through the whole system of the lower courts, including the State supreme court, has today a far better chance of a nonadverse decision, if law so justifies, in these lower courts.

The second argument, in form of the question: "Who * * * can favor sacrificing the protection of a final appeal to the Supreme Court?" The answer seems to me to be painfully obvious. "What protection?" I would ask here: "What protection, in the Warren supreme court?" If, in questions involving subversion, the record clearly shows that protection has exclusively involved protection for the leftwing, I would say that is poor protection indeed, and that the lower courts had, in such cases, already demonstrated better fitness in handling of such cases. The protection here has been for the wrong litigants, against America, not for America.

In addition, knowing the probable leftwing course that will be taken in the Warren court, litigants will probably hesitate to even take their case to that Court, if an anticommunist cause is to be served. The protection has truly been selective, by, for, and of the leftwing, and, therefore, against America. In all

other matters, of course, excepting those involved in subversion and the five types of specific cases related to the Jenner bill, the Supreme Court can and would still be provided for, as the Tribune so quaintly put it, "the protection of the final appeal."

Now, the last argument advanced by a few barristers and some newspapers (doubtless influenced by their own legal counsel, which in some cases extends into the ranks of the communistic National Lawyers' Guild) that a dangerous precedent may be set for our future, can be handled with a very simple and elemental bit of logic. If, at some future date, Congress so wills it, and the Communist menace has faded beyond our horizons, Congress can take away as Congress can give—and the will of the people, expressed through Congress—may as readily repeal S. 2646 as it had enacted it.

S. 2646 simply serves notice upon the Supreme Court, as Congress has always had the right to serve notice to any branch of our Government, that it does not have the right to review certain types of cases, simply stated, in five regions in which that Court had demonstrated its inability to handle these matters. Thus, if the Supreme Court demonstrates its selectivity in certain types of cases, let Congress, too, state that it shall repose its greater confidence in the lower courts, in the sovereign States, and in the people of those sovereign States, and selectively remove those cases beyond the jurisdiction of the Supreme Court which necessity and commonsense now demand.

Ours is a battle of great proportions against the Communist menace. S. 2646 skilfully and realistically recognizes that menace. And it would block further undermining of our national safety and security. It can help to return America to national sanity. It lays down tough rules for the enemy, in place of rules against Americans and our security.

It is high time that we brought some hard-and-fast rules for the enemy, and it is a small price for our continuance as a Nation of law-abiding citizens. Without S. 2646 I fear that our great Constitution and our Bill of Rights will be trampled to dust. But with S. 2646 our great Congress will have at last served notice upon our enemy, the Communists, that "You may no longer have the help of the Supreme Court of the United States." Yes, S. 2646 must pass.

Senator JENNER. While we are waiting for Mr. Boudin, here are some letters, and I have indicated to you, Mr. Sourwine, the certain ones that I would like to go into the record and to become a part of the record. And since they are so voluminous—these are all letters in support of this bill from all over the United States, I will turn them over to you, and ask to make them a part of the official record.

Mr. SOURWINE. Yes, sir.

(The documents referred to will be found in appendix III.)

STATEMENT OF LEONARD B. BOUDIN, ATTORNEY, NEW YORK, N. Y.

Senator JENNER. You may give the reporter your full name.

Mr. BOUDIN. Leonard B. Boudin, B-o-u-d-i-n.

Senator JENNER. Where do you reside?

Mr. BOUDIN. Twenty-five Broad Street, Manhattan, N. Y.

Senator JENNER. And you are an attorney?

Mr. BOUDIN. I am.

Senator JENNER. Are you appearing here as an individual or are you representing some organization?

Mr. BOUDIN. Both. I am appearing here as a member of the bar of the Supreme Court and I represent—I am counsel for the Emergency Civil Liberties Committee.

Senator JENNER. You may proceed.

Do you have a prepared statement?

Mr. BOUDIN. No, I will be brief and extemporaneous.

Mr. SOURWINE. I want to ask you further questions.

Are you the same Boudin who was a member of the executive board of the National Lawyers Guild?

Mr. BOUDIN. Yes, I was.

Mr. SOURWINE. In 1956?

Mr. BOUDIN. I am still a member of the National Lawyers Guild, but I am not a member of its national executive board.

Mr. SOURWINE. Are you the same Leonard B. Boudin who in 1941 was 1 of 450 signers of a petition to the President and the Congress to defend the rights of the Communist Party?

Mr. BOUDIN. I think we have reference to the same document. It will be very helpful if someone would give it to me in the future, so I could be sure of it, but I think you are probably correct. And, of course, it referred not to upholding the Communist Party, but its legal rights as we understood them under the Constitution.

Mr. SOURWINE. And you are the same Leonard B. Boudin who in 1940 was one of the petitioners in support of the eligibility of Communists to hold commissions as officers in the United States Army.

Mr. BOUDIN. That I have no recollection of.

Mr. SOURWINE. Are you, sir, the same Leonard B. Boudin with respect to whom the Secretary of State advised the United States district court that he had information you had been a member of the Communist Party as late as 1950?

Mr. BOUDIN. I am the same person—I take it you will permit me to state—

Mr. SOURWINE. That is the only question I asked. You may make any statement you want.

Mr. BOUDIN. Let me state for the record I am the same Leonard Boudin who ultimately was successful in the court of appeals and received a passport from the Secretary of State, upon the Secretary's Deputy's understanding that I had never been a member of the Communist Party.

Now I think my biography is clear enough.

Senator JENNER. Proceed.

Mr. BOUDIN. Off the record?

Senator JENNER. Off the record.

(Discussion off the record.)

Senator JENNER. Back on the record.

Mr. SOURWINE. Would you prefer to be uninterrupted during your discourse, or if a question arises would you prefer to have it asked at the time?

Mr. BOUDIN. I suppose like all people who answer questions like that, you may interrupt if you wish; privately, of course, I would prefer not to be interrupted, but of course—

Mr. SOURWINE. I will try not to interrupt without good reason.

Mr. BOUDIN. Fine. I want to approach the matter briefly, and from a purely technical point of view, Mr. Chairman, that is: This is basically a committee of lawyers, and other people have discussed the objectives of the bill, and have discussed the possible implication, I gather from the newspapers, on a political level.

I am here wanting to approach the problem only from a technical point of view, and possibly to make some small contribution to a very important subject.

Under the Constitution this is, of course, a Government with three departments, and article 3, dealing with the judicial power, is the article which is in issue in the present case.

Article 3, of course, says that the judicial power of the United States shall be vested in one Supreme Court.

The proponents of the bill presently under discussion rely upon the language appearing in the Constitution which says:

In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

And they read that provision as intending to permit a substantive subject to be taken out of the jurisdiction of the Supreme Court by appellate review.

Now I think, on examining article 3 and the other provisions of the Constitution, the following reasons would argue against giving it that broad interpretation. And that what is really intended is a limitation upon procedural jurisdiction, procedural matters, rather than a limitation on the substantive powers of the Supreme Court.

Mr. SOURWINE. Is there such a thing as procedural jurisdiction?

Mr. BODIN. I think you are correct. The words should not be "procedural jurisdiction."

Mr. SOURWINE. "Procedural" and "jurisdiction" are two different—

Mr. BODIN. You are absolutely correct.

On reading article III, I should say, it is to determine, that is, the intention, matters of procedure for or to the extent that it will determine matters of jurisdiction, a division of authority between the State and Federal court.

Mr. SOURWINE. You mean that in the Constitution where it speaks of appellate jurisdiction it really means procedure with respect to the power of the Congress to make exceptions and regulations?

Mr. BODIN. Yes. Quite right.

Now this view is supported by the following facts:

First, you will recall that, upon reading the proceedings in the Constitutional Convention, there is no discussion at all which would suggest that any tremendous power of this kind was to be given to the Congress and that, on the contrary, when a proposal was made reading that "The jurisdictional powers shall be exercised in such manner as the legislature direct," that proposal was defeated by the Convention.

Now the difficulty with the problem as we now look at it in 1958 is that the Constitutional Convention was not confronted with a question of what jurisdiction to give to the Federal court which would be subject to review and what jurisdiction which would not be subject to review. The problem before the Convention was whether the Federal court should be given any material jurisdiction, since most of the jurisdiction was expected to and, indeed, for the first years under our Constitution, come from the State courts.

It was also recognized at that time that the supremacy clause of the Constitution would create the greatest problem and a problem which would have to be resolved by the Supreme Court.

There is no suggestion, in analyzing the supremacy clause, that the decisions of the highest courts of the State would not be subject to review, and, indeed, the decisions of the higher courts of the State had to be subject to review by the Supreme Court under the conception of the problem as they then had it. In other words, they did not have

in 1789 the problem that we are now discussing, namely, shall the Federal court be regulated by the Supreme Court? The problem there was, shall we give any jurisdiction to the Federal district court, substantial jurisdiction?

So far as the State courts are concerned, the courts which were intended to get the bulk of the jurisdiction, those courts under the supremacy clause of the Constitution, would have to have their decisions reviewed by the United State Supreme Court, because it would be inconsistent for a Federal government to be created and to leave in the State court, even the highest State court, the power to determine questions of whether or not the State law was in conflict with the Federal Constitution.

Mr. SOURWINE. Subject to it—

Mr. BOUDIN. I refer to ultimate power.

Mr. SOURWINE. Except as to determination.

Mr. BOUDIN. The second reason why we state that the power to determine constitutional problems is inherent in this Constitution lies in article I, section 9 of the Constitution.

Mr. SOURWINE. You mean the power of the United States Supreme Court to have appellate jurisdiction over constitutional problems is inherent in this Constitution?

Mr. BOUDIN. Yes. May I continue? May I continue?

Mr. SOURWINE. With the exception that the Congress may make regulations and exceptions?

Mr. BOUDIN. Yes. The reason why I believe the Supreme Court has to have appellate jurisdiction is because, if the Supreme Court did not have appellate jurisdiction so far as the restrictions upon the States are concerned, which are referred to in article I, section 3—I am referring to the prohibition against bills of attainder by the State, or the prohibition against impairment of contract—there would be no way in which, after a State had spoken through its legislature and through its highest court, that the matter could get to the United States Supreme Court. The only way in which the Federal Government could protect its rights under the Federal Constitution as against the State—this, of course, deals with what is before it—is by an appeal from the State appellate court to the United States Supreme Court.

I may say, thirdly, that the passage of the Bill of Rights, following the original promulgation of the Constitution, again necessitated an appeal to the highest tribunal in the country, ultimately, for the vindication of constitutional rights.

Whether we regard that as necessary from the new matters to which the extension of jurisdictional power could apply or whether we regard the Bill of Rights as a pro tanto modification of the regulations provision, is a matter of argument.

The fact is, (a) that the Federal court would have to protect the rights of citizens under the Bill of Rights, remembering the Bill of Rights was directed against the Federal Government. And if it is anticipating the question that you may put, Mr. Sourwine, we ask why the individual, the separate Federal court, cannot have the ultimate power, or why the courts of appeal cannot have the ultimate power, the answer is that it is unreasonable to pit a single Federal court judge or a court of appeals group of judges, only part of the jurisdictional power of the United States, against the entire weight of the legislative power.

Quite aside from the uniformity argument, where a law of Congress is involved, where constitutionality is involved, it would be unreasonable, I think, even from the point of view of the proponents of the bill, to argue that the ultimate power to make a decision on constitutionality should rest in a district court or a court of appeals.

And so we argue, on the other side, that the man who is asserting the constitutional right has the same kind of right and the same necessity to have the United States Supreme Court make the ultimate decision.

Mr. SOURWINE. Are you saying a man who is asserting a constitutional right of any nature has another constitutional right—to wit, to have the Supreme Court of the United States to make the ultimate decision?

Mr. BOUDIN. On the constitutional issue—not on the issues of fact—not on many things that the Supreme Court has declined to accept jurisdiction of. But I think it quite clear from the decisions of the Supreme Court, where the issue has been squarely raised on the constitutional basis, where a question of constitutional rights has been argued, that the Supreme Court has considered the constitutional issue, with the *McCardle* exception.

Mr. SOURWINE. If I raise a constitutional issue as a litigant, I, also, have a constitutional right to have that determined by the Supreme Court; is that what you are saying?

Mr. BOUDIN. Yes.

Mr. SOURWINE. Suppose the Supreme Court refuses to grant certiorari—do they deny me my constitutional right?

Mr. BOUDIN. They do not, because the Supreme Court by denying certiorari makes in essence a decision that the question is not a substantial one for Federal review.

Mr. SOURWINE. You say that the denial of certiorari is a review of the question involved?

Mr. BOUDIN. I say denial of certiorari is a determination—

Mr. SOURWINE. Of the constitutional question involved?

Mr. BOUDIN. That there is not a constitutional question involved, or one of substantial or of critical importance which would justify the Supreme Court reviewing it.

Let me add to that—because I can see where you are moving here—I think there is a radical distinction between giving the Supreme Court power to determine that in a particular case it will let the matter rest with the decision of the lower court, whatever may be its reason, and the decision of the Congress to prevent the Supreme Court from exercising that appellate decision.

Mr. SOURWINE. You were talking about the constitutional right of the litigant to have the constitutional question determined by the Supreme Court—you were mentioning that a moment ago.

Mr. BOUDIN. Yes.

Mr. SOURWINE. You figure that the denial of certiorari does that?

Mr. BOUDIN. A denial of certiorari is a decision by the Supreme Court that it will not take the case.

Mr. SOURWINE. Yes, sir?

Mr. BOUDIN. Correct, and I regard—

Mr. SOURWINE. It does not decide anything else?

Mr. Boudin. I regard that as a decision, that the constitutional issues involved are not sufficiently pertinent to justify review by the Court.

Mr. Sourwine. You may regard it any way you wish. Go ahead.

Mr. Boudin. Of course you are asking me a question, I would, also, call the committee's attention to the practice which we have had beginning with the act of 1789, the Judiciary Act, down to the present date, as the present Justice Frankfurter points out in his book, which, of course, I will not read from, because of the time problem—first, the Court has always exercised—the Supreme Court, I mean, has always exercised full power over constitutional rights when they have been assailed. That is, neither the Congress—the Congress has not taken away from the courts the power to determine constitutional problems, and the Court on its side has decided on constitutional problems when it has felt it necessary in the interest of the Federal system or the interests of the vindication of the rights of the individuals involved. And this has been an unbroken practice from the beginning of this country until today.

We know, of course, that in the area, for example, of Federal criminal prosecution, that appeals cannot always be taken to the United States Supreme Court. But there are, also, cases that hold that where constitutional problems such as where the jurisdiction of the trial court is involved, that the Supreme Court is ready to hear the case, on a writ of habeas corpus. Of course, as Mr. Sourwine knows, there is this single exception, this sport as it were, the McCordle case, a case in which it is not clear from a reading of the opinion—the briefs, of course, are not available—whether there was not then available to McCordle an alternative route to the Supreme Court, whether by direct writ or otherwise. That is, application to the Supreme Court for a writ of habeas corpus. I cannot honestly tell from reading of the opinion whether the language, which is somewhat ambiguous, does not suggest another route, but even if the McCordle case is as stated, I still would say that, in my view, the Supreme Court would not do that again.

Mr. Sourwine. Do you regard it as unique, that McCordle case?

Mr. Boudin. Yes.

Mr. Sourwine. In what respect?

Mr. Boudin. It is the only case that I know of involving a constitutional issue. Certainly, there is a constitutional issue implicit in McCordle's arrest and detention. I must concede that. The only case I know in the history of the Supreme Court where the Supreme Court was not willing to accept jurisdiction, despite the obvious constitutional issues which I am sure it recognized.

Mr. Sourwine. Are you saying that it is the only case which construed the second clause of the second paragraph of article III?

Mr. Boudin. You will notice I have been very careful in not saying that.

Mr. Sourwine. I was not sure.

Mr. Boudin. I would not make that statement; of course not. I may call your attention to the dissenting opinion of Mr. Justice Rut-

ledge, in *Yakus v. United States* (321 U. S. 414) which provides an interesting information for the committee:

While Congress has plenary power to confer or withhold the appellate jurisdiction--compare *ex parte McCardle*--it has not so far been held and it does not follow that Congress can confer it and yet deny the appellate court "power to consider" constitutional questions relating to the law in issue."

And I would, also, call your attention ----

Mr. SOURWINE. Mr. Justice Rutledge said he was following the theory that the Supreme Court has no appellate jurisdiction unless the Congress confers it--that is what he was saying.

Mr. BORDIN. He was recognizing McCardle as an authority for that proposition.

Mr. SOURWINE. Yes.

Mr. BORDIN. But he was also suggesting that, where constitutional issues are raised, a different problem might be involved.

Mr. SOURWINE. What was involved in it?

Mr. BORDIN. I think it was the OPA Emergency Court of Appeals case, where you were precluded from going through one court and had to go to the Emergency Court of Appeals.

Mr. SOURWINE. Yes. What was Mr. Justice Rutledge's position with regard to that?

Mr. BORDIN. As I recall it, in *Yakus*, the argument was there made by the defendant that, in some respects, the procedure he was compelled to follow prevented him from stating all of the constitutional rights which he could have done if he had secured an injunction against the Government, did not have to go through a criminal prosecution.

Mr. SOURWINE. Did not the justice say:

I agree with the Court's conclusion upon the substantive issues----

Mr. BORDIN. Unless we know what the substances are, I do not see how that is conclusive.

Mr. SOURWINE (reading):

But I am unable to believe that the trial for the petitioners conforms to constitutional requirements.

Mr. BORDIN. That does not preclude the fact that, apparently, the United States Supreme Court, by the majority vote, thought it was. The point I am making is not an argument whether *Yakus* is right. I merely pointed out Justice Rutledge has pointed out himself, where constitutional issues are involved, a different rule might be applicable.

In view of the normal time problems here, I can merely conclude by stating to the committee as follows:

First, I agree with the view which has been expressed by other witnesses before this committee, since I have seen it in the press, that the lack of uniformity which would be created here would be quite serious.

Secondly, I believe that in view of the fact that the original problem related to State courts appeals to the United States Supreme Court----

Mr. SOURWINE. I would like to interrupt to read a paragraph from this decision which has been called to our attention from the dissent of Mr. Justice Rutledge.

Senator JENNER. All right. Make it brief.

Mr. SOURWINE. He said:

I have no difficulty with the provision which confers jurisdiction upon the Emergency Court of Appeals to determine the validity of price regulation or if

that has been all the mandate which makes the jurisdiction in that respect exclusive. Equally clear is the power of Congress to deprive the other Federal courts of jurisdiction to issue stay orders, restraining orders, injunctions, or other relief to prevent the operation of price regulations or to set them aside. So much as may be rested on Congress is plenary authority to define and control the jurisdiction of the Federal courts under constitutional article III.

Senator JENNER. Go ahead. You were about to conclude.

Mr. BOUDIN. I was about to conclude my statement. That is by saying that, if we remember that the original problem before the Convention related to State courts and the action that there would be taken, and, if we agree, on reviewing the proceedings before the Constitutional Convention, that it is inconceivable that the Congress could have taken away from the United States Supreme Court appellate power to review State court decisions, we must come to the same conclusion with respect to the Federal appellate jurisdiction, because there is no distinction in article III with respect to appellate jurisdiction vis-a-vis State courts and vis-a-vis Federal courts.

Secondly, as I said before, it seems to me that the Bill of Rights is meaningless unless there is an agency of government, a judicial agency of government capable of mediating between the legislative body or the Executive and the citizens. And I do not believe that the individual Federal courts, a court which is on the same level as the very important legislative body of the Congress, or the Executive, himself, and I think, as I said before, that the Congress would be the first body to be concerned if a district court judge or a court of appeals group of judges were to hold that a law is unconstitutional and that Congress was unable to appeal to the United States Supreme Court.

I think probably, without ever having been here, that most of the other things I might say have been said by other witnesses opposing the bill. And may I thank you, Senator Jenner.

Senator JENNER. We are very glad to have all shades of opinion on this important matter.

Mr. BOUDIN. Thank you, sir.

Senator JENNER. The next witness, I believe, is Mr. L. Brent Bozell.

STATEMENT OF L. BRENT BOZELL, EDITOR OF THE NATIONAL REVIEW, MONTGOMERY COUNTY CONSERVATIVE CLUB, CHEVY CHASE, MD.

Senator JENNER. Your full name is Brent Bozell?

Mr. BOZELL. Yes, and I reside at 6108 Kennedy Drive, Chevy Chase, Md.

Senator JENNER. Are you appearing as an individual, or representing someone?

Mr. BOZELL. I am representing some organizations besides myself as an individual.

Senator JENNER. What organizations are they?

Mr. BOZELL. The National Review, of which I am an editor, and the Montgomery Conservative Club, which I serve as president, and the American Legion of the State of Maryland, of which I am a member.

Senator JENNER. You may proceed.

Mr. BOZELL. Let me say, on behalf of all of these organizations, and for myself, that I am grateful to the committee for this opportunity to testify on S. 2616.

By way of indicating my background and qualifications, I am a lawyer by training, and a journalist and author by profession.

I was graduated from the Yale Law School in 1953 and practiced law in California, where I am now a member of the State bar association. I am presently working, however, as an editor of a weekly magazine, *National Review*. I write a column of political analysis, and have dealt extensively over the past 2 years with decisions of the Supreme Court. I coauthored a book in 1954 with William F. Buckley, Jr., called *McCarthy and His Enemies*. The book, as the title might indicate, dealt extensively with the problem of subversion, and particularly with the Federal loyalty-security program, which is one of the areas affected by S. 2616. I am now writing a book on the Supreme Court which I hope to have ready for publication next summer or, possibly, fall.

Congress' power to enact S. 2616: The question has been raised, here and there, as to whether Congress has constitutional power to enact the Jenner bill. While, therefore, this seems like the proper place to begin, I do not propose to devote much time to these doubts. I do not regard them as serious. Even Mr. Rauh, who was here the other day, quickly abandoned his suggestion that the bill might be unconstitutional, preferring, finally, to describe it as anticonstitutional.

My last statement is not affected in the slightest by the presentation this committee has just heard, if for no other reason than that Mr. Boudin represents the Emergency Civil Liberties Committee, which is a Communist front.

There is no question, I submit, about Congress power. Section I of article III of the Constitution vests the national judicial power "in one Supreme Court and in such inferior courts as the Congress" shall establish. Clause 1 of section 2 identified the types of cases to which the judicial power extends. Clause 2 of section 2 breaks down that definition of power into 2 categories, and then qualifies it.

It provides that the Supreme Court shall have original jurisdiction in certain cases, and that, in all other cases—

the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Supreme Court's appellate jurisdiction is, therefore, subject to whatever exceptions—and let us emphasize exceptions—and regulations that Congress might want to impose. The language is plain; it permits of no other interpretation. Mr. Rauh suggested that the grant of power in section I is in conflict with the qualification of that grant of power in section II and, therefore, that we all must put our minds to reconciling the two provisions.

Obviously, however, no conflict exists if section II is read as a qualification of section I. And by not reading section II as a qualification, we read it right out of the Constitution—a feat that ordinarily requires a constitutional amendment.

Mr. Rauh made the further point and invoked authorities for it, that, even though the letter of the Constitution might permit it, Congress could not deprive the Court of all of its appellate jurisdiction, without fatally distorting the constitutional plan.

This is an interesting point, but surely an academic one for the purposes of this committee. The Jenner bill does not deprive the Court of all of its appellate jurisdiction—does not even come close to it—the rhetoric of Mr. Rauh to the contrary notwithstanding.

Having decided—that is, Mr. Rauh—that Congress could not go the whole hog, Mr. Rauh asked:

But can it constitutionally deprive the Supreme Court of all its appellate jurisdiction, except a little that doesn't really matter?

I would not have mentioned this recognizably silly statement, except that one repeatedly runs into intimations in the press and elsewhere, that the Jenner bill would leave the Supreme Court without much to do. I think it would be a good idea, if I might suggest it, Mr. Chairman, for your staff to insert in the record the number of cases in the fields to which the Jenner bill applies that have come before the Supreme Court in the last 10 years.

My guess is that it would be something like 15, perhaps a few more. Let that figure be compared with the hundreds of cases in all the fields of law that have come before the Supreme Court in the same period. And the absurdity of that statement!

Senator JENNER. That might be a very interesting explanation.

Mr. BOZELL. The issue, then, is not whether Congress can do what the Jenner bill proposes, but whether it ought to. I intend to devote the balance of my remarks to that question.

The motives of proponents of S. 2646: It has been said over and over again, and over and over again by people who ought to know better, that the only reason proponents of S. 2646 want to curb the Supreme Court is that they disagree with some of the Court's decisions.

The clear implication, sometimes stated, sometimes not, is that the supporters of the bill are like children who, having failed to get their way, want "to get back" at the Court. Take the testimony of Mr. Rauh before this committee. I do not intend, incidentally, to go on using Mr. Rauh as my foil; it's too easy; let me mention this one last example, and then be done with him:

The Supreme Court is under attack today—

Mr. Rauh said—

because its recent decisions emphasizing human dignity and human freedom have gone contrary to the views of segregationist politicians in the South and security-mad politicians in the North.

This charge, for all of its pomposity, is not untypical of the tactics of opponents of the Jenner bill.

I believe such tactics have unfairly impaired the bill's chances of passing. More important perhaps, they have seriously impaired intelligent public discussion of the bill, and of the subject matter to which the bill relates. The notion is broad on the land, broad at least in the daily press, that mere differences of opinion over how certain cases should have gone, differences of the kind that any lawyer is likely to ventilate after he has just lost a case, are the basis of an effort to undermine one of our most revered institutions.

Nothing could be further from the truth. Let me say as emphatically as I know how that no responsible proponent of S. 2646 supports efforts to curb the Court simply because he disagrees with the Court; I will go further: I know of no supporter of the Jenner bill who is not

devoted to the Supreme Court as an institution, and who is not anxious for the Court to regain the esteem and respect which it ought to have, and which, in most times past, it has earned.

As I see it, the reasons the Jenner bill is necessary divide themselves into four distinct considerations. Let me enumerate them now, and then attempt to develop each of them 1 by 1.

I maintain, first, that the Supreme Court, in case after case, has exceeded the limits of permissible judicial discretion. In reaching its decisions, that is to say, the Court has roamed outside the area of reasonable disagreement between reasonable men.

Therefore the Court needs to be disciplined, it needs to be disciplined quite aside from the impact of its decisions on our constitutional system, and quite aside from the effect of its decisions on our internal security. Our society must deal with the Court as it deals with many other transgressors of law and order. We must teach the Court judicial responsibility.

Second, the Supreme Court has seriously upset the balance of power, and the division of governmental functions, prescribed by the Constitution. There was, when the Constitution was adopted, and there still is good reason for that balance of power and that division of functions. They are essential for the preservation of liberty and order. They must be restored.

Third, the Supreme Court has immobilized our national defenses against the international Communist conspiracy. The result is a national crisis. The necessary rebuilding of these defenses cannot go forward under the current line of Court decisions.

Fourth, popular respect for the judiciary, and the judicial process, is today at a low ebb. This trend is due, in part at least, to the conduct of the Supreme Court. Our society urgently needs, never more than today, a respected, prestigious judiciary. What I am saying is that we must save the judiciary from the Supreme Court.

Now, as to the individual decisions, and let me repeat myself: I am not saying they are erroneous decisions, or bad decisions—I am saying they are indefensible decisions. And I am saying that they are indefensible by a series of standards that have nothing to do with my personal opinion; I believe they are objective standards which all reasonable men will and do as a matter of course accept.

I mean due respect for the rules of logic; I mean due respect for the printed word; I mean due respect for the traditional rules of statutory and constitutional construction; I mean due regard for the truth, for the minimal requirements of intellectual honesty. I maintain that the Warren court has failed us by all of these criteria.

Take the Nelson case—I do not intend to subject every case to the detailed analysis that I want to subject this one to. I think we ought to have one case before us in all of its aspects, take all of the arguments that were presented and test them to see the kind of thing that the Court does in its decisions. I know from reading some of the testimony before this committee that the assumption is simply made that the Court has done more or less what the Supreme Court always does, and consequently, that any objection to the Court is a political objection of some kind. I think this is a presumption, and an assumption that ought to be squelched.

The issue was whether the Smith Act had superseded the Pennsylvania Sedition Act so as to prevent Pennsylvania from prosecuting a notorious Communist, Steve Nelson. Now, one would have thought that the first question for the Court to ask was whether Congress had the constitutional power to preempt the sedition field.

This is a difficult constitutional problem, one that has never been resolved by the Court. The issue was simply ignored in the opinion of Chief Justice Warren. The next question, assuming Congress had the power to preempt the field, was whether Congress had intended to do so. If Congress had not meant to exclude the States, that would be the end of the case. The Court, accordingly, addressed itself to the question of intent.

I now summarize the Court's analysis which I submit must leave the reader gasping. In the course of it, the Chief Justice did the following—cited two cases in which past Courts had ruled that Congress had intended to occupy the field of interstate commerce—about which let us say simply that what Congress might or might not have intended by its commerce laws could not shed the smallest light on what Congress intended by its sedition laws.

He then mentioned the three major pieces of Federal anti-Communist legislation then on the books—the Smith Act, the McCarran Act of 1950, and the Communist Control Act of 1954—and briefly described the general scope of each.

He finally deduced that “the conclusion is inescapable that Congress has intended to occupy the field of sedition.”

That was Warren's entire showing. He did not cite a single passage of any congressional enactment, indicating an intention to exclude the States. Nor any statement or speech by a Member of Congress during the debates on the bills. Nor a word by the sponsors of the bills, or from the hearings or the reports of the congressional committees that considered the bills.

The reason for these omissions was, of course, that no such evidence was available. What was available to Warren, had he wanted to use it, was a letter from Congressman Smith of Virginia, the author of the Smith Act.

The letter was addressed to the Pennsylvania attorney general shortly after the Pennsylvania's Supreme Court's decision in the Nelson case. I will read the relevant portions of it, Congressman Smith's letter.

As I am the author of the Federal act in question, known as the Smith Act, I am deeply disturbed by the implications of this decision.

May I say that when I read this opinion, it was the first intimation I have ever had, either in the preparation of the act, in the hearings before the Judiciary Committee, in the debates in the House, or in any subsequent developments, that Congress ever had the faintest notion of nullifying the concurrent jurisdiction of the respective sovereign States to pursue also their own prosecutions of subversive activities.

It would be a severe handicap to the successful stamping out of subversive activities if no State authority were permitted to assist in the elimination of this evil, or to protect its own sovereignty. The whole tenor and purpose of the Smith Act was to eliminate subversive activities, and not to assist them, which latter might well be the effect of the (Pennsylvania court's) decision in the *Commonwealth v. Nelson* case.

But my main point is not that Warren said what he said in the absence of any supporting evidence; but rather that he said what he said in the teeth of conclusive evidence to the contrary. Congress

made the Smith Act a part of title 18 of the United States Code. Section 3231 of title 18 provides:

Nothing in this title shall be held to take away or impair the jurisdiction of the several States under the laws thereof.

A more explicit statement that Congress did not have the intent the Warren Court attributed to it can hardly be imagined.

What Congress must do is to improve upon its intent, to pass another law, because we are up against the wording in the Nelson decision, where the Congress did precisely that and which the Supreme Court paid no attention to.

Senator JENNER. No, they did not.

Mr. BOZELL. The dissenting judges in the Nelson case wrote that this provision was "in and of itself decisive" in establishing Pennsylvania's right to prosecute Nelson. And there is other evidence. In the McCarran Act, to which Warren also alluded, Congress said:

The foregoing provisions of this subchapter shall be construed as being in addition to and not in modification of existing criminal statutes.

In a word, Warren's misstatement of Congress' intent was inexcusable and, we must conclude, advertent and intentional.

Having disposed of the intent issue, the Court turned to two other criteria which it maintained were relevant. Warren said the Court must also ask whether "the Federal interest is so dominant" in the field as "to preclude the enforcement of State laws." (The question, however you want to answer it, is recognizably one for the political departments of our Government—not for the judiciary.) Warren answered it by citing two authorities—one of the commerce cases we mentioned earlier, and *Hines v. Davidowitz* (312 U. S. 52) in which the Supreme Court held that State alien registration laws might jeopardize our foreign relations. The analogy with sedition laws is not easy to see—unless, with regard to the *Hines* case, Warren was implying that State sedition laws might offend the Soviet Union. There was a precedent, however, that was very much in point. The point I want to make is that Warren had to deal with the case of *Gilbert v. Minnesota* which was a pretty clear precedent, anyway you look at it, for Pennsylvania in its case, because that was the case involving a statute passed by Minnesota purporting to punish any disturbance with enlistments in the United States Armed Forces, and it was a clearer case than the Nelson case was, but the Court held that Minnesota had a concurrent interest in the Armed Forces of the United States, and consequently, concurrent jurisdiction.

In *Gilbert v. Minnesota* (254 U. S. 325) decided in 1920, the Court had held that a Minnesota statute which had outlawed conduct that would "interfere with or discourage the enlistment of men" in the United States Armed Forces was not superseded by Federal laws dealing with the Armed Forces.

This was a much stronger case for supersession than the Nelson case, since the Constitution expressly gave Congress power to raise national armies, and gave it no such express power in the sedition field. My reason for mentioning the *Gilbert* case is not that the Supreme Court disregarded a precedent—heaven knows that has happened before. My point is that the Warren Court, in order to make its reasoning sound plausible, deliberately misrepresented this precedent.

Warren distinguished the Gilbert case on the grounds that the Court had construed the statute as merely a measure to protect local peace against disorder and violence. The demonstrable facts of the matter, which one cannot avoid on reading the Gilbert case, are that the Court held that the States have a concurrent interest in, and therefore concurrent jurisdiction over, the national Armed Forces, and that the Court made this determination the principal basis of its holding.

The Court then added that the statute could be construed, alternatively as a local police measure, which is what Warren stated. What is more, the words Warren quoted to show the basis of the Court's holding were not, as Warren said they were, the words of the Court—but the words used by the State's attorney in offering this subsidiary argument.

Now, I say this is dishonest. It is safe to say that if a lawyer ever pulled a trick like that in a brief, and if the judge caught him, he would have billy-hell to pay. For the Supreme Court of the United States to resort to such chicanery is a national disgrace.

The third test Warren employed in the Nelson case was whether, in the point of fact, the enforcement of State sedition acts "presents a serious danger of conflict with the administration of the Federal program." (I do not have the time, obviously, to subject each case to this sort of minute dissection; nevertheless, I hope that one case, so treated, will afford some clues as to the way the Warren Court has been discharging its judicial duties.)

This question was, of course, another instance of the Court concerning itself with matters that were none of its business. If State laws were, in fact, interfering with Federal laws, the problem was one for the political departments. If remedies were needed, it was up to Congress or the executive branch to provide them. But let us leave the usurpation of power question for a later moment. My purpose here is to show how the Warren Court deals with evidence. Warren decided that State laws did interfere with Federal laws.

He cited only two authorities for this conclusion—a statement by President Roosevelt made in 1939, and another by J. Edgar Hoover made in 1940—both of which were to the effect that local law-enforcement agencies should speedily furnish the FBI with information of subversive activities. Neither of the statements contained a word about the necessity or the desirability of State governments desisting from enforcing their laws.

Those were the Court's authorities. The relevant authority here was, of course, the Justice Department which had the responsibility for enforcing the Federal sedition laws.

The Department had, as a matter of fact, filed an *amicus curiae* brief in the Nelson case, supporting the position of Pennsylvania. The committee, I am sure, is familiar with this paragraph of the Justice Department's brief:

The administration of the various State laws has not, in the course of the 15 years that the Federal and State sedition laws have existed side by side, in fact interfered with, embarrassed, or impeded the enforcement of the Smith Act. The significance of this absence of conflict in administration or enforcement of the Federal and State sedition laws will be appreciated when it is realized that this period had included the stress of wartime security requirements and the Federal investigation and prosecution under the Smith Act of the principal national and regional Communist leaders.

The Warren Court, however, did not even allude to the Justice Department's views. Just as it had second-guessed Congress on the question of what Congress intended, just so it second-guessed the Justice Department on whether the Justice Department was having trouble enforcing Federal laws.

Chief Justice Warren's opinion in the *Nelson* case is, in my judgment, an open-go-shut indictment of the Supreme Court. And I maintain that the case is characteristic of the Court; it reflects the Court's practice in this field of deciding in advance, on political grounds, how it would like the case to turn out, then looking around for precedents and arguments—however spurious or distorted or irrelevant—to support its preconceived conclusion. It is a classic example, but there are others.

Take the *Slochower* case. The question there was whether the city of New York could fire a teacher in one of its public schools on the grounds that he had invoked the fifth amendment when asked about Communist activities.

The New York City Charter specifically provided for mandatory dismissal in such a case. The Supreme Court held that the provision was unconstitutional as a violation of due process. There are three points that I think need to be made here.

The first is that the Court decided here, as it had in several previous cases, that the due-process clause applies to public employment; and yet in this case, as in the others, the Court refused to go so far as to say that there is a constitutional right to public employment. Here the rules of logic become troublesome.

The due-process clause provides that no person shall be deprived of life, liberty, or property without due process of law. Manifestly, therefore, before a failure of due process can be alleged, it must first be shown that there has been a loss of life, liberty, or property. Some substantive right, in other words, must be shown to have been violated before it can be said that that right was violated without due process of the law.

Now public employment is neither life nor liberty nor property. At least it has never been so construed. In case after case, the Court has expressly avoided such a determination. How, therefore, can it logically justify application of the due-process clause to public employment?

It has done so, nonetheless; it has done so by invoking the formula of arbitrariness. As long as State action, in the Court's judgment, is arbitrary, nothing more need be shown. This comes down to the Supreme Court writing into the Constitution provisions that are not there.

The second point I would make about the *Slochower* case is that the Court decided it on the grounds that it was unreasonable for New York to infer guilt from the fact that Professor *Slochower* invoked the fifth amendment, yet the New York Court of Appeals expressly held that the statute's mandatory dismissal provision was not based on an inference of guilt, but rather on failure to comply with a condition of public employment.

Now as I understand it, it is an unchallenged rule of statutory construction that the highest court of a State has the last word in determining what a State statute means. The Supreme Court cavalierly broke that rule and cast its own construction on the statute.

The third point about Slochower, and I consider it the most important, is the Court's position on the significance of taking the fifth amendment. The Court said that one cannot infer guilt from the fact a man takes the fifth amendment. Now if this were all the Court said, I would agree that we are in an area in which reasonable men can differ.

But this is not all the Court said. It held that in New York City case to infer guilt was so unreasonable and so arbitrary as to be a violation of due process. Let us stop and consider. Dean Griswold of the Harvard Law School has written a book which the Court cited in its opinion arguing that guilt cannot be inferred from invocation of the fifth amendment.

Let us agree, whether or not we accept his argument, that Griswold is a reasonable man. On the other hand, Prof. Sidney Hook, a brilliant and distinguished scholar, has written a book disputing Griswold's thesis, maintaining that inferences of guilt can, and in most cases, ought to be drawn from invocation of the fifth amendment.

Most commentators feel Hook had much the better argument. But let us agree, whether or not we accept his position, that Sidney Hook is also a reasonable man. This is a question, in other words, about which reasonable men can and manifestly do differ.

But the Supreme Court has denied this—it has written into the law the proposition that no reasonable man can draw an inference of guilt from the fact of taking the fifth amendment. I say this is an intellectual outrage.

Konigsberg v. State Bar: Take the *Konigsberg* case. There the Court's usurpation of power was more grievous than in the *Slochower* case. The question was not whether the petitioner had a right to public employment but whether he had a right to practice law. The State bar association is a quasi-private organization, regulated to a great extent, to be sure, by the State, but nonetheless entitled by tradition to establish its own professional standards and conditions for admission. To my knowledge, the Supreme Court had never, before May 6, 1957, when it handed down the *Schwartz* and *Konigsberg* decisions, presumed to tell a State bar association whom it could and could not admit, for no other reason than that the State bar association is a State quasi group, regulated by the State, to be sure, but according to the tradition, it is able to establish its own professional standards and conditions for admittance.

But the Court's chief sin in this case, as in *Slochower*, was a sin against reason. California law imposes upon an applicant to the bar the burden of proving affirmatively (a) that he has good moral character, and (b) that he does not advocate forceful overthrow of the Government. Let us not stop to consider how persuasive this evidence was. The point is that the committee asked *Konigsberg* over and over again whether these charges were true. And *Konigsberg* refused to answer every question put to him relating to communism or to his alleged activities on behalf of the Communist Party and its doctrines.

He said the committee had no right to ask him such questions because they violated his right of free speech. Again and again the committee urged him to talk about these matters, pointing out that if he failed to do so, he could hardly discharge his burden of proof. To no avail. The committee finally concluded that he had failed to

go forward with his burden of proving affirmatively his qualifications for the bar.

Mark well the Supreme Court's ruling. The Court did not hold that *Konigsberg* had correctly invoked his constitutional rights. Justice Black said, rather:

We are compelled to conclude that there is no evidence in the record which rationally justifies a finding that *Konigsberg* failed to establish his good moral character or failed to show that he did not advocate forceful overthrow of the Government—

and, therefore, that the committee's action was a violation of due process.

Let me put the point in sharper focus: May I assume, on the strength of California's statutory requirements and on the strength of the record before the committee of bar examiners, that you, Senator Jenner, would have disposed of *Konigsberg's* application, however reluctantly, in the same way that the committee of bar examiners did?

Assuming this is your position, Justice Black is not saying that he disagrees with you; he is saying that you are irrational if you disagree with him.

I say for him to do this and to justify Federal intervention that belongs to State and local bodies is the kind of judicial impudence which no free society can afford to tolerate.

If Justice Black had simply differed with the committee of bar examiners, we could all kneel down and pray for his enlightenment; no harm would have been done since he would have had to uphold its decision as a proper exercise of State discretion. But for Black to say that men who differ with him on this point are unreasonable and irrational—thus authorizing Federal intervention in the affairs of State and private bodies—is the kind of judicial impudence which no free society can afford to tolerate.

Cole v. Young: Take the *Cole* case. As this committee knows, the *Cole* case held that the Federal loyalty-security program does not extend to what the Supreme Court called insensitive jobs. Once again, let us steer clear of the policy question—i. e., whether it is wise to exclude so-called insensitive jobs from the coverage of the security program. I happen to share the view of the dissenting judges in the *Cole* case who wrote: "Obviously this might leave the Government honeycombed with subversive employees"; and later on "One never knows just which job is sensitive. The janitor might prove to be in as important a spot securitywise as the top employee in the building." But this I concede is a matter about which reasonable men can differ, and I am not suggesting that because the Court did differ with what I regard as a sound security policy, Congress is justified in curbing its powers.

The problem before the Court was not whether blanket coverage of the whole Government was wise, but whether blanket coverage had been authorized by Public Law 733. Public Law 733 authorized the head of an executive agency to invoke summary suspension and summary dismissal powers against an employee of his agency when he deemed such measures to be in the interest of national security. The act was made expressly applicable to 11 designated agencies of the Government, which—though Congress never used the term—we may

call sensitive agencies. However, section 3 of Public Law 733 provided:

The provisions of this act shall apply to such other departments and agencies of the Government as the President may, from time to time, deem necessary in the best interests of national security.

In April of 1953, President Eisenhower issued Executive Order 10450, establishing a new security program. Section I of the Eisenhower order provided:

In addition to the departments and agencies specified in the security act of August 20, 1950 (Public Law 733) * * * the provisions of that act shall apply to all other departments and agencies of the Government.

This meant that the Department of Health, Education, and Welfare, among others, was brought into the purview of Public Law 733. Accordingly, Secretary Hobby applied the procedures proscribed by Public Law 733 to Cole and eventually dismissed him after finding that his employment was not "clearly consistent with the interests of the national security." Now everything here would seem to be in its proper order. On the face of it, everything was done that was supposed to have been done.

But the Supreme Court disagreed. As Justice Harlan saw the situation, Public Law 733 required Secretary Hobby to make a specific finding that the job Cole occupied was a sensitive one, and since Secretary Hobby did not make such a finding about Cole's job, his dismissal was unauthorized.

I want to call the committee's attention to the reasoning process by which Harlan arrived at this conclusion. Here is how the argument runs:

1. By a feat of intellectual gymnastics which we cannot take the time to trace here, Harlan concludes that the extension section of Public Law 733 does not mean what it says it means ("The provisions of this act shall apply to such other departments and agencies of the Government as the President may * * * deem necessary") but that it means that—

The provisions of this act shall apply to such sensitive jobs in such other departments and agencies of the Government as the President may * * * deem necessary * * *.

2. Harlan then writes:

* * * we will * * * assume for purposes of this decision, that the act has validity been extended to apply to the Department of Health, Education, and Welfare";

so that—

3. Section I of Eisenhower's Executive order, as Harlan construes it, now provides: "The provisions (of Public Law 733) shall apply to sensitive jobs in all other departments and agencies of the Government"; however

4. Harlan argues that we must assume Secretary Hobby did not, in fact, determine that Cole's job was a sensitive one. And why must we assume that? Because, and solely because, the Executive order does not require her to make such a determination.

The contradiction would be apparent to a 10-year-old. If the Executive order did not require Secretary Hobby to make a determination about the job's sensitivity, then the Executive order did not validly extend the act as the Court construed the act. But Harlan

said the President did validly extend the act. On the other hand, if the order validly extended the act, then it did require the Secretary to make the determination about sensitivity which the Court says it did not require her to make. The contradiction is critical. Without it, the Court could not have reached the conclusion it did. The result is that vast areas of the Federal Government are now defenseless against Communist infiltration.

Was this only an inadvertent logical slip, the kind the best of us is likely to make. Hardly. The dissenting judges caught it, and called Harlan's attention to it. Justice Clark wrote: "Although the Court assumes the validity of the President's action under section 3 extending the coverage of the act to all Government agencies, the reasoning of the opinion makes that extension a fortiori unauthorized."

This implication is that the Court simply didn't care. Having made up its mind that insensitive jobs should not be covered by the security program, the Court proceeded to uncover them.

One other matter in connection with the Cole case. The Court held that Cole's dismissal was illegal because it was unauthorized by Public Law 733. The Court did not pause to consider, however, whether the dismissal might have been authorized under the President's independent, constitutional power to regulate the affairs of the executive branch of the Government. I have never heard it seriously questioned by any constitutional authority that the President can hire and fire whom he chooses, and that he can do so by whatever methods and under whatever standards he selects—provided he does not violate the Constitution, and provided he does not violate valid laws of Congress.

There was no constitutional objection to Cole's dismissal. And the exercise of the President's constitutional power could not have violated Public Law 733, inasmuch as that act was entirely permissive in nature: it did not require the President to do anything. The Government raised the point in its brief. It pointed out that the President had issued his Executive order under the authority of the Constitution as well as under the authority of Public Law 733. The dissenting judges scored the Court for not mentioning the point. I believe that a Supreme Court concerned with interpreting the law, rather than with making it, would have done so as a matter of course.

United States v. Watkins: Take finally, the Watkins case. In the interests of time, I will not discuss the Court's gratuitous abuse of congressional investigating committees; nor the novel notion, advanced by Warren, that there is a first amendment right to silence.

While I regard these remarks as infinitely mischievous and capable of producing great evil in the days ahead, they are, as I read the case, obiter dicta. The case turned on the Court's narrow holding under the due-process clause of the fifth amendment. Warren said that Watkins could not determine whether he was entitled to refuse to answer the committee's questions on the ground that the questions were impertinent to the subject under inquiry, since Watkins did not know what the subject matter under inquiry was. I concede, once again, that reasonable men can differ about whether the requirements of scienter are as strict for congressional contempt proceedings as they are for ordinary criminal cases. I differ from the Court on that point,

but, for these purposes, I accept its view as correct. I deny, however, that reasonable men can differ about whether Watkins, in this case, knew what he was being questioned about.

But, of course, he knew, and, of course, anyone with even passing knowledge with this investigation knows that he knew. And anyone who had read Warren's opinion cannot help but conclude that the Court knew what "the subject matter under inquiry" was.

The very evidence that Warren discussed made the conclusion incapable that the committee had been investigating Communist infiltration of the labor movement. Just one example: 23 out of the 30 persons Watkins, a labor leader, was questioned about—and his refusal to answer these questions was the basis of the contempt citation—were expressly identified with the labor movement. Commented Warren:

When almost a quarter of the persons on the list are not labor people, the inference becomes strong that the subject before the subcommittee was not defined in terms of communism in labor.

There is, I might add, a line of cases holding that scienter can be inferred from the circumstances, even if a statute is vague.

Warren nonetheless concludes:

We remained unenlightened as to the subject to which the questions asked petitioner were pertinent.

On this thin absurdity, the Court hung a sweeping opinion that could not fail to place the legality of every investigating activity of Congress under a cloud of doubt.

The Court's irresponsibility, even in these cases, is not confined to the illustrations I cite. Much less is it confined to these cases. There is *Jencks*, where Justice Brennan boldly lifted from the middle of a paragraph of a previous Court opinion a passage that appeared to be a precedent for the conclusion he was driving at.

The paragraph, read as a whole, is clear authority for the opposite conclusion. There is *Peters*, where Chief Justice Warren maintained that President Truman was unaware that his Loyalty Review Board was postauditing loyalty cases, although the President had been officially advised of 19,000 such cases, and had been personally involved in some of them. There is *Yates*, where Justice Harlan held, in effect, that, though Congress had aimed the Smith Act primarily at the Communist Party, it had not intended the attempt-to-organize clause of the act to apply to the party.

These are not actions that reasonable men can defend. This is why I say Congress must chasten the Supreme Court and make it behave.

As much as I admire the efforts that went into the bill, it does not completely embrace all of the cases in which one might be terribly disturbed with the performance of the Court.

Senator JENNER. It is a very limited bill, as a matter of fact.

Mr. BOZELL. The *Jencks* case; it does not cover that. It can be demonstrated there that Justice Brennan went into a previous case and bodily lifted out of the middle of a paragraph of that precedent, which was the *Gordon* case, as I recall, two sentences and used them as precedent for his holding where this paragraph read as a whole, if it were to be read, it was a clear precedent for the opposite holding.

Again, I say this is the kind of thing that no lawyer can get away with. It is the kind of thing that the liberal press screams about when politicians do it. When they do it, we close our eyes and suppose that, in such an august body as that, it could not happen.

The balance-of-power question: I turn now to my second contention—that the Supreme Court has seriously upset the balance of power envisioned in the constitutional plan. And I hasten to make clear at the outset that this is more than a formalistic objection. More is involved than the demonstrable fact that our written Constitution is not being adhered to and, therefore, that people who want their society to be run according to the rules have good reason to be dismayed. The Constitution's division of powers—its scheme of balance—and the checks built into the Constitution in order to preserve that balance perform an immensely valuable function in our society. They are our guaranties, the people's guaranties, against losing control over the conduct of their affairs by virtue of one branch of the Government becoming, or tending to become, all powerful.

This is the first lesson of most high-school civics courses. The most dangerous way to upset the balance is to upset it in favor of the judiciary, and again the point is elemental. If the executive branch usurps and exercises more power than it ought to, or if Congress does the same thing, the people of the country have a way to handle the situation—assuming that elections are still going on, they can vote the transgressors out of office.

But there is no such popular check on the judiciary. The Justices of the Supreme Court are not, in this sense, responsible to the people. The concept of judicial tyranny has always had particularly frightening connotations in a free society, for only the most drastic steps can curb it. That is why Congress' constitutional power to limit the Court's jurisdiction looms so importantly at the present time. There is no other way, save through some Court-packing device, for the people, through their representatives in Congress, to keep the Court in check. This is the power that Senator Jenner is reaching for today, the last resort in a serious situation.

This is an elemental lesson which is taught in the first year of civics course in high school. Just as elemental, then, are the restrictions on the judiciary, which are more important than any other kinds of restrictions, because if the Congress gets out of line, or if the President gets out of line, assume there are still elections going on, you can turn them or him out of office the next time around. But you cannot do that to the Supreme Court. That is why this provision in the Constitution referring to Congress' power to limit the Court's jurisdiction is so terribly important. It is the only avenue of restraint available to the American people against the Supreme Court.

Senator JENNER. Outside of impeachment.

Mr. BOZELL. Outside of impeachment; yes. You could pack the Court and that sort of thing, but this is about all that is available.

Is the situation really serious? I make two assumptions on which, I take it, there is general agreement. First, all political decisions in our society must be made by the political departments—the executive and legislative branches of both Federal and State Governments. Otherwise, we, the people, lose control over the conduct of our affairs; we cease to be a free and a democratic society. Second, if the political

departments are wrongly prevented from making political decisions in wide areas of vital national concern, the situation is serious. Has this happened?

As to whether the deprivations of power we are talking about are wrong, I have attempted to show in my earlier remarks that there is no constitutional or legal justification for the Court's intrusion into political policymaking in this field. That being the case, the political departments have been deprived of their powers wrongly, and the Court has assumed these powers wrongly. With what results?

The issue of whether millions of so-called insensitive employees of the Federal Government should be of unquestioned loyalty to the United States—a political issue—has been resolved by the Supreme Court. The issue of whether, and to what extent, and how the sovereign States should protect themselves and the Federal Government against subversion—a political issue—has been resolved by the Supreme Court. The issue whether, and under what conditions, Communist suspects should be allowed to teach the youth of the country—a political issue—has been resolved by the Supreme Court. The issue of whether, and under what conditions, State bar associations shall admit Communist suspects to the practice of law—a political issue—has been resolved by the Supreme Court.

The issue of how, and perhaps whether, Congress shall gather facts necessary to its legislative function—a political issue and one entirely concerned with the internal affairs of Congress—has been resolved by the Supreme Court. The issue of whether the Federal Government shall prosecute Communist leaders—a political issue—has, in effect, been resolved in the negative by the Supreme Court. I could go on. The offense is not confined to these cases, or to this field. I have mentioned, incidentally, Federal prosecutions of Communists—the Smith Act cases, most particularly the Yates case. This area is not covered by the Jenner bill. I think it ought to be. I wish it were.

I do not mean to suggest that in the areas I have mentioned the Court has definitely disposed of all of the issues. A great number of them it has left open, causing confusion and uncertainty in the legislative and executive branches—to say nothing of the lower courts. The point is that in all of these areas, the Court has asserted jurisdiction, has "taken over," as it were. From now on, the political departments are on notice that whatever decisions they make in these areas are at the mercy of whatever caprice or whim the Supreme Court is in a mood to indulge.

Let me now turn briefly to several objections that are frequently raised in this connection. One hears the argument that there are (or, as it is more often put, "there must be") other, less drastic ways of bringing the Court into line. The suggestion most frequently advanced is that Congress enact corrective legislation in each of the areas where the Court has transgressed. But in many cases—3 of the 5 types to which the Jenner bill is addressed—Congress simply has no power to "reverse" the Court.

The Watkins, Slochower, and Konigsberg cases all turned on the Court's highly imaginative definition of "due process of law." Congress has no authority to interpret the due process clauses of the Constitution; more exactly, the Court has no obligation to pay any

attention to Congress' interpretation. 'The Nelson and Cole decisions would seem to hold more promising opportunities for reversal since they were based on an alleged "intent of Congress."'

However, as we have seen, in both of these cases Congress had made its intention perfectly clear—it would be hard to think up more explicit words than those Congress used to express its intent; yet the Court decided that Congress had the opposite intent. The point is not so much that more explicit words are not to be found, but that Congress, with this experience of judicial perversity in cases where the Court is determined to reach preconceived conclusions, cannot afford to rely on new professions of intent.

After new legislation has been enacted and implemented and processed through the courts—this might take years—the Supreme Court will undoubtedly have thought up a new device for frustrating the congressional will. Congress cannot, in my opinion, afford to run that risk in areas that vitally affect our national security.

Another objection one frequently hears is really more of a debater's point than a serious objection; I mention it because it is made so often. Is not the Jenner bill, its critics want to know, reminiscent of efforts to discipline the Court in the thirties? Is the Jenner bill very different, that is to say, from Roosevelt's Court-packing plan? In the thirties, most of us deplored attempts by the political branches of the Government to punish the judiciary for making unpopular decisions.

How justify a volte face in the fifties? There is, it seems to me, an obvious and decisive difference between the two situations. The Supreme Court, before Roosevelt tried to pack it, was insisting upon strict adherence to the Constitution. Most of us opposed political efforts to compel the Court to deviate from the Constitution. Today, however, the Supreme Court is violating the Constitution in case after case. Senator Jenner's bill seeks to enforce compliance with the Constitution. There is no inconsistency. The common denominator in the two situations is allegiance to the Constitution.

In three of the areas to which your bill relates, the question is one of due process under the Constitution. And Congress has no power to decide what due process is. And the Supreme Court has no obligation to pay any attention to what Congress does about that. There is no power.

And, in the other two cases, it is a question of congressional intent. And Congress has already expressed its intent in both the Cole and Nelson type cases that the Court has ignored.

The point here is that Congress cannot afford to write new intent laws and have them go through the courts and be implemented by the States. This would take years to do and then find out that the Court is going to find some new reason for turning them down.

A more serious objection—though hardly, I submit, any more valid—was expressed recently in a resolution of the American Bar Association. I read the ABA's resolution opposing this bill with a great deal of sorrow; for it seemed to me that the association's conclusion is conclusively refuted by the premises that I understand had been firmly established in the course of the association's debate on the question.

The association took the position that, although the Court's decisions were widely regarded throughout the profession as erroneous,

the Jenner bill would upset the constitutional balance of power. But the point surely is that the constitutional balance of power has already been upset by the cases to which so many lawyers take exception. We are currently beset by an imbalance of power. So that what the ABA really ends up saying is that we should not disturb an imbalance of power. It is a position that I would not find easy to defend.

The Jenner bill is defensive; it seeks to push the judiciary back into its own territory, thus restoring the constitutional plan. It is the Supreme Court that has trespassed; the Court has already crossed the boundaries that are supposed to separate the branches. That being the case, it is the duty of the political branches to recover the ground that rightfully belongs to them. It is their duty to us citizens. For, I repeat: We have a constitutional right to popular control over our political affairs.

The Court's impact on internal security: I shall not dwell on my next contention beyond indicating the nature of the problem; the damage that has been done to the American position in our war against the domestic conspiracy is well known to this committee. This committee is rightfully famous as the national expert, the unchallenged fountainhead of information on this subject. It will learn nothing new from me. But I urge the committee, in evaluating its information, to take the following considerations into account:

(1) The importance of denying the States the right to enforce their sedition laws—however damaging that was at the time of the Nelson decision—has been multiplied a hundredfold by the more recent Smith Act cases dealing with Federal prosecutions.

For, after having destroyed the State sedition laws in the name of aiding enforcement of the Federal laws, the Supreme Court has turned around and almost totally emasculated the Federal laws. The result, in practical terms, is that no public authority can prosecute Communists these days. Steve Nelson is a case in point. After his Pennsylvania conviction was reversed Nelson appealed his Smith Act conviction to the Supreme Court. The Court remanded the case for retrial on a contrived showing of "tainted evidence." But in the light of the Smith Act cases, the Justice Department dropped the case, and it has been dismissed by the lower court. As far as I know Steve Nelson is today a free man.

(2) With regard to State control of subversion, the problem goes much deeper than the specific holdings of the cases we have mentioned. Though I do not mean to underestimate the significance of the specific holdings. The effect of the Court having injected the vague concept of "arbitrariness" into the field of State antisubversive activity—as it did in the Slochower, Konigsberg, Sweezy, and Wieman cases—is to cast an impenetrable shadow of doubt over the entire field.

State authorities, both legislative and executive, do not have the slightest idea today of what they can and cannot do. The result is that they are doing nothing. I suspect the Supreme Court intended it this way. It was unnecessary to batter down all State defenses against communism. It could successfully immobilize them by brandishing the threat of judicial reprisal.

(3) With regard to Federal prosecution of the Communists, the point is not so much that the Smith Act is "in shambles," as a Fed-

oral court recently put it, but that Congress, in effect, has been put on notice that it cannot enact new legislation to replace the Smith Act without running afoul of the Court's edicts. The Yates case is critical in this respect. On the one hand, the Court held that the most imposing evidence of conspiratorial intent to overthrow our Government by violence was evidence of nothing more than "abstract advocacy of overthrow"—which, it said, the Smith Act did not prohibit. Thus Congress is on notice that the most cogent evidence the Justice Department can reasonably hope to amass in a Communist case will be insufficient to show a violation of the Smith Act.

On the other hand, the Court stated that, if Congress had intended to prohibit "abstract advocacy" of forceful overthrow of our Government, it would have entered a "constitutional danger zone." Thus, Congress is given fair warning that it better not try to do what the Smith Act could do not do. This is why I regret that the Jenner bill does not extend to Federal prosecutions of Communists. I think that the reasons for curbing the Court in this field are as compelling, if not more so, than in the other fields.

(4) With regard to the Federal security program, the immediate effect of the Cole case is bad enough. But the significant fact is that the Court, in the Cole case, the Service case and the Peters case, established itself as the overseer of the executive security program. The Court has not yet, in so many words, departed from its ruling in *Bailey v. Richardson*, a 1951 case, that the security program did not involve constitutional questions. But it has dropped obiter dicta, here and there, which will serve as foundations for further judicial intrusions—whenever the Court is so moved. I mention, by way of illustration, the Court's observation in the Peters case that the loyalty program procedures involve "substantial rights affecting the lives and property of citizens." This remark opened the door for application of due process arguments to the Federal security program.

(5) With regard to congressional investigations of communism, the minor problem is to find out, as the committees are now endeavoring to find out, what it is that the House Committee on Un-American Activities did wrong in the Watkins case. The major problem, however, is to find out what the committee did right. For the Supreme Court seemed to disapprove, explicitly or implicitly, just about every step in the committee's investigation. As Justice Clark said in his dissent: The Court "has substituted the judiciary as the grand inquisitor and supervisor of congressional investigations."

The real threat to the judiciary: My final point is that the Jenner bill—far from being an assault on the judiciary—is needed by the judiciary and will, in the long run, be helpful to the judiciary. The impression seems to be widespread that the Jenner bill would curb the judiciary, generally, that it would, in effect, remove the judiciary from its customary role in our society. This misconception ought to be corrected. For one thing, the Jenner bill does not put even the Supreme Court out of business.

The Court's power, as I said earlier, is unaffected in the majority of the cases that generally come its way. For another thing, the bill does not place the Communist cases beyond judicial review. The highest courts of the States, the circuit courts, would have final say in subversive cases arising under their laws.

The circuit courts of appeal would have the last word in the Federal cases with which the Jenner bill deals. And as to the Communist cases, finally, the Jenner bill simply puts the Supreme Court on probation; should the Court show signs of having learned its lesson, Congress could, and probably would—and in my judgment certainly should—restore the power that the bill takes away.

This is not a permanent measure. It is an emergency measure. Let the Court learn how to behave. Then Congress can restore this power.

A more serious objection in connection with the bill's effect on the judiciary is that it would bring about judicial confusion—some use the word "chaos"—in the field of subversion. The argument is that, unless the Supreme Court is there to umpire the game, there will be no uniformity in law interpretation and law enforcement.

There are at least two points that I think ought to be made. First, the possibilities of harmful diversity of the lower court decisions are almost de minimis. Three types of cases affected by the Jenner bill require construction and evaluation of State laws.

Centrally imposed uniformity in this area is not only not necessary; it may be quite undesirable. To be sure, such cases may involve an interpretation of the Federal Constitution. But State supreme courts are, presumptively, as capable as a Federal court of reading and construing the document, and if the Missouri Supreme Court happens to read the document differently from the Ohio Supreme Court, where is national loss? And where is the loss to the individual citizen of either State who would, after all, be put on notice by the Jenner bill that the final adjudication of his rights will come henceforth from Jefferson City or Columbus, rather than from Washington? The man who finds he can make an inflammatory and seditious speech in Missouri, but not in Ohio, is in no different circumstances from the man who might today find himself in jail in Missouri, and free in Ohio, because the criminal statutes of the two States are different.

The other cases affected by the Jenner bill—security program cases and congressional contempt citations—will nearly always originate in the United States District Court of Washington. Then they do not always do so, congressional committees usually hold their hearings in Washington, and in contempt cases, it is the place the alleged crime took place that determines jurisdiction. Security program cases are civil cases. The plaintiff must come to the defendant, and the defendant is normally the head of the plaintiff's department and can thus be found in Washington. In these cases, the final court of appeal would always be the circuit court for the District of Columbia, and uniformity of decisions would follow as a matter of course.

But it seems to me that against the few possibilities of undesirable diversity resulting from the Jenner bill, we must weigh the undesirable diversity that the word "chaos" is proper—in the lower courts, as the result of the Supreme Court's holdings in the Communist cases. This situation is fast approaching a national scandal. One of the most serious indictments of the Supreme Court is precisely that it does not perform its textbook function of keeping the lower courts in line. This is due, in part, to the Court's refusal to grant certiorari in many cases where there are conflicting decisions in the circuits.

The example that comes to mind is the security program case decided in the ninth circuit a year or so ago which held that an employee must be confronted by his accusers. This is the only circuit that has so held and it is my understanding that the Court has refused to grant certiorari. Much more important: In the cases which the Court has decided, its reasoning has been so diffuse, and its holdings so imprecise that the lower courts can only guess about the state of the law. Very often they guess differently. Examples are legion.

What did the Jencks decision require? Some courts will tell you that Jencks required pretrial production of documents. Others say that the defendant, rather than the trial judge, should determine the relevance of prosecution documents. Still others believe that the O'Mahoney bill correctly interpreted the Court's decision.

Who knows what the Watkins case required? Judge Youngdahl thinks it required observance of a first-amendment right to silence. Most jurists and lawyers disagree. What member of this committee or of any other congressional committee who may have the responsibility of conducting a congressional investigation can be confident that his personal interpretation of the Watkins case will tally with that of his brethren?

It is an unanswerable question for most Congressmen.

In the field of public employment, who knows which conditions of employment are reasonable, and which are arbitrary? The Supreme Court has decided only 3 or 4 cases on the point, each involving a unique factual situation. And in those cases the Court steered clear of any effort to establish categories of arbitrariness or reasonableness that would help out lower courts in the future. This, I repeat, is one of the Supreme Court's gravest offenses. The Jenner bill would surely help to correct the evil—in this field, at least—by removing the Supreme Court from the chain of command.

Finally, if Members of Congress are really disturbed over the uniformity issue, there is nothing to prevent Congress from adding to the Jenner bill a provision that would nominate a given circuit court of appeals to serve as an acting Supreme Court.

Such a provision could be mandatory, or Congress could simply provide that it is desirable in Congress' judgment for the rest of the courts to acknowledge the primacy of the one Congress has nominated. Either approach would probably accomplish the purpose.

The point I really want to make about the judiciary has nothing to do with these technical considerations.

Let me put the matter this way. I hold that any institution that gets out of touch with society—gets so far out of touch that it no longer shares the society's values, or sympathizes with its aspirations, or understands its organic processes—I hold that such an institution will not long survive as an influential element of that society. Either that, or it will impose its will on the society, and rule it as a tyrant. The Judiciary, under the leadership of the Supreme Court, is in danger of becoming such an institution.

What, after all, are we talking about here? This committee has heard testimony for 3 weeks now on comparatively narrow issues—the meaning of the Constitution, the meaning of the laws, the requirements of logic and, of commonsense. But what is really the issue?

Why these strained and perverse interpretations of the Constitution and the laws every time a Communist case is placed on the Supreme Court docket? I say it is because the Supreme Court is living in a dream world of its own; because it sees, or thinks it sees, a different kind of society from the one the rest of us actually live in and want to live in; because its values are different from those the rest of us embrace. The only other explanation is that the Supreme Court Justices are partisans of communism, and I do not believe that.

What is the nature of the Supreme Court's dream world? Anyone who has read the Court's decisions in the Communist cases knows the answer. It is a world in which a significant struggle is going on. On the one side of this struggle there is a group of political dissidents who, for reasons the Court apparently could not care less about, call themselves Communists. This group has unorthodox views. It is a minority element of our society. And its purpose? This minority group, though handicapped by insignificant members and small resources, is strenuously endeavoring to sell its political philosophy in the free market place of ideas. And it hopes to transform itself, one day, from a minority into a majority. Over on the other side of this struggle there are some security-mad politicians, in Mr. Rauh's phrase; there are witch hunters; there are headline seekers; there are congressional committees who want to expose for exposure's sake. This is the Supreme Court's world. This, we must conclude, is reality for the Court.

But what is the real world for the rest of us? It, too is a world in which a significant struggle is going on. On one side is a group of dedicated, purposeful men who have rejected all of the fundamental values of western civilization, and have embraced a nihilistic code. Their fountainhead, spiritually and organizationally, is Moscow. They function as an arm of the Foreign Office of the Soviet Union. Their modus operandi in our society is conspiratorial. Their purpose is to overthrow our society and our institutions by whatever means will accomplish that end.

On the other side of the struggle, as we see it, the public authorities of our society, supported by the vast majority of our citizens, are searching out ways of containing the conspiracy and defeating it. Their task is not easy. The enemy is a novel phenomenon in human experience, certainly novel in the history of our society. Our public authorities find that existing criminal laws are inadequate to the task. They must devise new ones, and they must go beyond the criminal laws to special devices such as security programs and loyalty oaths and conditions on public employment that exact higher standards of reliability than those imposed by the criminal laws. And they try and keep the problem under constant scrutiny by means of legislative and executive investigations. This is the world the rest of us live in and see around us. This is our view of reality.

Now my point is not so much that our view of reality is closer to the truth than the Supreme Court's; but rather that the two worlds have long ceased to communicate with one another. They cannot communicate with one another because they do not understand one another—they do not speak the same language, they do not share the same goals, they do not recognize the same enemies.

It is impossible therefore for both views of the world to govern our society simultaneously. They cannot coexist. One must give way. I have no doubt which will give way, but I increasingly fear that, as the Supreme Court sinks lower and lower in the esteem and respect of our society, and as its aberrations are increasingly reflected in the decisions of the inferior courts, it will pull the whole judiciary, as an institution, down with it. This would be an incalculable tragedy.

The judicial system is out of touch, in the sense I indicated earlier, with the rest of our society.

Mr. Chairman, may I mention this one last case, which I think will sharpen up the point I am trying to make?

You are a Member of Congress, and you signed a bill, Senator, back in 1950, which Congress passed, requiring subversive organizations to register with the Federal Government. The Subversive Activities Control Board was established to determine whether or not an organization was subversive. Congress provided that appeals could be taken to the courts.

Now, 8 years later, in 1958, the Subversive Activities Control Board is still unable to demonstrate to the satisfaction of the courts that the Communist Party is a subversive organization.

The Communist Party has still not been required to register. When the case finally got to the Supreme Court a couple of years ago, the Court ruled that since the reliability of three of the witnesses who testified against the party was questionable, the case had to be remanded to the Board for further consideration (*Communist Party v. Subversive Activities Control Board*).

This despite mountains of evidence in the form of documents and testimony by other witnesses which demonstrated the character of the party beyond a shadow of a doubt.

The Board had to make a new case. By the time the new case got to the Circuit Court of Appeals, the Supreme Court's Jencks opinion had been handed down. The FBI had not produced some memoranda desired by the Communists, so back the case went to the Board. That is where it is now.

Now, I say something is wrong. Surely this is a matter for deepest national concern. I submit that 99 percent of the people of the United States know that the Communist Party is a subversive organization—know it with the same certainty with which they know the sun will rise in the east tomorrow. But the judicial system of the United States does not know it. It cannot take cognizance of it. And I say this judicial system is not going to be long, or any other kind of influence in our society, if it pursues that kind of activity and makes that kind of performance.

The judicial system is out of touch, in the sense I indicated earlier, with the rest of our society. The problem is to persuade the judiciary—for its own sake—to rejoin the community. The remedy as I see it is to unleash the judiciary from the leadership of the Supreme Court. No other course will sufficiently impress upon wayward judges the fact that this is a society of popular government, and that we, the people, mean to keep the kind of society we now live in and love.

Senator JENNER. Thank you, Mr. Bozell, for your fine statement. We appreciate your interest in coming before the committee and giving us the benefit of your views on this very important matter.

For the new reporter who has just taken over, all of the statement will be included as part of the record.

Mr. BOZELL. Mr. Chairman, may I request that 3 articles which I have, 1 by Forrest Davis, 1 by James Burnham, and 1 by William A. Rusher, who once served as assistant counsel for this committee, written last summer about the courts, be submitted to you and put in the record if you choose?

Senator JENNER. They will be put into the record and will become a part of the official record of this committee.

Mr. BOZELL. I have them here.

Senator JENNER. Just give them to the reporter.

(The articles referred to are as follows:)

[The National Review, July 6, 1957]

THE COURT REACHES FOR TOTAL POWER

(By Forrest Davis)

In its decision of June 17 the Warren court, says one of the most erudite of American journalists, has thrown down a gage which Congress must take up unless it is willing to abdicate

The 17th of June was a decision day in the vast, muted, alabastrine palace of the United States Supreme Court, a steamingly humid, unreasonable day without. The decisions announced within may well mark the date in future as our 18th Brumaire—the occasion on which the Court asserted its power over the Congress as on that November day in 1799 the Napoleon consulate seized power from the Council of the Five Hundred.

On June 17 the Court, in its Watkins decision, announced itself, as dissenting Justice Tom C. Clark phrased it, the "Grand inquisitor and supervisor of congressional investigations." That decision, written by Chief Justice Earl Warren, arrogated to the Court by profuse obiter dicta command over a vital function of the Congress, derived from Lord Coke's description of the House of Commons as the "general inquisitors of the realm" and from long usage and precedent. In its decision in the California Communist cases, acquitting 5 and ordering new trials for 9 other defendants, the Court repealed 1 section of the Smith Act, an act previously held constitutional by this Court. It wrote law by establishing a new standard, under which a Communist scarcely could be found guilty of conspiring to overthrow this Government by force unless apprehended on the barricades, faggot in one hand, Tommy-gun in the other; and the Court usurped the ancient prerogative of a jury to be the sole judge of the facts at trial.

In short, on June 17 the Warren court (bearing the Chief Justice's name in some public derogation because to him is attributed the stiffening of the will to power in certain of his associates) precipitated a constitutional crisis long in the making which, should Congress defend its prerogatives, will give rise to a struggle for power reminiscent of the quarrels between King and Commons in Stuart and Hanoverian England.

Even more frighteningly, the Court on June 17 confirmed the public judgment that in all cases dealing with communism it hastens to the side of those guilty or accused of bearing a part in the great conspiracy, fathered in Moscow, which the Executive and the Congress repeatedly have declared to be a "clear and present danger."

ABSOLUTISM

The only visible beneficiary of the Court's solicitude for the Communist cause is that cause itself; a fact to which the New York Daily Worker exuberantly testified. The Court, because it speaks in the name of civil liberties, is often described as "liberal." Yet as it suppresses the powers of the Congress, as it spreads the broad mantle of its protection over the Communist apparatus, it is reactionary; as reactionary as the endeavor to subvert and betray our fuid, flexible, tractable but often uncomprehending society is reactionary. Where the Court, beyond the reach of the citizen, arrogates to itself the irresponsible right to make law de novo (as in the school cases); where it blurs the line between

the State and society (as in the Harvard College case); where it mends the law capriciously (as in the California Communist cases); the Court is not only reactionary but tinged with the political vice of the 20th century: absolutism.

Four decisions of June 17 conformed to the Court's pattern set in the Steve Nelson appeal from a Pennsylvania conviction. Two--the reversal of the conviction of John T. Watkins, an Illinois labor leader, for contempt of Congress, and the California Communist rulings--bespoke a revolutionary impulse in the Court, i. e., a desire to realign the power relationships of the State and to magnify the Court into the sole legitimate author of the law of the land.

What the Court did in Watkins was to ride down the congressional right to investigate, to press it within narrow limits of legislative intent, to surround witnesses with a wall of immunity, and specifically to deny the Congress' right "to expose for the sake of exposure," which was the Chief Justice's belittling term for the right of "informing." A right which Woodrow Wilson, in his Congressional Government, placed above even the Congress' legislative function. Said Wilson, of a right pretty well taken for granted and highly regarded by liberals, including two members of the Court, before the Congress began seeking light on the Communist threat in our midst:

"* * * even more important than legislation is the instruction and guidance in political affairs which the people might receive from a body which kept all national concerns suffused in a broad daylight of discussion. * * *

To suffuse national concerns in Mr. Wilson's "broad daylight" requires that the Congress be free to inform itself, as well as the people, through the investigative process with power to subpoena persons and papers and to punish refractory and obstructive witnesses for contempt.

The Watkins decision, by adding the first amendment's guarantee of free speech and the common-law right of privacy to the fifth amendment as a screen between Congress and the witness, makes future inquiries dependent on the leave of those under investigation.

Congress' right to free inquiry, struck down by the Chief Justice and five associates in supposed deference to the citizen's right freely to discuss, has been maintained in large part by liberals. Two concurring Justices in the Watkins decision, Hugo L. Black and Felix Frankfurter, upheld the congressional prerogative to the full when the reluctant witnesses were businessmen or corrupt politicians. In a New Republic article of May 21, 1924, revealingly entitled "Hands Off the Investigations," Mr. Frankfurter eloquently affirmed the right searchingly to inquire.

He wrote: "The question is not whether people's feelings here and there may be hurt, or names 'dragged through the mud' * * * The real issue is whether the danger of abuses and the actual harm done are so clear and substantial that the grave risks of fettering free congressional inquiry are to be incurred by artificial and technical limitations upon inquiry * * *."

In 1930, Black was conducting as chairman of the Senate's Lobby Committee an inquiry into the practices of certain corporate witnesses. He wrote feelingly for the February Harper's magazine, under the title "Inside a Senate Investigation," of the dodges employed by witnesses to withhold papers and escape his questioning. Senator Black, as a matter of course, militantly upheld the right of his committee to penetrate the "special privilege of secrecy" claimed by witnesses. He witheringly dismissed any invocation of the right of privacy. Wrote Black:

"There is no power on earth that can tear away the veil behind which powerful and audacious and unscrupulous groups operate, save the sovereign legislative power armed with the right of subpoena and search. * * * Notwithstanding * * * continuous opposition, the House and Senate have uniformly sustained the right of their committees to obtain such evidence (from balky witnesses) since the first congressional investigation was ordered by the House in 1702. The courts have upheld them."

It is clear that Justice Black does not regard Communist agents and all who serve Moscow as members of "powerful and audacious and unscrupulous groups" from whom the veil may only be torn away by the "sovereign legislative power." Nor does Justice Frankfurter currently hold that Congress' writs should run against the witnesses able but unwilling to reveal the scope and nature of Moscow's endeavor to undo our society.

THE KILBOURN CASE

In reaching his decision in the Watkins case, the Chief Justice relied upon an all-but-forgotten and long-neglected Supreme Court case, *Kilbourn v. Thompson* (103 U. S. 108), decided in 1881, and a rather singular finding. Warren held that the legislative purpose behind the questioning of Watkins had not been disclosed to him with "indisputable clarity."

This assertion Justice Clark disputed in his dissenting opinion, bluntly and specifically. Clark noted that the committee chairman remarked upon opening the hearing that the House had referred to the committee (the House Un-American Activities Committee) a bill which, if enacted, would limit the benefits of the National Labor Act to unions not Communist controlled. It was understood, said Clark, that the committee was inquiring into the extent of Communist influence in unions in the Chicago area, and that Watkins clearly knew the legislative purposes, as was evidenced by his formal statement.

Clark obviously thought this objection, upon which the Chief Justice based the reversal of Watkins' conviction, a quibble. Upon *Kilbourn v. Thompson* Warren relied for obiter dicta, questioning the propriety of the Un-American Activities Committee's possession of the subpoena power, Congress' right to interrogate private persons, and the right to any inquiry where a narrow legislative intent is not proclaimed.

The contention that Watkins was not sufficiently apprised of the legislative intent can be understood best by a reference to Kilbourn. For there the 1881 Court found, with some reason, that the House, in establishing a committee to inquire into an aspect of the historic crash of the banking firm, Jay Cooke & Co., had neglected to state or imply a legislative intent. To bring Watkins into line with Kilbourn, therefore, it was necessary to raise a doubt about the current committee's proclamation of intent.

The Kilbourn citation itself casts a reflection upon the liberalism of the Court's motives. As the only Supreme Court decision attacking the congressional right to free inquiry, it has drawn the devastating fire of liberal historians of the Court for three generations. The House, obviously, was acting in its "informing" capacity when it authorized the inquiry into a real-estate pool involved in the Cooke failure. Kilbourn, the pool manager, resisted the committee, was adjudged guilty of contempt, imprisoned, gained freedom on a writ of habeas corpus, and sued the Speaker, the committee members, and the Sergeant at Arms, Thompson (from whom the case derives half its title), for false arrest. The District of Columbia Supreme Court upheld the defendants, the United States Supreme Court reversing.

The Kilbourn Court held that the House, in the absence of intent to legislate, had no authority to make "inquiry into the private affairs of the citizen," much less punish him for silence. The Justices concluded:

"This Court does not concede that the Houses of Congress possess this general power of punishing for contempt. The cases in which they can do this are very limited. The House of Representatives is not the final judge of its own power and privileges in cases in which the rights and liberties of the subject are concerned, but the legality of its action may be examined and determined by this Court."

If we are to judge the desires of the Chief Justice by the internal evidence of his Watkins opinion, Kilbourn, once he had got over the hurdle of intent, fitted his purposes with exactitude.

Prof. James M. Landis, who, holding office under President Franklin D. Roosevelt, was accounted a New Deal liberal, expressed the liberal consensus concerning Kilbourn in the Harvard Law Review of December 1926, under the heading, "Constitutional Limitations on the Congressional Power of Investigations," wherein he wrote:

"* * * no standard of judgment can be developed from *Kilbourn v. Thompson*. Its result contradicts an unbroken congressional practice, continuing even after the decision, with the increasing realization that committees of inquiry are necessary in order to make government effectively responsible to the electorate."

Concerning the doctrine, so fervently announced by Warren, that a House of Congress or a committee thereof must explicitly state the immediate purpose of an inquiry in advance, Landis protested:

"That is must announce a precise choice before adducing evidence necessary for a proper judgment, is to insist upon leaping before looking, to require of Senators that they shall be seers. The grant of legislative powers by the founders in 1789 carried no such implications."

FIVE COMMUNISTS ACQUITTED

In the California Communist cases, this Court flagrantly demonstrated the truth of the late Chief Justice Charles Evans Hughes' ironical aphorism that "the law is what the judges say it is." The majority, again with Justice Clark as the lone dissenter (although Justice Harold H. Burton demurred on one point), distorted the verb "organize" in the Smith Act out of recognition by its framer or the Members of Congress who passed it. The Smith Act included the organization of the Communist conspiracy's myriad agencies, committees, and "fronts." The Court confined the meaning to the reorganization of the Communist Party, U. S. A., in 1945, invalidating that section of the act as bearing upon the defendants on the ground of the statute of limitations. Since the Smith Act became law in 1940, the Congress hardly could have brought the 1945 reorganization into purview.

The five defendants were acquitted on the ground of "insufficient" evidence. On this point, Justice Clark said:

"This Court should not acquit anyone here. In its long history, I find no case in which an acquittal has been ordered by this Court solely on the facts. It is somewhat late to start in now usurping the function of the jury, especially where new trials are to be held covering the same charges."

The Warren Court, never impressed by rights claimed by the States, found no difficulty on June 17 in denying the right of the New Hampshire Supreme Court to hold a Socialist editor, Paul Sweezy, in contempt for refusing to answer questions by the State's attorney general, acting for the legislature, regarding a lecture Sweezy had delivered at the University of New Hampshire. The attorney general was seeking to discover what affiliations Sweezy had, if any, with the Communist conspiracy. The Court's decision followed Kilbourn on the subject of legislative intent.

A tendency of the Court in 1930 to substitute personal inclination for principle moved the "Great Dissenter," Oliver Wendell Holmes, to a frank derogation of his colleagues. Dissenting in a case where the majority applied the due-process clause of the 14th amendment against what he considered a constitutional right of Missouri, he wrote:

"As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of the Court as, for any reason, undesirable."

Justice Holmes further doubted that the 14th amendment "was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions."

In the *Stere Nelson* case, the Court ruled that the Pennsylvania courts had no power to investigate or act upon Communist issues because the Smith Act preempted that field to the Federal Government. Congress had not so stipulated or intended. The Nelson decision had the effect of dismantling the investigative machinery of the many States inquiring into the Communist conspiracy.

The Warren Court's decisions in the so-called Communist cases from Nelson to June 17, in the sociologically founded desegregation school case of 1954, the Du Pont antitrust case, and the Olrard College case which opened the door to the State's interference in the institutions and associations of society, indicate that this Court employs criteria, constitutional or not, that can fairly be termed, in lawyer's English, "terms of art."

WHY?

What lies behind the Court's lenity toward witnesses and petitioners associated with the Communist cause? Who can tell what goes on in the somewhat commonplace minds of the Court's majority, none of whom was known as a leader of the bar or (except for the literate, mercenrial Frankfurter) for any intellectual distinction before mounting the bench? All owe their immense dignity and well-remunerated, lifetime jobs to accidents of patronage, religion, or geography. The Chief Justice, himself, can only be supposed to hold his elevated office because he made the expedient choice at the Republican National Convention of 1952; certainly, no previous attainment as a jurist or scholar recommended him.

Why should the Court's majority steadfastly inhibit the Congress and the executive arm in exercising vigilance against so awful an endeavor to destroy us? Frankfurter in the 1920's, Black in the 1930's, powerfully maintained

the right of free inquiry to Congress against the citizen. Back in 1944, Earl Warren, rising to the governorship of California on the strength of his prosecutions of Communist mischiefmakers as attorney general, recognized the face of the enemy. The California Parole Board had freed 3 Communist goons, sentenced to 20 years for murder, after they had served only a little more than 4 years of their sentences. Warren expressed his outrage and scorn in a newspaper statement, which ended:

"• • • The murderers are free today not because they are rehabilitated criminals, but because they are politically powerful communist radicals. Their parole is the culmination of a sinister program of subversive politics, attempted bribery, terrorism, and intimidation which has evidenced itself in so many ways during the past 3 years.

What warrant has Warren for believing that the "Communist radicals are less potent now than in 1944? Or less "sinister," less gifted in "terrorism and intimidation"?

Justice Black, with Justice William O. Douglas, concurred in the California Communist cases, but went further, because they had dissented when the Court held the Smith Act constitutional. As part of his concurrence, Black wrote:

"The first amendment provides the only kind of security system that can preserve a free government—one that leaves the way open for people to favor, discuss, advocate, or believe to causes and doctrines, however obnoxious and antagonistic such views may be to the rest of us."

The statement, equating the right of the citizen freely to hold and present views, "however obnoxious," with the disciplined utterance and schematic program of world communism's fabric of subordination, is either unbelievably naive or motivated by a hidden spring. Why should witnesses in 1957, with access to the methods and personnel which Moscow is using against us, be relieved of the necessity of imparting when witnesses in 1953 were sternly enjoined to disclose all?

It has been said that the Warren Court could not more faithfully be advancing the Communist desire to conquer the United States from within if each week the Justices met to con and effectuate the latest instructions from the American branch of Agitprop in Moscow. The intimation is insupportable and shameful, but the Court has laid itself open to it.

I prefer, being an easy man, to take the charitable view that this Court can no more decipher the will of the Kremlin than it can bring into workable knowledge the appalling fate of those countries which have fallen to communism from internal corruption.

WARREN-BLACK-DOUGLAS AXIS

Chief Justice Warren made his sure-footed way through the depression politics of California, the "ham and eggs," Upton Sinclair's "end poverty in California," and the old-age-pension glumblers, opportunistically. Black, a former Ku Kluxer, is somewhat suspect in terms of integrity. Douglas, intellectually on the blowy side, conditioned the Yale Law School to its current social relativity and dogmatic leftism. He has been a kind of open-faced rube among the artful dodgers of Soviet persuasion. Alone among ranking Americans, Douglas rejoiced at the Soviet Embassy last November over the anniversary of the October revolution when Hungarian women and children were breathing their last under the shards of Red army tanks. Douglas seems, to me, incurably frivolous.

I doubt that the opportunistic Warren and Black and the faintly absurd, mountain-climbing Douglas would deliberately deliver their society and culture to the wolves of Moscow. I think it very likely that they would do so inadvertently, striving to make time with, for example, the intellectuals of the Washington Post, which, from condemning McCarthyism at the top of its lungs, went on to pillory something it called communism.

The Warren-Black-Douglas axis on the Court lies, in my judgment, under the nihilistic blight of fashionable liberalism. Intellectually inadequate, the Justices of the childish left mistake the liberty of the citizen for the franchise of the Soviet subversionist. It pains me to say this, but I fear that we have a dumb core of the Court and a timid fringe. Justice Burton, who should know better, I put in that fringe.

CONGRESS HAS RECOURCES

The remedy lies, as always in a free society, with the people and their tribunes in the Congress. The Congress can scarcely forbear taking up the gage thrown by Warren et al. If Pat McCarran and Bob Taft were alive and functioning, I

would have greater assurance regarding the outcome. The Congress cannot take the assaults in the Watkins case, the California cases, and the Jencks case lying down unless it is willing to abdicate its constitutional functions and historical prerogative.

The issues are joined. To put it in vulgar terms, they lie between the arrogating political accidents in the plush-lined Supreme Court Building and the freely elected Representatives of the people across the Capitol Plaza.

The Congress has many recourses if it is bold enough to assert them. It controls the purse. The Congress could, if it so willed, reduce the salary of Associate Justices from \$35,000 to \$3,500 a year. That would inflict severe pain. The Congress could institute an inquiry into how the Court has become so indulgent toward persons associated with communism. It could subpoena and punish for contempt before the Court could get around to interdicting such processes.

It would be illuminating to know why the Court exhibits such invariable tenderness toward citizens, or aliens, called before congressional committees to render an accounting of their commerce with the devil. We probably never shall know unless Congress finally reasserts its power as a historically coequal branch of the Government that constrains us all.

[The National Review, July 20, 1937]

WHY NOT INVESTIGATE THE COURT?

James Burnham

An editor of National Review argues that Congress should undertake an investigation of the workings of the Judiciary in order to determine the way in which to answer its recent encroachments

In the article that here follows I seek to motivate the following conclusion: A congressional investigation of judiciary is the best present reply to the Supreme Court.

HOW POWERFUL IS THE COURT?

In a footnote to Federalist No. 78, Alexander Hamilton quoted Montesquieu: "Of all three powers above mentioned, the judiciary is next to nothing." Amplifying, Hamilton wrote: "The judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them * * * The judiciary * * * has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgement; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments * * * It is beyond comparison the weakest of the three department of power; [and] can never attack with success either of the other two."

Chief Justice John Marshall was repeating the same essential conclusion when he declared in 1824: "Judicial power, as contradistinguished from the power of the laws, has no existence. Courts * * * can will nothing." And Justice Owen Roberts echoed in 1936: "All the court does, can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment."

Reflecting on the decisions of the Earl Warren Court in re Slochower, Steve Nelson, Watkins, du Pont, Jencks, Sweezy, Girard College, the Smith Act defendants, what are we to make of this traditional estimate? Were Montesquieu, Hamilton, Marshall, and Roberts ignorant as analysts and false as prophets? Have changed conditions made their words irrelevant? Or have we on our side failed to make necessary distinctions?

The answer is suggested in the same Federalist paper: "Though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislative and executive powers * * * Liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either [or both] of the other departments."

And is this not really obvious? The act of a court is a judgment, and this can be rendered only on an individual complaint that is brought--after the event--before it. The court cannot directly compel anyone to initiate the complaint or to accept its findings. Police and army--the means of coercion--are under command of the executive, not the judiciary. The courts cannot even assure the material conditions of their own existence: the taxing and appropriating powers belong to the legislature.

The judiciary can usurp undue power only with the support or compliance of the other two branches, only in a united front with one or both of them. In the long run the judiciary must inevitably lose in a direct conflict with the executive and legislature--if, let us add, they choose to fight.

Not merely in theory but in historical practice, our system provides an arsenal of weapons--too many, perhaps--for checking judicial encroachment.

THE HISTORICAL RECORD

In 1810 the Supreme Court ordered the Wheeling & Belmont Bridge Co. to destroy its bridge over the Ohio River as an "unlawful" obstruction to navigation. The company, disregarding the decision and a subsequent injunction, turned to Congress, which in 1852 passed a statute declaring the bridge to be "a lawful structure." The Court, accepting, noted that although the bridge "may still be an obstruction in fact, it is not so in the contemplation of law."

In 1868, when *Ex parte McCordle*--an action that implied a challenge to the constitutionality of the Reconstruction Acts--was actually before the Court, Congress passed (over President Johnson's veto) a rider repealing the Supreme Court's jurisdiction in all cases arising out of the relevant statute. The Court then dismissed the case. The Franklin Roosevelt administration similarly exempted from Supreme Court scrutiny the workings of the wartime Price Control Act.

Numerous States have simply refused to carry out Supreme Court writs, or to obey Federal court injunctions, and at least a dozen States have released Federal prisoners from jail. Throughout our history, judgments of the Federal judiciary have frequently been softened, bypassed or negated by many kinds of "State interposition," as in the South today, in resistance to court orders for racial integration.

Congress' act of March 1, 1863, prohibiting slavery in the Territories, flatly contradicted the *Dred Scott* decision.

In drawn-out conflict with the Court, the "political departments" have threatened to use, and have a number of times actually used, their power to alter the number of its members. Under the original Judiciary Act (1789) there were six Justices of the Supreme Court. As episodes in Jefferson's struggle to control the Court, the number was changed in 5 in 1801 and back to 6 in 1802. It was raised to 9 in 1837 (to water down the influence of John Marshall), and to 10 in 1863 (to give the North a safer majority); dropped to 7 in 1866 (to prevent Andrew Johnson from appointing new members), and rose back to 9 in 1869, when Grant could name the new Justices--who, as expected, brought a reversal of the Court's previous finding against the *Legal Tender* Act. Franklin Roosevelt's 1937 Court-packing proposal was never adopted; but its threat, combined with his manipulation of public opinion and Willis Van Devanter's forced resignation, brought the Court around to acceptance of the New Deal measures.

The Court can always be corrected by constitutional amendment: amendments XI, XIII, and XV were specifically adopted in order to overrule Court decisions. Impeachment is also always a formal possibility, although it has not been attempted for Supreme Court Justices since the Jeffersonians failed against Salmon Chase. Still, even the latent possibility of impeachment serves as a psychological curb on the judiciary. And what finally settled the constitutional problems of slavery and secession was the bloody arbiter that has always been the court of last appeal.

CONGRESSIONAL CONTROLS

The Constitution provides for only the barest minimum of our judicial system; all the rest is for Congress to determine. The Constitution decrees "one supreme Court" (composition unspecified), but only "such inferior Courts as the Congress may from time to time ordain and establish." These inferior courts--their numbers, kinds, jurisdiction, funds, duties, rules, their rights to issue writs and injunctions and orders--exist only by virtue of congressional statute.

But the Supreme Court itself--though existing by constitutional and not statutory fiat--is not exempt from congressional control. The number of its members, its budget, even where and when it meets, are subject to the legislative will. The Constitution assigns the Supreme Court "original jurisdiction" only "in all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party." This paragraph (in art. III, sec. 2) then concludes: "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." [My italics.]

Let us also note that the Justices do not grow Topsy-like from the bench. They are selected by the Chief Executive and confirmed by one House of the Legislature. Though by virtue of permanent appointment and human mutability, they, like other men, change through the year, they and their Court usually reflect the basic opinions and values of those who have chosen them. The members of the present Court were appointed by Franklin Roosevelt, Harry Truman, and Dwight Eisenhower, and in each case confirmed by a legislative chamber lending toward subservience to the executive power. The Court is a product of New Dealism, Fair Dealism, modern Republicanism--in short of the egalitarian, demagogic, welfare-statist ideology of contemporary liberalism. It behoves us we should expect it to behave.

TO ACT OR NOT TO ACT

The Court decided that the Du Pont holding of 23 percent of General Motors common stock is illegal under section 7 of the Clayton Act. It is naive for those who object to the ruling to blame only the Court. The executive arm, not the Court, brought the suit against Du Pont. Congress could overturn the decision in a day by a bill repudiating the Court's interpretation of section 7, but there is no reason to think that a majority in Congress or in the Nation wants it overturned.

In the Steve Nelson decision the Court declared that Congress had "pre-empted" the field of subversion for the Federal Government, and thus "super-seeded" all State laws thereon. (Nelson himself, having been convicted under a Pennsylvania law, was set free.) This decision, like others of the Earl Warren Court, is simultaneously a blow at States rights, an encroachment on the Legislature, and a setback to domestic security. But here, too, an easy method of correction is at hand: Congress need only repudiate the Court's dicta, and declare that the national laws on subversion supplement, without supplanting, the State laws. The last and the present Congress have failed to do so. It is to be noted in this instance that the Executive, in practice if not always in words, agrees with the centralizing tendency expressed by the Court. Congress is too lethargic or too divided to take the initiative on its own.

The immediate response to the Jencks decision on opening confidential files is an instructive contrast. Here the Executive (spurred no doubt by Mr. J. Edgar Hoover) as well as Congress realizes that the Court's ruling might make a shambles out of law enforcement. Within a couple of days the administration came up with a proposed bill to plug the gap, and Congress prepared to act on it.²

The recent decision freeing a number of California Communists convicted under the Smith Act was based partly on technicalities, partly on a constitutional interpretation of the first (free speech) amendment, and partly on a criticism of the evidence adduced at the trial as "insufficient." The Court's criteria would make it hard to convict anyone of any kind of subversion unless he were caught throwing a bomb. But under its constitutional powers Congress could remove all questions of fact in these cases (including the question whether the Communist Party is a conspiracy or a debating club) from the appellate jurisdiction of the Court; and could without too much difficulty revise the rather sloppy wording of the Smith Act.

Even the Court's decisions on school integration would not have much practical meaning if they were not correlated with already existing political trends. *Brown v. Board of Education*, in the three years since it was rendered, would

² Not in respect to a salary cut applicable to sitting members, however. In his suggestion that this would be an effective way to discipline the Justices (National Review, July 6), Mr. Forrest Davis overlooked the constitutional injunction (art. III, sec. 1) that their compensation "shall not be diminished during their continuance in office."

³ Though, as Mr. Bozell explains in this issue, the bill itself is faulty.

not have had wide repercussions if the Executive and Congress had been sharply opposed to it, and if it had been wholly out of line with national sentiment. The truth is that the executive establishment agrees with it; both with the policy of school integration, and with the use of national power to coerce the States to carry out that policy.

As on many of the other issues, congressional opinion is divided. If it were firmly opposed, Congress would by now have taken away the power of the circuit courts to issue the orders by which they are implementing *Brown v. Board of Education*, and would have made a stab at removing the entire field of education from Federal jurisdiction.

Instead, the House has just passed and the Senate is now considering a Civil Rights Act that would not diminish but vastly extend the power of the Federal courts to coerce individuals, local communities and States in these racial matters. For the present it is only State interposition that is offering any serious resistance to the integration rulings.

THE GENERAL TREND

Some of the problems raised by specific decisions of the Earl Warren Court can be handled, and in some cases even will be, by specific legislation. But there is also the more general problem of the Court's fundamental trends, to wit: (1) its assault on States' rights; (2) its legal sabotage of security measures; (3) its encroachments on the other two branches of government, especially on the legislature, reaching a climax in the Watkins decision, which presumed to tell Congress how to go about its sovereign business of legislating.

Is there any action, politically feasible at present, that would in some measure counter these trends, and pull the Court back toward judicial continuity and restraint?

Impeachment or any of several constitutional amendments could of course do so, but these means (even if desirable) are for the time being excluded in practice. Nor would a Court-packing bill make much sense. In the unlikely event that Congress would vote it, what point would there be in having President Eisenhower name another half dozen Earl Warrens?

There remains, however, a traditional but hitherto unmentioned alternative: a congressional investigation of the Federal Judiciary, in particular of the Supreme Court.

Whatever its collective attitude on States rights, Congress is overwhelmingly opposed to the Court's dilettante treatment of security; and Congress' own political existence is threatened by the Court's tendency to transform itself into a supreme legislature. Very practical motives thus prompt Congress to some sort of broad counteraction. A thorough investigation would be both effective in itself and the best way of determining exactly what further steps are needed.

Instituted under Congress' constitutional mandate to ordain and establish the inferior courts, to regulate the appellate jurisdiction of the Supreme Court, and to provide the funds for the maintenance of the judiciary establishment, the propriety of such an investigation could not be challenged even under the provocative reasoning of the Watkins decision. The legislative objective would be clear-cut: to determine, by examining the workings of the judiciary, what changes, if any, should be made in the Judiciary Act and other statutes regulating the judiciary in order to ensure its efficiency and effectiveness in fulfilling its assigned role under the laws and Constitution of the Nation.

As directly relevant to such an inquiry the investigative committee would presumably wish to discover the way in which the staffs of the Supreme Court and the inferior courts are selected, the functions of law secretaries and other aides of the judges, the exact manner in which decisions are being prepared and written—and by whom.

During the past two decades, comparable congressional research has turned up some remarkable facts concerning many executive agencies and certain of Congress' own committees. Congress found, for example, that though some of its committee orders and reports had been signed by a Gerald Nye, a Harley Kilgore, a Claude Pepper, James Murray, or Robert La Follette, they had been written largely by an Alger Hiss, John Abt, Henry Collins, or other Communist or fellow-traveler. (Come to think of it, before going to work for Congress Alger Hiss had started his career as law secretary to a member of the Supreme Court.) It would be more than idle interest to learn just how books by fellow-travelers were cited among the authorities of *Brown v. Board of Education*, and how the Smith Act decision's amazing comments on the nature of the Communist Party

were arrived at. And a study of the recent swelling of the Federal injunctive power would be worthwhile from every point of view.

In a Republic there is nothing sacrosanct about the judiciary to exempt it from scrutiny by the legislative representatives of the people. If the judiciary has nothing to hide—as we must presume—it should welcome a serious and public inquiry. If the judges have been inching beyond their due role in a republican system, an open investigation by the sovereign legislature is an ideal means to remind them of the traditional duties and restraints that blind the true judicial conscience.

Is Congress—are Congressmen—afraid of the Court? Under the Court's galling crossfire Tom Walsh or Pat McCarran would not have waited this long, we can be sure, to propose such an inquiry. And how quickly either one of those tough, fighting Americans would have jumped for the chance to head it.

[The National Review, September 7, 1957]

CAN CONGRESSIONAL INVESTIGATIONS SURVIVE WATKINS?

By William A. Rusher

A former counsel to the Senate Internal Security Subcommittee explains why the Watkins case cripples Congress in a new and peculiarly deadly way

As associate counsel to the Senate Internal Security Subcommittee during the 18 months ending in August, I was able to study at close quarters the impact of recent Supreme Court decisions on congressional investigations of communism. For a time it was possible to contend that the Court was concerned only with erecting additional procedural "safeguards." But in *United States v. Watkins*, handed down just 2 months ago, the Eisenhower Court revealed a deadly purpose. Today the issue is no longer the much-belabored "methods" of the committees, but their authority to ask questions—in effect, their very right to exist. The benign judicial gaze has become a glare.

One must bear in mind that every congressional investigating committee is created by a resolution of the Senate or House, authorizing it to investigate designated subjects. Once created, the committee proceeds by asking questions of persons who have the information Congress wants. This means, when investigations of communism are concerned, interrogating those most conversant with current Communist practices: the Communists themselves.

The classic rejoinder of the Communists was to invoke the fifth amendment—to swear that a truthful answer would tend to incriminate them. But despite the frequency with which Communists used the fifth amendment, they never learned to enjoy it. The trouble was that Congress and the public had seen through the device, and its use by Communists gave rise to inimical legislation. Moreover, invoking the fifth amendment on party membership or related questions invited considerable social and economic penalties—the loss of friends, the loss of one's job, and so forth. This year, for example, Western Union and RCA suspended several employees who invoked the fifth, and the International Association of Machinists followed suit. Such consequences explain why Communist witnesses so often and so ostentatiously invoked the first (free speech) amendment along with the fifth, hoping to dilute the taste of the latter. (One agitated recalcitrant recently went so far as to cite not only the first and fifth amendments but the entire Bill of Rights and the 39th article of Magna Carta.)

PRACTICAL BUSINESS

Even so, the Communists—at least the known Communists—almost never failed to take the fifth, for practical reasons. Being a busy little conspiracy with a world to win, communism cannot afford to let many of its limited number of agents languish indefinitely in Federal jails, paying the penalty for perjury or for a theatrical gesture of contempt of Congress.

The only exception to this rule was the Communist who was so well camouflaged that the party was willing to run the calculated risk of a contempt prosecution rather than expose him to the social dangers involved in pleading the fifth. In such cases (the classic one is Alger Hiss) the witness would often simply lie to the committee, and gamble that there wasn't enough usable evidence to put him in jail. Or if this was deemed too risky, he could decline

to answer on some ground other than the fifth (the more idealistic, the better). In doing so, the concealed Communist banked on becoming indistinguishable from those chronic rampart watchers of our liberties who, having no urgent need to stay out of jail, will court contempt proceedings for the sheer thrill of defying a McCarthy or a Walter or an Eastland. Moreover, even if prosecution for perjury or contempt ensued, it was always possible that the witness might win an acquittal by inducing some helpful judge to find a defect in the procedure of the hearing or hold that the committee had overstepped its authorized jurisdiction. (Former Harvard professor Leon Kamin was the beneficiary of this sort of luck.)

Nevertheless, the fifth amendment remained, for the reasons I have outlined, the staple diet of most Communists appearing before congressional committees. And so well settled did the law on these subjects become that a sort of rough *modus vivendi* was ultimately achieved between the committees and the handful of attorneys who represent most Communists summoned to testify. The committee members could be depended on to insist that the witness who refused to answer questions must explicitly invoke the fifth or face contempt proceedings; and the party's attorneys would, in turn, prepare their clients to comply, as succinctly as possible.

Ironically, it took a liberal to perceive that the Eisenhower Court could be induced to furnish the Communists an escape from this monotonous predicament—an escape that not even their own able lawyers had ever dreamed possible. The man of destiny was the irrepressible Joe Rauh, recognizable as head of the ADA and, by those who know the great story of Paul Hughes, as chief paymaster to anti-McCarthy confidence men. Representing John Watkins, a disillusioned laborer in the Red vineyards with a tender solicitude for the privacy of his former comrades, Rauh convinced the Court that Watkins should not be compelled to tell the House Committee on Un-American Activities the names of persons he had known as Communists, for a new and ingenious reason.

Mr. Rauh did not seek acquittal for his client on the familiar ground that there had been a defect in the committee's procedure; indeed, the committee's procedure was impeccable. Nor did Mr. Rauh reiterate the old argument (most often employed against McCarthy's Government Operations Committee) that the committee had gone beyond the scope of the authority conferred upon it by its parent body.

Chief Justice Warren, finding for the defendant, explained the Court's (and Rauh's) reasoning as follows:

"It would be difficult to imagine a less explicit authorizing resolution (than that of the House Committee on Un-American Activities). Who can define the meaning of 'un-American'? * * * The committee is allowed, in essence, to define its own authority, to choose the direction and focus of its activity. Yet it is impossible in this circumstance, with constitutional freedom in jeopardy, to declare that the committee has ranged beyond the area committed to it by its parent assembly because the boundaries are so nebulous."

Whatever else may be said of these comments, they at least have the merit of candor. Finding itself thwarted in upholding the customary objection that the committee had overstepped its authorized jurisdiction, the Court instead asserts that the limits of the committee's jurisdiction are too vaguely defined. To cure this situation, Chief Justice Warren proceeded to lay down a new and sweeping rule:

"Protected freedoms should not be placed in danger in the absence of a clear determination by the House or Senate that a particular inquiry is justified by a specific legislative need."

MR. WARREN'S OPINION VAGUE

There is the nub of the Watkins case, and its meaning is simple: unless the House of Representatives is willing to engage in major surgery (for example, limiting the appellate jurisdiction of the Supreme Court), it must redefine the mandate of its Committee on Un-American Activities and, to a considerable extent, narrow its scope, or risk successful defiance of any question it asks.

But just how much, and how, must the committee's mandate be narrowed to satisfy the Court? Does the language last quoted mean that the whole House must officially approve, in advance, every investigation initiated by the committee, relating and limiting it expressly to some "specific legislative need"? Lawyers who frequently represent Communists before the committee have seriously advanced this argument, citing as a precedent the Senate's resolution creating

its select committee on labor racketeering. But on this question Chief Justice Warren's opinion is afflicted with that very vagueness it condemns:

"It is of course, not the function of this Court to prescribe rigid rules for the Congress to follow in drafting resolutions establishing investigating committees. That is a matter peculiarly within the realm of the legislature, and its decisions will be accepted by the courts up to the point where (the Court's) own duty to enforce the constitutionally protected rights of individuals is affected."

What that point is, the distinguished Chief Justice does not say.

The House of Representatives is thus left to play a variant of "Twenty Questions" with the Supreme Court, in which the Court knows what sort of mandate it would deem satisfactory, but won't tell. The House can only keep on guessing—drafting and passing successive resolutions, hearing recalcitrant witnesses challenge them, citing these witnesses for contempt, and taking each case all the way to the Supreme Court, until some mandate, in some distant hereafter, is at last held sufficiently narrow.

And even that will be only a hollow victory, because the power to define will bring in its wake the power to exclude. The liberal majority on the Court will at last be in a position to argue, as it now bitterly protests it cannot, "that the committee has ranged beyond the area committed to it by its parent assembly."

The superficial orderliness of the procedure thus proposed may be pleasing to law professors, but it would be hard to imagine a decision better calculated to make a shambles of congressional investigations. Until some new mandate wins the Court's approval, the House Committee on Un-American Activities is at the mercy of any suspected Communist it wishes to question. He can refuse to testify and simply cite the Watkins decision. To the untrained eye, he will be indistinguishable from any non-Communist who exuberantly chooses to thumb his nose at the committee by challenging its questions on the same ground.

Take, for instance, a hypothetical case of a woman Communist who over the years has acquired a prominent position in, let us say, the Parent-Teacher Association. If she had been summoned before the House committee prior to the Watkins case, she was obliged either to tell the truth, or commit perjury or contempt (and risk prosecution), or invoke the fifth amendment. If she took the fifth, her influence, let alone her position in the PTA, was ended. Today, she has another and more appealing alternative: she can challenge the jurisdiction of the committee on the ground of the Watkins decision, yet hope to suffer no graver ill effects than those occasioned by over indulgence at testimonial dinners in her honor. To be sure, there will always be those, in and out of her PTA chapter, who deem refusal to cooperate with the House committee objectionable, even when the ground for refusing is not the fifth amendment but the advice of the Chief Justice of the United States. But no one who saw how hard (and, as it proved, how unnecessarily) the Communists and their apologists labored to dignify the pleading of the fifth amendment can doubt that a plea of the Watkins case will be hailed by many as the only patriotic course of action.

DECISIONS TO COME?

Although this is perhaps the most immediate effect of the Watkins decision, no discussion of it would be complete without some mention of the numerous dicta it contains—statements not necessary to the Court's holding, but indicative of its attitude. Such dicta often foreshadow decisions yet to come, and if this rule holds true for Watkins we are in for some rude shocks.

Leaving aside the learned smalltalk about Titus Oates and George III, and the toothsoneness of the statements about "abuses of the investigative process" (passages that will be quoted in the next 10 million briefs filed by Communists in the Federal courts), there are sentences that seem frankly designed as the basis for decisions still to come. Perhaps the most striking is the phrase "• • • nor can the first amendment freedoms of speech, press, religion, or political belief or association be abridged." Now it is a fact that while the classic freedoms of speech, press, religion and assembly are expressly protected by the fifth amendment, "political belief or association" is not. The Court has simply added the latter to the former; and, since this was not necessary to the argument in the Watkins case, we can only assume that the Court is here staking out new territory, to be cultivated and brought to bloom in future months and years.

Meanwhile, the technique by which the Watkins case crippled the House committee has already been used by one lower Federal court to hobble the Senate Internal Security Subcommittee.

Judge Luther Youngdahl of the Federal bench in the District of Columbia, who 2 years ago dismissed the larger part of two successive perjury indictments against Owen Lattimore, recently felt obliged to find Seymour Peck, a deskman on the New York Times magazine, guilty of contempt for refusing (on grounds other than the fifth) to name his former colleagues in the Communist Party. But the moment the Watkins decision was handed down, invalidating the House committee's mandate, Judge Youngdahl, perceiving identical shortcomings in the mandate of the Senate subcommittee, reversed his own previous decision and freed Peck.

CALCULATED RISKS

The Peck decision is still to be passed upon by the Supreme Court, before which attorneys for the Justice Department will argue to set it aside. Until the Supreme Court acts, therefore, it remains a risky business for refractory witnesses to plead anything but the fifth before the Senate subcommittee. The speculation on this subject, by the lawyers who regularly practice before it, is revealing. Joe Rauh, transported by his success, has already indicated that his clients will, before the Senate subcommittee as in the House, eschew the fifth amendment, gambling that the Supreme Court will agree with Judge Youngdahl and find the Senate mandate intolerably vague.

The Communist Party's intended legal battery, on the other hand, is more conservative. Immediately after the Watkins decision, two of their witnesses refused to answer questions put by the Senate subcommittee, protesting that its mandate was too obscure. Subsequent witnesses, however, have reverted to the safer, if less heroic, policy of invoking the fifth. This suggests that the party, while eager for a test case, is not yet willing to bet its entire bankroll on the chance that the Internal Security Subcommittee's mandate will be invalidated.

Since the party has its own ways of knowing what is, and is not, likely to happen, this is perhaps a hopeful sign. Much certainly depends on the outcome. A few months ago, during the particularly savage public attack on the Internal Security Subcommittee that followed Herbert Norman's suicide, a high representative of one of the Nation's most respected intelligence organizations said to me, "Our work is carried on quietly, out of sight. We see much, but can say nothing. Your subcommittee and the House committee are the only two organizations currently presenting the viewpoint of intelligence agencies to the American people. America can't afford to lose them."

America will lose much more besides, if Watkins is allowed to stand.

Senator JENNER. Any questions, Mr. Sourwine?

Mr. SOURWINE. I have none, sir.

I have, however, three items offered for the record. These are a letter and various documents from Senator Wiley, a letter and document from Senator Hennings, and a statement from the American Jewish Congress.

Senator JENNER. They will be received.

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
March 6, 1958.

HON. JAMES O. EASTLAND,
Chairman, Internal Security Subcommittee,
United States Senate, Washington, D. C.

DEAR MR. CHAIRMAN: As you know, I am opposed to S. 2646.

I wrote the American Bar Association asking its position on the bill. Enclosed is copy of my letter.

I now have a letter from the secretary of the American Bar Association, enclosing copy of the association's resolution opposing S. 2646. I enclose copy of that correspondence.

Basically, this bill would begin to undermine the constitutional division of powers between the legislative, executive, and judicial branches of the Federal Government. The balance-of-powers doctrine is a basic constitutional principle underlying our liberties as free people.

There is also enclosed a brief in opposition to S. 2646 which I asked the Legislative Reference Service of the Library of Congress to prepare for me. I

think the brief is well worth inclusion in the record, although there are some things in it with which I do not agree.

I shall appreciate your incorporating this letter of mine, together with its enclosures, in your record of the hearings on S. 2040.

Sincerely yours,

ALEXANDER WILEY.

AMERICAN BAR ASSOCIATION,
Chicago, Ill., March 3, 1938.

Hon. ALEXANDER WILEY,
United States Senate, Washington, D. C.

MY DEAR SENATOR WILEY: Your letter of February 12 with respect to S. 2040 was brought before the board of governors of the American Bar Association at its meeting in Atlanta February 21 to 22 last. Upon recommendation of the board, the house of delegates adopted a resolution, certified copy of which is enclosed. There is enclosed, also, for your information copy of a report of the special committee on individual rights as affected by national security which supports the position taken by the house of delegates with respect to this bill. The committee's report contains no recommendations requiring action by the house of delegates and was, therefore, received and filed.

The enclosed material is being transmitted also to Senator Eastland and to Mr. J. G. Sourwine, chief counsel of the Internal Security Subcommittee. We received on Friday a request from the office of Mr. J. G. Sourwine for the transcript of the discussion in the house of delegates with respect to this bill. A copy of this transcription is being sent to Mr. Sourwine.

We greatly appreciate your calling this matter to our attention and giving the association an opportunity to express its views on the pending legislation.

Sincerely yours,

JOSEPH D. CALHOUN, *Secretary*.

AMERICAN BAR ASSOCIATION

RESOLUTION ADOPTED BY THE HOUSE OF DELEGATES, FEBRUARY 25, 1938

Whereas in 1940 the American Bar Association adopted a resolution urging the Congress to submit to the electorate an amendment to the Constitution of the United States, to provide that the Supreme Court of the United States shall have appellate jurisdiction in all matters arising under the Constitution; and

Whereas S. 2040 now pending before the Congress, if enacted, would forbid the Supreme Court from assuming appellate jurisdiction in certain matters, contrary to the action heretofore taken by this association and contrary to the maintenance of the balance of powers set up in the Constitution between the executive, legislative, and judicial branches of our Government: Now, therefore, be it

Resolved, That, reserving our right to criticize decisions of any court in any case and without approving or disapproving any decisions of the Supreme Court of the United States, the American Bar Association opposes the enactment of Senate bill 2040, which would limit the appellate jurisdiction of the Supreme Court of the United States.

I hereby certify that the above is a true and correct copy of the resolution as adopted.

JOSEPH D. CALHOUN, *Secretary*.

AMERICAN BAR ASSOCIATION

REPORT OF THE SPECIAL COMMITTEE ON INDIVIDUAL RIGHTS AS AFFECTED BY NATIONAL SECURITY

The committee by majority vote favors the resolution recommended by the board of governors that the American Bar Association oppose Senate 2040.

S. 2040 would withdraw from the appellate jurisdiction of the Supreme Court five types of cases which are now reviewable in that Court. They may be summarized as cases involving: Congressional committees; executive security programs; State security programs; school boards; or admissions to the bar. The proposal obviously stems from disagreements with some recent decisions of the Supreme Court in these fields.

The integrity and uniformity of judicial review and the independence of the judiciary are vital to our system of government. If they are impaired, individual rights will be imperilled. Since maintenance of individual rights is the most notable distinction between our system and the Communist system, and the one on which we must rely to rally the hearts and minds of men to our cause, their impairment would also, in a broad sense, injure our national security.

The bill would leave lower courts to make final decisions in the fields withdrawn from Supreme Court jurisdiction. We do not believe it sound to prevent review in the highest Court of such important questions. The lower courts may differ among themselves so that there may be great confusion in decisions. Resolutions of such conflict is a historic contribution of review in the Supreme Court. It is difficult to conceive of an independent judiciary if it must decide cases with constant apprehension that if a decision is unpopular with a temporary majority in Congress, the Court's judicial review may be withdrawn.

In 1950 the association took action favoring a constitutional amendment which would go far to preclude such tampering with the Supreme Court's appellate jurisdiction. The logic of that position requires opposition to the present proposal.

ROSS L. MALONE, *Chairman.*
ARTHUR J. FREUND.
WILLIAM J. FUCHS.
CHARLES G. MOROAN.
WHITNEY NORTH SEYMOUR.

AMERICAN BAR ASSOCIATION,
Chicago, Ill., February 17, 1958.

HON. ALEXANDER WILEY,
United States Senate,
Washington, D. C.

DEAR SENATOR WILEY: We appreciate very much your letter of February 12 enclosing copy of S. 2640 and your statement with respect to hearings on this bill to be held between February 19 and March 10.

The board of governors, as you may know, is meeting in Atlanta on February 21 and 22, preceding the meeting of the house of delegates. This will be put before the board and reference made and action taken as promptly as possible.

We always appreciate your interest and this bill is of sufficient importance for the association to give it consideration.

Sincerely yours,

JOSEPH D. CALHOUN,
Secretary.

FEBRUARY 12, 1958.

MR. JOSEPH D. CALHOUN,
Secretary, American Bar Association,
Media, Pa.

DEAR MR. CALHOUN: As you may have heard, S. 2640, a bill to limit the appellate jurisdiction of the Supreme Court, is coming up for rehearing in the near future. Hearings are set to begin February 19 and to close before March 10.

At the first hearing, no public witnesses appeared, either for or against the bill.

It would exclude from the appellate jurisdiction of the Supreme Court such matters as contempt of a congressional committee or discharge of an employee on alleged internal-security grounds.

In order to make sure that the American system of checks and balances is fully maintained, it seems to me of supreme importance that there be a full discussion of this bill at the hearings.

May I, therefore, urge that, at the coming midwinter southern regional meeting at Atlanta, on February 19, a position be firmly taken on behalf of the American Bar Association with respect to this proposed legislation.

I believe that you and the other officers of the association would wish to have the point of view of your great organization fully expressed at hearings on this bill.

Sincerely yours,

ALEXANDER WILEY.

PROPOSED CONGRESSIONAL LIMITATIONS ON THE APPELLATE JURISDICTION OF
THE UNITED STATES SUPREME COURT

A brief in opposition to S. 2010, 86th Congress, prepared at the specific request of Senator Alexander Wiley by Spencer M. Hersford, American Law Division, the Library of Congress, Legislative Reference Service, February 28, 1958

SUMMARY OF THE BILL

S. 2010 would deny the appellate jurisdiction of the United States Supreme Court over cases involving:

- (1) congressional investigations;
- (2) summary security dismissals under section 22-1 of title 5, United States Code;
- (3) regulation of subversive activities by the States;
- (4) regulation of subversive activities by school boards and similar bodies; or
- (5) admission to State bars.

The avowed and apparent purposes of the bill is thus to overturn certain specific decisions of the Supreme Court, as follows:

Watkins v. United States (354 U. S. 178 (1957))
Service v. Dulles (354 U. S. 303 (1957))
Cole v. Young (351 U. S. 630 (1956))
Pennsylvania v. Nelson (350 U. S. 407 (1956))
Sweezy v. New Hampshire (351 U. S. 231 (1957))
Schooner v. Board of Higher Education of New York City (350 U. S. 551 (1956))
Schwartz v. Board of Bar Examiners of New Mexico (353 U. S. 232 (1957))
Konigsberg v. State Bar of California (353 U. S. 232 (1957))

ARGUMENT

1. The bill would virtually amend the Constitution and tamper with our constitutional form of government by extraconstitutional means

Article III, section 2, clause 2, of the United States Constitution grants the Supreme Court appellate jurisdiction over certain cases, "with such Exceptions, and under such Regulations as the Congress shall make."

The power of Congress to limit the appellate jurisdiction of the Supreme Court under this clause is necessarily subject to all the other provisions of the Constitution.

If this power is exercised by enactment of the bill, constitutionally protected rights will be nullified. To the extent that the same rights secured by decisions of the Court are denied, previously vested rights will be divested in violation of the due-process clause and also in violation of the other constitutional provisions on which the Court's decisions rested (notably the equal protection and supremacy clauses). In the future, others who find themselves in the same situations as the litigants in these cases will, likewise, be deprived of constitutional rights.

Enactment of the bill would also subvert the essential role of the Supreme Court in the American constitutional system, as the final arbiter between the States and the Federal Government and between individuals on the one hand and the State and Federal Governments on the other. It would vitiate the uniformity and certainty of the law in many matters of importance. Finally, it would set a dangerous precedent for future changes which could destroy the American constitutional system altogether.

A. The bill would impair constitutionally protected rights.—Enactment of the bill would, of course, nullify the very constitutional rights secured by the Supreme Court in the decisions which the bill proscribes. For example, the State Department would be free to fire John Service in violation of its own regulations, without fear that the Court would declare its action invalid. Public opinion and the courts alike have long condemned the legislative divestment of previously vested rights.

"... the private rights of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation." (See *Hodges v. Snyder*, 261 U. S. 600, 603 (1923) and the cases there cited.)

Retrospective legislation is harsh, liable to abuse, and fundamentally unfair.

Since the bill would have such effects, is it not a violation both of due process and of article I, section 9 ("No bill of attainder or ex post facto law shall be passed")?

More important, the bill would deny the constitutional rights of anyone else who, in the future, might find himself in the same situation as the litigants involved in the cases which the bill proscribes.

For example, there will be no appeal from the adverse decision of a local court for anyone who is refused admission to a State bar on the ground that he once attended Communist meetings, even though the Supreme Court has held that such refusal violates due process (*Konigsberg v. State Bar of California, supra*). Nor will there be any appeal from a conviction under a State statute for "sedition against the United States," even though the same act is also punishable under comprehensive Federal law (*Pennsylvania v. Nelson, supra*). In both these examples the supremacy clause would also be impaired, for the United States Constitution and acts of Congress in pursuance thereof would no longer be the supreme law of the land.

These results must seem unfortunate, whatever anyone may think of particular decisions. It requires very little imagination to see that wholly innocent people may be involved in congressional investigations, or dismissed from Federal employment on security grounds, or accused of subversion, or denied admission to the bar. They will have no recourse to the Supreme Court, nor will they benefit from the discipline maintained in lower tribunals by the possibility of Supreme Court review.

B. The bill would encroach on the "Judicial power" created by article III of the Constitution.—Article III, section 1, provides that "The Judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish * * *"; section 2, that "The Judicial power of the United States shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority * * *."

After enumerating the cases over which the Supreme Court "shall have original jurisdiction" section 2 provides that:

"In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make."

At first sight, the power of Congress to limit the Court's appellate jurisdiction, under this provision, seems both clear and unlimited. It will be contended, however, that this power is limited and in particular cannot be exercised so as to encroach on the "Judicial power" created by article III and thus violate the principle of the separation of powers.

The first point to note is that the constitution grant of appellate jurisdiction does not read that "the Supreme Court shall have such appellate jurisdiction as the Congress shall provide." On the contrary, it first expressly grants appellate jurisdiction to the Court, and then qualifies the grant by authorizing Congress to make exceptions and regulations.

The second and related point is that the words "exceptions" and "regulations" connote something less than abolition. In short, the choice of these words suggests that the power of Congress over the Court's appellate jurisdiction is limited. This point will not be labored, since it is amply supported by other evidence which will soon be considered.

These two matters of language are at least sufficient to raise a doubt. Does the Constitution really authorize Congress to make "exceptions" so great as to swallow up the grant of appellate jurisdiction? If not, and this is a limited power, what are its limits? Would not those limits be exceeded by the enactment of the bill?

Professor Hart has expressed his doubts whether article III authorizes "exceptions" that would vitiate the general rule (of appellate jurisdiction in the Supreme Court), adding that the Supreme Court has never had occasion to define "exceptions" or "regulations" within the meaning of article III because "Congress so far has never tried to destroy the Constitution" (Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts*, 66 *Harvard Law Review* pp. 1362, 1364-1365 (1953)).

While it is true that the meaning of "exceptions" as used in article III has never come before the Court, certain decisions of the Court shed considerable light on the scope of congressional power to limit its appellate jurisdiction.

In a line of cases beginning with *Wiscart v. Dauchy* (3 U. S. (3 Dall.) 321 (1796)), the Court refused to exercise appellate jurisdiction over any kind

of case without affirmative congressional authorization. In *Durousseau v. United States* (10 U. S. (6 Cranch) 307 (1810)), Chief Justice Marshall said (pp. 313-314) that the Court would have complete appellate jurisdiction (by virtue of art. III) in the absence of any congressional authorization whatever, but that a partial grant by Congress implied a denial of all appellate jurisdiction not expressly granted. The same rule was applied in *Ex parte McCardle* (74 U. S. (7 Wall.) 506 (1860)), holding that the repeal by Congress of an act giving the Court appellate jurisdiction in a certain kind of case amounted to a denial of such jurisdiction. It is evident that these cases were governed by a rule of construction rather than substantive law.

All these decisions involved interpretations by the Court of congressional intent, under circumstances which left no serious doubt that what Congress intended was constitutional.

For example, in *Wiscart v. Dauchy*, *supra*, the Court was interpreting the silence of Congress; in *Durousseau v. U. S.*, *supra*, an act of Congress (2 Stat. 285, sec. 8); and in *Ex parte McCardle*, the repeal of an act of Congress. But in none of these cases was there serious doubt that a denial of jurisdiction, if intended by Congress, would be a valid "exception" under article III.

On the contrary, the Court recognized that the power of Congress to limit the Court's appellate jurisdiction was itself limited.

In *Durousseau v. United States*, *supra*, Chief Justice Marshall intimated that Congress could not withdraw all the Supreme Court's appellate jurisdiction. (See 10 U. S. (6 Cr.) at 313, 314; see also *Martin v. Hunter*, 14 U. S. 304, 320-348 (1816).)

And, in *Ex parte Yerger* (75 U. S. 85, 104 (1861)), Chief Justice Chase characterized the action of Congress in denying the jurisdiction involved in the McCardle case as "unusual and hardy to be justified except upon some imperious public urgency."

It should be borne in mind, moreover, that the McCardle decision was based entirely on the act of 1867 (14 Stat. 385). As in *Wiscart v. Dauchy* and *Durousseau v. U. S.*, *supra*, the Court was merely interpreting congressional intent, and there was no serious doubt that, if that intent could be established, Congress had the necessary power. In view of Chief Justice Chase's later comment, quoted above, and the violent political circumstances of the McCardle case, it is more than likely that the Court was happy to be relieved of responsibility for making a decision on the merits.

Furthermore, in all the cases in which it has passed on the subject, the Court has taken the opportunity to note that its appellate jurisdiction is derived from the Constitution and not from Congress.

To the same effect, Charles Evans Hughes observed that "It is doubtful, to say the least, if Congress would have the constitutional authority to fetter the exercise of the judicial power by giving the control of it to the minority of the Court" (Hughes, *The Supreme Court of the United States* (1928), p. 241).

The keywords here are "fetter the exercise of the judicial power." This is what Hughes thought that Congress could not do. The same thought, in similar language, will recur when an attempt is made to answer the question, "What limits, if any, are there on the power of Congress over the Court's appellate jurisdiction?"

The decision that removes all doubt as to the Court's own views is *United States v. Klein* (80 U. S. 128 (1871)), in which the Court refused to give effect to an act purporting to deprive it of appellate jurisdiction, asking rhetorically:

"Can we do so without allowing that the Legislature may prescribe rules of decision to the judicial department of the Government in cases pending before it?" (p. 146).

That case involved an action in the Court of Claims for the proceeds of certain Confederate property seized during the Civil War. The former owner had been pardoned under the President's amnesty proclamation. While an appeal from a judgment in his favor was pending before the Supreme Court, Congress passed an act purporting to deprive the Supreme Court of appellate jurisdiction over such cases. (The statute unequivocally provided that "the Supreme Court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction" (16 Stat. 235).) The Court, nevertheless, assumed jurisdiction, and affirmed the judgment of the Court of Claims, referring to the act of Congress in the following words:

"It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power" (p. 146).

"We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power" (p. 147).

The importance of this case is obvious. This is a square decision by the Supreme Court showing that the power of Congress over the Court's appellate jurisdiction is only a limited power, or, in the usual language of constitution law, "not plenary."

Furthermore, the Klein case appears to have a basis in constitutional history. In the Federalist papers, the power of Congress to regulate and make exceptions to the Court's appellate jurisdiction is described as an "ample authority" (The Federalist, E. H. Scott, editor (1891), p. 410 (No. LXXX))—ample, that is to maintain the constitutional balance intended by the founders, but not plenary.

Further evidence may be found in Hamilton's observations that Congress "would certainly have full power to provide that in appeals to the Supreme Court there should be no reexamination of facts, where they have been tried in the original causes by juries. *This would certainly be an authorized exception* * * *." [Italic supplied.] (The Federalist, op. cit., p. 410 (No. LXXX).)

The italicized words plainly intimate that some legislative limitations on the appellate jurisdiction of the Supreme Court would not be authorized by the Constitution (i. e., would not be "exceptions").

Thus, in summary, there is a limit to this power of Congress over the Court's appellate jurisdiction, even though the power is "ample," and it would be difficult (if not presumptuous) to specify where all the limiting points would lie. Apparently, Congress could not withdraw all, or substantially all, the Court's appellate jurisdiction. Even if Congress could do so, however, it does not follow that Congress could impose any kind of limitation whatever. Congress could not "fetter the exercise of the judicial power" (Hughes, loc. cit.) or "prescribe the rules of decision to the judicial department" (United States v. Klein, supra). What do these words mean? Perhaps the clearest answer has been given by Professor Hart in suggesting a "measure" (i. e., limits) for the power of Congress over the appellate jurisdiction of the Supreme Court:

"The measure is simply that the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan. McCardie, you will remember, meets that test" (Hart, op. cit., p. 1365).

In the following discussion, it will be shown that the enactment of the bill, 2040, would, in fact, "destroy the essential role of the Supreme Court in the constitutional plan."

U. The bill would violate the principle of the separation of powers into the legislative, executive, and judicial branches, and would upset the system of checks and balances established by the Constitution.—The bill would "fetter the exercise of the judicial power," because its purpose is to reverse the results of certain specific cases, not by changing the rules on which they were based but by excluding the Supreme Court from its role of final arbiter over cases presenting a wide variety of fundamentally unrelated situations. The bill would, thus, violate the principle of the separation of powers.

For example, one purpose of the bill is to reverse the result in *Cole v. Young, supra*. It would be entirely sufficient for that purpose to enact an amendment to the Summary Suspension Act (5 U. S. C. 22-1), explicitly providing that the act shall apply to "nonsensitive" positions. Instead, the bill provides that the Supreme Court shall have no jurisdiction to review "any action, function, or practice of, or the jurisdiction of, any officer or agency of the executive branch of the Federal Government in the administration of any program established pursuant to an Act of Congress or otherwise for the elimination from service as employees in the executive branch of individuals whose retention may impair the security of the United States Government;".

This provision would exclude from the Court's jurisdiction a great variety of cases, some (by the law of probability) undoubtedly meritorious, which bear no perceptible relation in principle to *Cole v. Young*.

As this example shows, the bill so far exceeds its object, and has so broad a scope, that it infringes on the essential functions of the Court in the constitutional system. It would not merely make new law—which, after all, is the legislative function—but is designed to control how the law shall be interpreted and applied over wide areas.

The Framers of the Constitution saw this danger, according to Hamilton, and made provisions against it. They separated the judicial power from the legislative, on the ground that—

"From a body which had even a partial agency in passing bad laws, we could rarely expect a disposition to temper and moderate them in the application" (The *Federalist*, op. cit., p. 442 (No. LXXXI)).

Even after this separation had been made, however, they believed that special care was needed to protect the courts from legislative encroachment, since—

"The Legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex" (id., p. 274 (No. XLVIII)).

On the other hand, they thought, the danger of judicial encroachment on legislative functions was a mere "phantom":

"It may in the last place be observed that the supposed danger of Judiciary encroachments on the Legislative authority, which has been on many occasions reiterated, is, in reality, a phantom. Particular misconstructions and contraventions of the will of the Legislature may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system" (id., p. 443 (No. LXXXI)).

Competent modern observers agree that the Court's rôle of final arbiter is essential to the operation of the constitutional system. Thus, Judge Learned Hand, in the first of his Oliver Wendell Holmes lectures delivered in February 1958, made the following observation:

"It was probable, if indeed it was not certain, that without some arbiter whose decision should be final the whole system would have collapsed. The courts were undoubtedly the best 'department' in which to vest such a power, since by the independence of their tenure they were least likely to be influenced by diverting pressure." (As quoted in the *New York Times*, February 4, 1958.)

The doctrine of judicial independence is strongly entrenched in American political theory and practice. The Founders intended it to be so, as the above quotations indicate; and one of their chief concerns was to protect the courts from legislative encroachment.

There can be no doubt that the Founders did not intend to give Congress the power to destroy the rôle of the Supreme Court in the constitutional system. But there is no need to go as far as this, in opposition to the bill. It seems equally clear that the Founders intended to preclude any substantial encroachment on the judicial power. In particular, the Constitution could not have contemplated any curtailment of the Court's appellate jurisdiction which would make the Court ineffectual as an independent third branch of the Federal Government.

D. The bill would set a dangerous precedent for further and more radical changes in our constitutional form of government.—In addition to its immediate effects, the bill would set a precedent for further inroads on the appellate jurisdiction of the Court which would subvert the foundations of our constitutional system and might indeed cause it to collapse. For if Congress does not stop here, and reject this bill, where can it stop? Where else shall the line be drawn? Shall Congress curtail the appellate jurisdiction of the Supreme Court whenever a decision is not to its liking?

It is easy to foresee a series of social and economic changes of unprecedented magnitude, all under the guise of limitations on the Court's appellate jurisdiction. In the near future, at best, a bill is likely to be introduced which would deny the jurisdiction of the Court over State and local segregation in the public schools. In the longer run, the proponents of this bill may be forging a fearsome political instrument which can be used by the very subversives they condemn to overturn our system of government and society.

II. The bill would do grievous harm

A. It would lead to the changes in our form of government and society described in part I.—

1. Impairment of constitutional rights (see the discussion in pt. I).
2. Impairment and threatened destruction of our constitutional system (see the discussion in pt. I).

B. The "exceptions" carved out by the bill are not based on any logical classification, and would lead to arbitrary and capricious results.—As the preceding discussion has shown, the bill would carve out large areas from the appellate jurisdiction of the Supreme Court, excluding a great variety of cases which would bear no necessary relation to one another in principle. What is the basis of classification used in the bill? What unifying principle is at work?

This bill is quite different from one that would withdraw the Court's jurisdiction in all cases within a given field of law (e. g., criminal or admiralty law) or arising under particular statutes. It would, for example, deny jurisdiction over any regulation of allegedly subversive activities by a school board, no matter what

the regulation provided, and over the exclusion of anyone from the practice of law within a State, no matter what the groups. This leaves too wide a latitude for abuse and error.

May not Congress itself, or at least some of its Members and committees, knowing that certain of its actions cannot be set aside by the Court, tend to disregard proprieties, technicalities and constitutional precedents? Will not the State governments, including their courts, and the lower Federal courts—which will then in fact all be supreme courts—do the same?

It is instructive to compare the present components of judicial limitation with their predecessors of 20 years ago. In the 1930's, those who wished to curb the Court's power were typically the advocates of social and economic legislation by Congress in derogation of States rights. The Court was then the bulwark of the States against Federal encroachment. Today, they are mostly defenders of States' rights, conservatives with respect to social and economic change. This comparison at least intensifies already serious doubts whether current proposals for "curbing the Court" are likely to result in the rectification of judicial errors rather than the usurpation of judicial power and the opening of a Pandora's box of evils.

C. The bill would seriously curtail the Court's essential function of interpreting every act of Congress (or any other law or regulation) in the light of changing conditions and problems brought to light by its operation.—To conclude, as we do, that the bill would "fetter the exercise of the judicial power" inevitably raises questions as to the functions of the judicial power in the American political system. The role of the Court as the final arbiter between State and Nation and between the individual citizen and his Government has already been mentioned. Another essential function of the Court is to interpret and apply the law according to particular circumstances from time to time in "the great, complex, ever-unfolding exigencies of government" (Thayer, *Legal Essays* (1908), p. 22).

Needless to say, Congress is not omniscient. Neither are State legislatures, nor Federal administrators, nor school boards, nor boards of State bar examiners. There is a need, in any system of government, for the application of law (or other rules) to circumstances which could not be foreseen or known in detail at the time the law was made.

The bill would deprive the Court of this function as to the five classes of cases within its scope.

D. The bill would preclude the uniform and final decision of many questions of law, and would lead to a multiplicity of unresolved conflicting opinions of State and lower Federal Courts.—Still another essential function of the Supreme Court, which the bill would seriously curtail, is to achieve and maintain uniformity in the interpretation and application of law.

This matter cannot be more clearly explained, in relation to the principle of the separation of powers, than in the following statement made during the infancy of the American Republic:

"If there are such things as political axioms, the propriety of the judicial power of a Government being coextensive with its Legislative, may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed" (The *Federalist*, op. cit., p. 435 (No. LXXX)).

III. The decisions impugned by the bill were both reasonable and within the competence of the Court

There is no intention here to defend on their merits the decisions impugned by the bill. It is enough to say that those decisions were reasonable, whether right or wrong, and that the Court had a right to make them.

First, it should be pointed out, there is no need to consider any of a number of cases which are frequently discussed in connection with this bill but which the bill would not cover, especially:

Mallory v. United States (354 U. S. 449 (1957))

Yates et al. v. United States (354 U. S. 298 (1957))

Jencks v. United States (353 U. S. 657 (1957))

Pennsylvania v. Board of Trustees (353 U. S. 230 (1957) (the Stephen Girard case))

The cases which the bill would cover are listed at the beginning of this brief, under the heading "Summary of the bill."

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Secondly, the charge that these cases contain "factual errors" is irrelevant to the present argument. The main effect of the bill will not be to overturn these particular cases; it will be to make new rules of decision for large classes of future cases. In their future application, the decisions are merely statements of principles (i. e., law) which apply to the states of fact assumed (whether correctly or not) by the Court.

Lastly, something needs to be said about the responsibilities of Congress. It makes no difference in principle whether any Member of Congress finds himself in agreement with these or any other particular decisions of the Court. Even though he would have sided against the majority, if he had been on the Court when a particular case was decided, he may find it his duty as a Member of Congress, without having changed his mind or involving himself in contradiction, to defend the Court's rights to decide as it did. Members of Congress as well as the courts are sworn to support the Constitution.

In a government of separate powers, some latitude must be allowed, and some tolerance should be exercised by each of the three independent branches toward the others.

"Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts" (Holmes, J., in *Missouri, etc., Railway v. May*, 194 U. S. 267, 270 (1904)).

It is true that a balance of social interests is involved in all these cases, and that the cases seem to represent a shift away from Government security in the direction of individual rights. Such a shift, if it has indeed occurred, rests on a reasonable foundation. Even the Conference of Privy Counsellors on Security, whose findings are often cited for the view that the balance should continue to be tilted "in favor of offering greater protection to the security of the state rather than in the direction of safeguarding the rights of the individuals," reached that conclusion only as to "certain areas—notably in the Foreign Service, the defense field, and the atomic energy organization" (see the hearing on S. 2646, 85th Cong., 1st sess., p. 14 ff.). Of the cases impugned by the bill, only *Service v. Dulles* lies in any of these "areas." The "correctness" of that decision is not seriously questioned. If its consequences (the retention of a possible subversive in the Foreign Service) are regrettable, they should be attributed not to the Court but to the then Secretary of State (Mr. Acheson), who admittedly discharged Service without regard to applicable administrative procedures.

Without taking sides on the question of this "balancing of interests," it may be suggested that Members of Congress avoid making hasty judgments and consider whether the courts also may not have a function to perform in this respect. The views of an impartial observer may be of interest. In a public lecture delivered in February 1953, Judge Learned Hand reexamined the role of the courts as a bulwark of individual rights (particularly first amendment "civil liberties") in a free society. The following passage expresses his conclusion that they are a more reliable defender of such rights than the legislature:

"The most important issues here arise when a majority of the voters are hostile, often bitterly hostile, to the dissidents against whom the statute is directed; and legislatures are more likely than courts to repress what ought to be free. * * * Judges are perhaps more apt than legislators to take a long view." (Learned Hand in his third Oliver Wendell Holmes lecture at Harvard Law School, as reported in the *New York Times*, February 6, 1953).

These words should give us pause. The bill, S. 2646, would indeed apply to matters on which there is public hostility toward dissidents, and might well repress certain activities and alleged rights. Is Judge Hand right in concluding that the courts are likely to have better judgment in such matters than the Congress?

No one can doubt Judge Hand's impartiality, the wealth of his experience or the scope and penetration of his mind. To those who may feel that he is motivated by a professional bias in favor of the courts, perhaps the best answer is his own basic conclusion, stated in the Holmes lectures, that the power of courts to declare statutes unconstitutional should be confined within "narrow limits." (It should be added that S. 2646 does not involve any decision declaring an act of Congress unconstitutional.)

The proponents of S. 2646 have been heard to say that certain Supreme Court decisions violate the principle of the separation of powers and infringe on the functions of Congress. Even if this contention were accepted for purposes of argument, would it be proper for Congress, with the intention of "reversing" these decisions, to infringe on the functions of the Court? That would not

restore the balance of our constitutional system. It would at best replace judicial usurpation of legislative functions with legislative encroachment on the judiciary. It would be a mistake, simply because two wrongs do not make a right. The following brief comments are offered in defense or extenuation, as appropriate, of the decisions attacked by the bill.

A. Congressional investigations and contempt of Congress.—In *Watkins v. United States*, *supra*, a labor union official who refused to name people he once knew as Communists, but who he believed had since left the Communist Party was held not guilty of contempt because not adequately apprised of "the question under inquiry" by the House Committee on Un-American Activities.

In substance, this decision merely requires that investigations be clearly authorized.

Note that the statute under which *Watkins* was prosecuted (2 U. S. C. 102) punishes willful refusals to answer "any question pertinent to the question under inquiry." If the standards applied by the courts under this statute are considered unsatisfactory, Congress can either punish recalcitrant witnesses without recourse to the courts or change the standards of amending the statute.

B. Summary security dismissals.—In *Service v. Dulles*, *supra*, the reversal by the Secretary of State (Mr. Acheson) of findings made by the departmental loyalty board in favor of a Foreign Service officer suspended on security grounds was held invalid because contrary to State Department regulations.

The decision that a department or agency is bound by its own security regulations certainly conforms to prevailing standards of fundamental fair play.

In *Cole v. Young*, *supra*, the Court held that the Summary Suspension Act (5 U. S. C. 22-1) was not intended to authorize security dismissals of Federal employees in nonsensitive positions.

This is a complex and controversial matter. If the Court was in error, Congress has only to manifest its contrary intent by amending the act.

C. Regulation of subversive activities by the States.—In *Pennsylvania v. Nelson*, *supra*, the Court held, in effect, that Congress, by enacting comprehensive and detailed legislation on the subject, had manifested its intent to occupy the field of antisubversive regulation. Since the decision turned on an interpretation of congressional intent, Congress can "reverse" it by a further enactment.

Whether Congress should reverse it is another matter. Subversion appears to be a problem for Federal rather than State or local authorities. It necessarily involves the entire Nation. Even when subversion is directed at the State itself (as in the *Nelson* case it was not), the Federal Government is pledged by article IV, section 4, to guarantee to the State "a republican form of government." The effective administration of antisubversive measures may well require a unified national solution rather than a diversity of local solutions. Furthermore, the comprehensive control of subversive activities requires measures beyond the power of State and local bodies in areas where Federal power is supreme (e. g., immigration and naturalization).

D. Regulation of subversive activities by school boards and similar bodies.—In the *Slochow* case, *supra*, a college teacher was summarily dismissed because he invoked the fifth-amendment privilege against self-incrimination before a congressional committee.

It is apparent that this question is highly controversial. The decision is likely to be very limited in its practical application, involving "fifth amendment teachers" only. Even as to them, school boards can be expected to find sufficient collateral reasons for dismissal whenever there is any real danger of subversive influence. It would be difficult to say that the Court was unreasonable in holding that the invocation of the privilege against self-incrimination was not, by itself, conclusive evidence of guilt.

E. Admission to State bars.—In the *Schwartz* and *Konigsberg* cases, *supra*, the Court held that State bar examiners could not exclude otherwise qualified applicants on the sole ground that there was evidence of their past Communist affiliations.

This is a field in which Congress might well exercise self-restraint. Admission to the bar is incident to the judicial process and, under the principle of the separation of powers, is properly regulated by the judiciary. Furthermore, it has long been accepted that the right of admission to the bar is protected by the Federal Constitution (*Ex parte Garland*, 71 U. S. (4 Wall.) 333 (1867)).

IV. In case of a judicial misinterpretation of congressional intent or an apparent encroachment on legislative functions, Congress need not resort to procedural experiments, but can change the substantive law

When judicial mistakes occur, as they inevitably do, it is submitted that the way for Congress to correct them is by changing the substantive law. Such solutions are almost always available, and are free from the dangers inherent in making major inroads on the appellate jurisdiction of the Supreme Court.

UNITED STATES SENATE,
Washington, D. C., March 6, 1958.

HON. WILLIAM F. JENNER,
United States Senate, Washington, D. C.

DEAR BILL: As you probably know, I sent a letter to the deans of American law schools soliciting their views pro or con respecting S. 2010. When I testified before the subcommittee on March 4, I placed the replies that I had received in the record of the hearings. Unfortunately, the enclosed letter from the dean of Indiana University Law School had not arrived by the time that I appeared. I thought the enclosed letter from Dean Wallace would be of interest; therefore, I am enclosing a copy of his letter.

With every best wish, I am,

Sincerely yours,

THOMAS C. HENNING, JR.

INDIANA UNIVERSITY SCHOOL OF LAW,
Bloomington, Ind., March 3, 1958.

HON. THOMAS C. HENNING, JR.,
United States Senate, Washington, D. C.

DEAR SENATOR HENNING: An answer to your letter of February 7 has been delayed both by absence and illness. I apologize for the delay.

I believe that the enactment of S. 2010 would be most unwise in the long range of history.

Specifically, as to subsections (1) and (2) of S. 2010, the final determination of Federal constitutional questions in the defined areas would be left to the courts of appeal in the various Federal circuits. This would certainly lead to lack of uniformity of Federal constitutional law in the areas affected.

As to subsections (3), (4), and (5), conceivably, there might be some fact situations where an individual might be entitled to transfer to a Federal court under civil-rights legislation. Even so, final determinations would be made on the court-of-appeals level in the various Federal circuits. Even if possible, these situations would be rare. Under most fact situations arising under these subsections, the final determinations of Federal constitutional questions in the defined areas would be left to the courts of highest appellate jurisdiction in the various States. Consequently, various bodies of Federal constitutional law would be established in the several States without any recourse to any Federal tribunal. The rights of citizens of the United States under the Federal Constitution would change as one crossed State lines. I suspect that this itself raises a serious constitutional problem which has never been answered.

Even though I do not agree with all of the Court's opinions (nor do some of the Justices themselves), I cannot believe that in the long run such results as I have earlier proposed would be either desirable or to the ultimate best interests of the citizens of the United States.

The principle inherent in S. 2010 has been recurrent throughout our national history. It was enunciated in the thinking of the conventions of Massachusetts and New York called to consider the ratification of the Constitution. These conventions suggested that the President be authorized to appoint a commission of "such learned men as he shall appoint * * * to correct the errors in such judgment." The quoted part is from the Massachusetts convention. The New York convention provided for a commission of "such men learned in the law as he [the President] shall nominate * * * to correct the errors in such judgment." (Both referring to judgments of the Supreme Court.)

In 1807, a bill was introduced in the Congress to deny appellate jurisdiction to the Supreme Court granted under the Habeas Corpus Act of 1807.

Similar recommendations to restrict the appellate jurisdiction of the Supreme Court were made throughout the 19th century and well up into the 20th century.

In 1922, Senator La Follette, of Wisconsin, proposed in more general terms what S. 2046 proposes to do in specific areas.

Beginning with its platform of 1908, and in numerous of its platforms thereafter, limitation on the appellate jurisdiction of the Supreme Court was a standard plank of the Socialist Party of the United States.

To return to the 19th century, in midcentury, the only successful attack on the power of the Supreme Court to review problems which present Federal constitutional problems was achieved. I believe that it is quite proper to review, briefly, that episode.

The powerfully worded statement of President Johnson, in vetoing a bill repealing the appellate jurisdiction of the Supreme Court under the Habeas Corpus Act of 1867, on March 25, 1868, is just as apt today. He stated:

"Thus far during the existence of the Government, the Supreme Court of the United States has been viewed by the people as the true expounder of their Constitution, and in the most violent party conflicts, its judgments and decrees have always been sought and deferred to with confidence and respect. In public estimation, it combines judicial wisdom and impartiality in a greater degree than any other authority known to the Constitution; and any act which may be construed into, or mistaken for, an attempt to prevent or evade its decisions on a question which affects the liberty of the citizens and agitates the country cannot fail to be attended with unpropitious consequences. It will be justly held by a large portion of the people as an admission of the unconstitutionality of the act on which its judgment may be forbidden or forestalled, and may interfere with that willing acquiescence in its provisions which is necessary for the harmonious and efficient execution of any law."

At that time, Senator Thomas A. Hendricks of Indiana reproached the "brave Senators" who were "afraid of the decision of the Court. * * * You did claim to the country that the administration of Mr. Lincoln was entitled to its confidence; and are there not five Judges out of eight whom Mr. Lincoln appointed and whom you confirmed; and at the head is there not Chief Justice Chase, distinguished as a party leader? Then, with a Supreme Court, five out of eight appointed by Mr. Lincoln and confirmed by these honorable Senators that I am addressing * * * you say you cannot afford to risk this question before that Court. Why? Let that question be answered."

The bill was passed over the Presidential veto, but within a few years the appellate jurisdiction was quietly restored to the Supreme Court.

I believe that the facts of that day may well be compared to the facts of the mid-20th century. The facts are not the same, but they are uncomfortably analogous.

I shall not attempt further to go into detailed review of the problem and its varied historical background. As a citizen of the United States, I hope only that the Congress will take a long look before it starts the process of changing the balances of the Government of the United States.

Sincerely yours,

LEON H. WALLACE.

STATEMENT OF AMERICAN JEWISH CONGRESS ON S. 2046, SUBMITTED BY SHAD POLIER, CHAIRMAN, COMMISSION ON LAW AND SOCIAL ACTION

The American Jewish Congress is a voluntary organization of American Jews with 300,000 direct and affiliated members which has always been actively concerned with the preservation of our democratic institutions. We regard those institutions as the surest guaranty of the security of all minority groups and, indeed, of all Americans.

Accordingly, the American Jewish Congress has consistently and unequivocally opposed communism, fascism, and all other forms of totalitarianism. Knowing the shocking efforts that have been made to accomplish the cultural genocide of the Jews in the Soviet Union, we have joined with other Americans in resisting Communist aggression and subversion. We have also worked with others to preserve in this country the liberties that distinguish our form of government from that of totalitarian states.

As part of our effort to defend democratic principles, we have often participated in judicial proceedings in which citizens have sought to enforce constitutional guarantees of liberty and equality. In this aspect of our work, we are constantly reminded of the crucial part played by the courts, and particularly by the United States Supreme Court, in the system of checks and balances that

has long preserved the American constitutional scheme. Since the bill now before this committee (S. 2640) appears to be prompted by disagreement with recent Supreme Court decisions, we deem it important to express our view that the preeminent position held by the United States today as a leader of the free world is in large part due to historic rulings of that Court condemning racial inequality and striking down efforts to curb freedom of speech, press and religion. We submit this statement because S. 2640 would, in our opinion, impair a vital safeguard against erosion of the democratic structure of our Government.

THE BILL.

The Jenner bill, S. 2640, now pending before this committee is a challenge to the independence of the judiciary. It is the obverse of court-packing schemes of other years. Instead of adding to the personnel of the Court the present bill would subtract from its calendar. Instead of dictating judicial opinion, it would deny the Court the right to an opinion at all. Whether a manned court is better or worse than an enfeebled court is arguable. What is not arguable is that neither can safeguard freedom. And neither can function as an independent branch within the contemplation of the constitutional plan.

Briefly, S. 2640 would divest the Supreme Court of power to review:

1. Any act of any congressional committee, including criminal prosecution of witnesses for alleged contempts of such committees;
2. Any aspect of the Federal employees security program;
3. Any State statute or State executive regulation whose "general purpose" was to "control subversive activities within such State."
4. Any regulation of any State school board "concerning subversive activities in its teaching body"; and
5. Any action by any State agency denying any person admission to practice law in that State for any reason.

It has been widely declared by the author of the bill that each of these categories has been carefully drawn to correct alleged errors in specific Supreme Court opinions. In other words, Senator Jenner is displaced about certain decisions handed down by the Supreme Court in recent years and, to circumvent these decisions, he would now attempt to destroy the Supreme Court itself.

The first category specified by the Jenner bill is aimed at the Watkins case; the second, at the Cole and Service cases; the third, at the Supreme Court's opinions in the Nelson and Swezy cases; the fourth, at the Slochower case; and the fifth, at the Schwabe and Konigsberg cases.

THE ROLE OF THE SUPREME COURT

Our opposition to the Jenner bill is independent of our attitude toward the holdings in these cases. It would be less than forthright on our part, however, if we did not express our conviction that the line of cases implicitly denounced in the Jenner bill has done much to restore good sense and fairness in public proceedings in this country and to rebuild morale and a welcome respect for private opinion. We are convinced, however, that those who do not agree with our view of the decisions stand to forfeit just as much as do we by the emasculation of the Court intended by the Jenner bill.

The existence of the Supreme Court as an ultimate arbiter of rights is a reciprocal insurance we in this community grant each other that Federal constitutional freedoms will apply equally and indifferently to all men, no matter where they reside within our country, or what their station. Ours is a big and diverse country. We profit from this fact, and regional differences contribute positively to the characteristically flexible quality of our national temper.

But our federation into one nation means at least this; that the freedoms and liberties assured by the Federal Constitution remain constant and supersede all local variations limiting their scope and extent. These rights attach by virtue of one's status and position in the Nation at large, and no local authority can be permitted immunity in derogating from these minimum guarantees. We have, therefore, vested in the Supreme Court sufficient appellate authority to overcome any legislative or judicial distortions occasioned by local or regional biases or shortsightedness. The Bill of Rights in this sense is validated and given sanction by the appellate jurisdiction of the Supreme Court. It is our mutual assurance that, whatever our particular differences or disagreements,

no local power can ever be endowed with authority paramount to these freedoms.

If the Jenner bill were enacted, we would have not one supreme law governing individual rights, but separate bodies of law determined by the 11 Federal courts of appeals and the courts of last resort in the 48 States. We do not in any way deprecate the abilities of these courts when we say that they could not possibly achieve uniform interpretation of the Constitution. Constitutional controversies offer issues of great subtlety and difficulty, and the existence of numerous, coequal judicial bodies must result in a welter of conflicting opinion. Assuming an even distribution of competence, wisdom, and integrity on the part of each of the 59 judicial tribunals that under the Jenner bill would be empowered to make settled law in the categories precluded to the Supreme Court, their judgments on these matters would still vary widely. The condition and character of an individual's rights would, thus, be made to depend upon the irrelevant circumstance of where he resides or where he tries his case. This strikes at the heart of orderly and evenhanded meting out of justice. The Jenner bill, instead of promoting judicial regularity, would precipitate judicial anarchy. Nothing is more likely to destroy the sense of common enterprise and of a common stake in freedom that has been our greatest source of national unity.

LEGISLATIVE RESPONSIBILITY

Neither the Supreme Court nor its personnel ought to be immunized against criticism, however searching. Its interpretation of Federal laws, though not of the Constitution, is subject to review and correction by Congress. The present demand for destroying its appellate powers is apparently due to a reluctance to use these legitimate legislative channels.

As noted earlier, it is the conviction of the American Jewish Congress that the cases attacked by the Jenner bill exemplify the best traditions of the United States. We recognize that a number of others, including some Members of the Senate and the House, profoundly believe that these opinions are erroneous and dangerous. But, if this is their view, they should use the mechanisms available within our constitutional structure to rectify whatever damage they may believe to have been done by the Court's rulings. Charges broadcast by the supporters of S. 2046 convey the impression that what the Court has done in these cases cannot be undone by appropriate legislative act. This, for the most part, inaccurate representation can only stem from an eagerness to disparage and intimidate the personnel of the Court rather than assume the burden of serious legislation.

Thus, in the Watkins case, certainly one of the principal targets of the Jenner bill, it was held that a congressional committee must indicate to the subpoenaed witness the pertinence of the information demanded of him. Chief Justice Warren concluded in that case that neither the House resolution creating the Committee on Un-American Activities nor the remarks of the committee chairman during the investigation nor the nature of the proceedings themselves could have made clear to Watkins the nature of the question under committee inquiry. This ruling did not leave the Congress without remedy. If the House is so moved, it might accommodate to this opinion by reformulation of the enabling resolutions and by requiring greater clarity and stringency in committee procedures. Such a corrective measure would, obviously, be preferable to radical surgery which lops off not only the Supreme Court's appellate jurisdiction but also a vital protection of personal liberty.

Similar steps can be taken by State legislatures to meet the requirements of the Sweezy decision.

Again, in dealing with the Nelson case, which invalidated the Pennsylvania "Little Smith Act" because it was in conflict with the Federal Smith Act, there is nothing to prevent Congress, if it so desires, from amending the Federal legislation, expressly allowing the States to adopt such supplementary antisubversive legislation as they choose.

Finally, that section of S. 2046 addressed to excluding the Supreme Court from review of any aspects of the Federal employees security program was apparently dictated by the Cole and Service cases. Those decisions are, quite plainly, subject to modification by legislative action. Thus, in the Cole case, the Court declared that the Federal employees security program is applicable only to persons holding sensitive positions. The obvious response on the part of the Congress, if it regards this decision as a distortion of its intent, is to amend the legislatively established security program so that it embraces employees in nonsensitive positions.

The proponents of the Jenner bill are free to endorse, support, and guide through Congress any revisions of existing law that would correct what they regard as the Supreme Court's mistakes. Until they do so, they stand open to the charge that they have resorted to general and loose disparagement of the Court because they know that they cannot muster a majority in Congress for their point of view.

CONSTITUTIONALITY OF THE BILL

The Supreme Court is established by article III, section 1, of the Constitution. Section 3 of that article declares that it shall have "appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

It was suggested by Chief Justice Marshall, in *Durousseau v. United States* (10 U. S. 307, 317-318 (1810)), that Congress cannot constitutionally deprive the Supreme Court of the whole of its appellate jurisdiction. Since this is true, it should also follow that Congress cannot deprive the Supreme Court of appellate jurisdiction that is vital and crucial to its functions. (See Hart, *The Power of Congress To Limit the Jurisdiction of Federal Courts*, 66 *Harvard Law Review* 1032 (1952).)

The power given to Congress by article III to make some exceptions to the appellate jurisdiction of the Supreme Court should not be construed as permitting it to abolish such jurisdiction where the need is imperative for a single unifying view for the retention and promotion of national order. Such a construction would destroy the independence of the judiciary so carefully guarded by other provisions of the Constitution.

The enactment of S. 2040 must necessarily have a debilitating effect upon the entire judiciary. Inferior Federal courts are even more vulnerable than the Supreme Court to the authority and control of the Congress. The Constitution itself establishes the Supreme Court, but the inferior Federal courts are the direct creatures of Congress. A Congress capable of such drastic reprisal against the Supreme Court could be expected to resort to even more damaging retaliation against any inferior Federal court with which it disagrees. The lower courts would, thus, operate under a threat, no matter how conscientiously they sought to resist its effects.

THE EFFECT OF THE BILL ON STATE PROCEEDINGS

State officials tend to reflect regional needs as well as national interests and requirements. The possibility that bias caused by this natural preoccupation will sometimes result in attempts to override constitutional restraints now is mitigated by the existence of an appellate stage beyond State influence. However, if the Jenner bill succeeds in preventing the Supreme Court from passing upon the cases falling in its third, fourth, and fifth categories, the constitutional safeguards against such indulgence in regional bias would be largely destroyed.

This is graphically proved by events now taking place. Concurrent with these hearings there is a continuing investigation in Florida by the Johns Committee, created by the legislature of that State. Nominally, the Johns Committee is mandated to investigate "the Communist Party and other subversive organizations * * * seeking to agitate and engender ill will between the races of this and other States." But hearings already conducted by the committee establish that its actual purpose is to hamper or suppress any organization, no matter how unimpeachable its devotion to this country, that in any way seeks to bring about orderly compliance with Supreme Court decisions outlawing racial segregation.

The principal efforts of the Johns Committee have been directed to manufacturing a link between the National Association for the Advancement of Colored People and the Communist Party, despite the NAACP's impeccable record of loyalty and its characterization by J. Edgar Hoover as having "done much * * * to perpetuate the desires of our Founding Fathers." The Johns Committee's assault upon the NAACP and its efforts to pillory and harass such reputable and responsible biracial organizations as the Florida State Council for Human Relations and the Dade County Council, on Community Relations evinces a deliberate design to establish an equation between subversion and activities on behalf of desegregation.

The tactics of the Johns Committee show how easy it is for a State to place an invasion of the rights of freedom of association and expression under the

rubric of "antissubversive" regulation. Under the Jenner bill, State actions unconstitutionally designed to preserve segregation and to suppress lawful anti-segregation activity could be protected against all restraint by a simple declaration, in the words of the Jenner bill, that their "general purpose * * * is to control subversive activities." In view of the openly expressed intention of a number of State governments to frustrate implementation of the Supreme Court's anti-segregation decisions, it would be folly to provide such an easy escape from enforcement of the Federal Constitution.

CONCLUSION

The merits of recent decisions by the Supreme Court are not in issue here. What is in issue are the central assumptions of constitutional democracy. In company with eminent practitioners of law in this country and in company with those who believe in the wisdom of separation and distribution of governmental power and in the need for restraint on the part of each, the States, the courts, the Executive and the legislature to insure that each remains within its prescribed sphere, we urge that S. 2646 be rejected by this committee.

Respectfully submitted,

SHAD POLIER.

Now, we have been here several days on this hearing on Senate bill 2646, and I want to make a summary, as best I can, as to why I put the bill in, and what the bill purports to do.

STATEMENT BY SENATOR WILLIAM E. JENNER, SENIOR SENATOR FROM INDIANA

In 9 days of hearings, criticism of my bill, S. 2646 has fallen into several categories. I want to discuss these briefly, touch upon the main objections to the bill which have been advanced, and answer them. I won't do this extensively, because I don't think the objections to the bill require extensive answers. But there are a few points I want to make before this record closes.

All of the objections to this bill fall into two main categories:

(1) those which involve the claim that the bill is unconstitutional; and

(2) those which admit the constitutionality of the bill but object to one or more of the features of it on some other grounds.

Let's look first at the constitutional arguments.

The constitutional arguments against the bill fall into three sub-classes:

(1) The argument that the language of article III, section 2, clause 2 does not mean what it says. This is the argument first advanced by Mr. Joe Rauh when he testified representing Americans for Democratic Action. This is a completely specious argument and has been repeatedly refuted by expert witnesses during the course of these hearings.

(2) That the grant to the Supreme Court of original jurisdiction over cases having a State as party encompasses a grant of appellate jurisdiction over any case in which a State is a party, and that this includes cases brought in State courts and involving State statutes.

This point not only does not involve any good law, it doesn't even involve any good logic. As Mr. Frank Ober pointed out yesterday during his testimony, original jurisdiction and appellate jurisdiction are two separate things in law, and are treated quite separately in article III of the Constitution.

(3) That the provisions of article III, section 2, clause 2 of the Constitution, respecting the power of the Congress to regulate and make

exceptions to the appellate jurisdiction of the Supreme Court, have been somehow negated by the adoption of some amendment to the Constitution.

Two amendments have been suggested as possibly modifying the cited provisions of article III. They are the 5th amendment and the 14th amendment.

Now, the 14th amendment can hardly be deemed as amendatory of article III of the Constitution, since the amendment is concerned with actions by the States and article III is concerned with a grant of power to one of the branches of the Federal Government.

The fifth amendment, of course, cannot be said to repeal article III, and is not in any direct and apparent conflict with the provisions of article III; the fifth amendment does, however, protect certain individual rights, and if one of those protected rights should be directly interfered with through an exercise of power under article III, it is conceivable that such an exercise of power might be deemed unconstitutional.

We come then to consideration of whether anything in the fifth amendment to the Constitution can be deemed to render my bill unconstitutional.

Principal proponent of the contention that the fifth amendment to the Constitution might be considered as a bar to enactment of my bill was Mr. Tom Harris, who testified representing the AFL-CIO.

Mr. Harris did not say that my bill was unconstitutional; he simply suggested how a court might find it unconstitutional. It would be necessary, Mr. Harris said, to find that one of the categories in my bill represented an unreasonable classification.

Mr. Harris did not express the opinion that any of the categories in my bill was unreasonable; he just said it might be possible for a court to decide that one of them was.

Mr. Harris gave some examples of what he considered unreasonable categories—such as a provision which might seek to divest the Supreme Court of jurisdiction to try a case involving a particular named person—and none of the examples he gave was anywhere close to any of the provisions of my bill.

Those are all the arguments that have been made about the constitutionality of the bill. None of them will hold water.

Now we come to the opposition to the bill on its merits.

The American Bar Association passed a resolution opposing the bill on two grounds:

First, that the bill was contrary to a position previously taken by the American Bar Association at another time and prior to some of the worst of the recent decisions of the Supreme Court. This is, of course, a self-serving action. It might be well if the bar association were reminded of Emerson's warning that a foolish consistency is the hobgoblin of little minds.

The other announced basis for the bar association's action was that my bill would be "contrary to the maintenance of the balance of powers set up in the Constitution."

As I have already pointed out in a public statement, my bill only proposes to implement one of the basic check and balance provisions of the Constitution; and I fail to see how the use of a constitutional provision can be deemed to be contrary to the spirit of the Constitution.

Various witnesses and others have assumed the right to declare the basis upon which I have predicated this bill. They charge me with seeking to punish the Supreme Court. I would not be adverse to admitting this charge if it were true; because I think some of the recent decisions warrant punishment, at least to the old-fashioned extent of being required to stand in the corner. But punishment was not the objective of the bill; and, in fact, the bill would not and could not punish the Court.

The Supreme Court has no vested interest in any case or any class of cases that comes before it. The compensation of the Justices will not be affected in any way if my bill is passed. Their tenure will not be affected; their working hours will not be affected. If they are held in less repute by some of the citizens of this country than they formerly were, this is not and will not be the result of my bill, but, rather, the result of the decisions which the Court has handed down.

No, the purpose of this bill is not to punish the Court; the purpose of this bill is to utilize one of the basic check-and-balance provisions of the Constitution for the purpose of restoring a balance which has been seriously upset by the actions of the Supreme Court. The Court has repeatedly sought to legislate. The people of the United States are unhappy about this. They do not have to be lawyers to understand that it is the job of their elected representatives to legislate, and not the job of the Supreme Court; and they do understand this.

It is not any particular decision or the provisions of any particular decision which I am attacking with this bill. What I am attacking is the problem of how to overcome a trend—a trend toward judicial legislation by the Supreme Court of the United States. I concluded that the only way to check this trend was to utilize the provision of the Constitution which I believe was placed there for the purpose of permitting the Congress to act in just such a situation as we now find ourselves in.

It is perfectly clear to me as it must have been perfectly clear to everyone who has examined this question in any substantial degree that enactment of the bill S. 2646 will not repeal or reverse any of the decisions of the Supreme Court about which I—among many others—have complained.

This kind of an act cannot reach and affect a decision of the Supreme Court. It may be that by a different kind of an act or acts, the Congress could, for the future, effect a change in the principles declared by the Supreme Court in some of these recent decisions; and so far as this can be done, I want to see it done, and I will help to do it, where the change will restore the Constitution to its real meaning, where the Supreme Court has warped and twisted and misconstrued it.

But I have never thought that my bill would change any of these decisions or any of the Court's interpretations. What my bill will do, I hope, is to push the Supreme Court out of the field of legislation and back into the area where it was constitutionally intended to operate. My bill is not punitive; it is wholly remedial in purpose.

It has been said in opposition to this bill that, if enacted, it would result in the possibility of diversity of decisions.

In order to consider this point intelligently, we must take note of the fact that several different situations are covered in my bill.

With respect to judicial power over congressional investigations, my position is that there should be none; and if my bill should be enacted, and the appellate power of the Supreme Court in this field should be curtailed, we would have none. Lower courts could protect the rights of individuals without attempting to police the investigative powers of the Congress or to assert its legislative powers. It has been the Supreme Court, not the inferior courts, which has sought these unworthy ends.

With respect to the Federal employee security program, I think nearly all of the cases would be brought in the District of Columbia, so that the court of last resort for cases in this class would be, to all effects and purposes, the United States Court of Appeals for the District of Columbia Circuit.

With respect to the enactment of State laws and the conduct of State investigations respecting subversion, with respect to the control of subversive activity in local schools, and with respect to admission of individuals to the bar of particular States, I feel that a federally imposed uniformity is extremely undesirable.

These are matters committed, by the 10th amendment to the Constitution, to the States. They should be controlled by the people of the various States through their elected legislatures and, whatever they decide to do, the Federal Government should not interfere. States certainly have a right to protect their own welfare, to protect their children, and to choose who shall be the officers of their courts.

It has been argued against my bill that it would have the effect of "freezing" the various Supreme Court decisions in the fields which the bill would affect.

This argument depends upon the assertion or the assumption that all lower courts would be absolutely bound by these decisions, even in cases where the lower courts might consider the decisions to be bad law.

This argument is just another way of saying that the Supreme Court can make law which neither the Congress nor any other court can change; but that the Congress can do nothing to change a law which the Supreme Court has made, and that the judge of a lower court must adhere to a decision of the Supreme Court rather than to the Constitution as he understands it.

I say that is not the case. The Congress can act, in any one of several ways, and my bill is one of the ways.

And a lower court can act in a way contrary to a Supreme Court decision, because what the judges of our courts are sworn to uphold is the Constitution of the United States, not the Supreme Court of the United States.

Before I close, I want to refer to the letter of the Attorney General of the United States, delivered yesterday and placed in the record yesterday afternoon.

First, I want to call attention to the fact that the Attorney General was requested by letter of the chairman of the Committee on the Judiciary, under date of February 3, to appear and testify on this bill. I am informed that letter was never answered. I am informed the Attorney General spoke to the chairman of the committee and asked if it would really be necessary for him to come up in person, or if he could send a written report, and that the chairman told him

if he didn't want to come, a written report would be all right. I take that to mean that the Attorney General did not in fact want to come up and testify before this committee, and subject himself to questions; he preferred to file a report in writing and have it sent up here by messenger.

We have been trying to get this report from the Office of the Attorney General for some 2 weeks now; and the word always has been that the report was in process. They were "working on it." I had visions of a long and carefully drafted and well-documented and erudite report, that would give us some help in our consideration of this bill. But no. That is not what we got. We got a 2½-page letter addressed to the chairman of the full committee, which starts out:

DEAR SENATOR: BECAUSE of the importance of the subject, I am taking the liberty of stating my views on the bill S. 2846 * * *

Now, that doesn't even indicate that the Attorney General knows he has been asked to testify on this bill. That sounds like he was telling us that he is sending us his opinion voluntarily.

How can he be "taking the liberty" of stating his views, when he has been asked in writing by the chairman of the committee to do so, on February 3?

Well, the Attorney General's letter goes on for another 2 pages. The second paragraph summarizes what the bill provides.

Then the third paragraph starts off with this sentence:

In the first place, it is clear that this proposal is not based on general considerations of policy relating to the judiciary.

Now, where do you suppose the Attorney General got that idea?

How can he say it is clear to him on what basis I based my proposal?

He has not talked to me about it.

The Attorney General goes on:

It (my proposal) is motivated instead by dissatisfaction with certain recent decisions of the Supreme Court in the areas covered and represents a retaliatory approach of the same general character as the court-packing plan proposed in 1937.

This is one of the specious arguments against the bill which has been repeated by various thoughtless witnesses; but I never thought I would hear the Attorney General of the United States repeat it.

I am of course interested to hear that the Attorney General disapproved of the "court-packing plan" in 1937.

Now let me point out what the real relationship is between the court-packing plan and my bill.

In the first place, the court-packing plan was an effort to influence the Court so as to bring about a particular kind of decision. My bill is an effort to halt the incursions of the Court into the legislative field.

The court-packing plan advanced by President Roosevelt sought to influence the Court by increasing its size and thereby changing its philosophy. My bill does not seek to change the philosophy of the Court in any way—I do not believe that to be possible—but, rather, to set up a barrier against the philosophy which the Court has been evidencing.

One more point needs to be brought out:

The liberals who favored the court-packing plan in 1937 have been making a good deal of the fact that they appear now as defenders

of the Court, in opposition to my bill. But they have not changed their position one iota.

The liberals opposed the Court in 1937 and favored the court-packing plan because they were anxious to secure Supreme Court approval for social and other legislation which would change the face of America and lead to increased centralization of government and the destruction of States rights. The liberals who oppose my bill today are doing so for exactly the same reasons. It is the Supreme Court which has changed its position in the interim, not the liberals and not Bill Jenner.

Well, now we come to the fourth paragraph of the Attorney General's letter.

He says that the Congress has only enacted legislation of this kind once before, that this was in 1868, and that—

• • • because it realized that this was a mistake Congress reversed itself, restoring the jurisdiction in 1885.

I do not know whether the jurisdiction which the Congress took away from the Supreme Court in 1868 was restored 17 years later because Congress realized that it had made a mistake 17 years before, or because the situation had changed in the intervening 17 years.

I can foresee the possibility that if my bill passes, another Congress 17 or 20 years from now might see fit to restore the jurisdiction which this bill would take away, on the ground that, in the meantime, the Supreme Court had learned to stay within its proper orbit and could once again be trusted with matters in these fields.

However that may be, I do want to call attention to the fact that Congress did on a previous occasion make use of the same constitutional provision which I would make use of through the enactment of my bill S. 2646, and that the Supreme Court of the United States considered the matter and held the bill to be constitutional, and bowed to its provisions.

The Attorney General apparently does not think that the question of constitutionality of the bill is sufficiently important to receive any mention in his report.

On page 2 of his report, the Attorney General raises the question I have already discussed, with respect to the possibility of different rules of decision in different circuits and in different State courts.

I have already spoken about that question, but I will add this:

There may be some argument for uniformity of decision among the circuit courts of appeals; but there is no logical argument for uniformity in the decisions of the courts of the States.

The State courts are exercising residual powers. The Federal courts are exercising only specified powers granted under the Constitution. We do not demand that all of our States be alike. We do not demand that they think alike on matters of public policy. There is no reason for demanding that their courts think alike or adhere to identical rules of decision. There are in fact many subjects today on which there are differing rules of decisions in the various State supreme courts; and no one has been suggesting that there should be Federal legislation or Supreme Court legislation to force uniformity.

The Supreme Court does not make it a practice to accept all cases which involve decisions of the courts of appeals which may differ

from decisions of other circuits. I think our record is complete on that.

The Attorney General goes on to declare that :

Full and unimpaired appellate jurisdiction in the Supreme Court is fundamental under our system of government.

That must be the Attorney General's opinion, because it is not the Constitution; and I guess we are supposed to consider the Attorney General's opinion more fundamental than the Constitution.

The Constitution contains the provision in article III, section 2, clause 2, giving the Congress the right to make regulations and exceptions with respect to the Supreme Court's appellate jurisdiction. That certainly is not—quoting from the Attorney General's letter—"full and unimpaired" appellate jurisdiction.

So we have this situation :

The Attorney General is declaring as fundamental something that the Constitution not only does not provide for but specifically provides against.

Personally, I'll take the Constitution. It has been there a long time and attorneys general change every so often.

The Attorney General goes on to indicate that he regards the Supreme Court as the "final arbiter" in "the maintenance of the balance contemplated in our Constitution as among the three coordinate branches of the Government."

But the whole theory of our Constitution is that there should be no "final arbiter"—because the Founding Fathers understood that if any one branch of the Government got complete ascendancy, we would not have a Government of checks and balances but an oligarchy which would lead unquestionably and irresistibly to tyranny.

The Constitution did not make the Supreme Court—quoting the Attorney General—the "final arbiter"—nor did even Mr. Justice Marshall, in *Marbury v. Madison*.

Marshall said there were "some cases" in which the Court should consider questions of policy. He did not say that the Court should consider questions of policy in all cases. Now it happens that the case of *Marbury v. Madison* was tried without a jury; and, therefore, naturally, the Court was allowed a much wider latitude than it would have been allowed if this had been a jury case.

The genius of the Constitution is that it does not provide for a final arbiter; it does provide for checks and balances which may be used by the different branches of the Government, one against the other, to guard against or to repel encroachments.

It is this very system of uneasy balances which gives the citizen his best guarantee that his rights will continue to be observed. For once all power is put in a single place, so, surely as "power corrupts and absolute power corrupts absolutely," the individual rights of citizens are doomed from that day on.

At the top of page 3 of his report, the Attorney General says :

This type of legislation threatens the independence of the judiciary.

That statement simply is not so. This bill does not threaten the independence of the judiciary, and it does not threaten our system of checks and balances.

What it does threaten is the imbalance which has been created by decisions of the Supreme Court in recent years. It threatens the

power to legislate which the Supreme Court has arrogated to itself during those years. It threatens the status quo, the situation which favors the growth of big central government and the decline and decay of States' rights.

There are a great many people in this country today who favor that status quo, who want to see it preserved, and we must now assume the Attorney General of the United States is one of them. But that does not justify him in confusing the status quo with the independence of the judiciary.

Well, so much for the report of the Attorney General.

I wanted to mention it, because I think that when the Attorney General of the United States expresses an opinion upon proposed legislation, it should be important, but I am afraid in this instance he has been badly advised.

In closing, I want to repeat in new words what I have said many times before and at least once here :

I introduced this bill not out of any spirit of retaliation, but out of a deep concern for the preservation of the Constitution of the United States as it was meant to be, and our American way of life as we used to know it.

I have introduced this bill in an effort to secure action by the Congress which would help to restore the balance between the respective branches of the Federal Government, and to restore to the States a measure of their rights, guaranteed under the 10th amendment of the Constitution but which have been stripped from them, notwithstanding that guaranty, by judicial legislation.

I am not wedded to any line or word of this bill. There have been some suggestions during these hearings respecting possible amendments to the bill, and I am willing to sit down with the committee and consider any of those suggestions. If the committee can agree upon different language, even representing in part or in whole a different approach to this problem but which will be effective in achieving the objective I have sought, the committee will find me ready to go along.

I will support this bill or any other bill which I think will help to limit the Supreme Court to its proper sphere of action, to restore to the Congress autonomy over the conduct of its own affairs, and to preserve for the States the rights and powers which they reserved when the Federal Government was created and which are guaranteed to them under the 10th amendment to the Constitution of the United States.

I think my bill S. 2646 will go a long way in that direction, and I am going to be for it with all the force I can muster. If you can show me or anyone else a better way, or even another good way, to accomplish the same purpose, you can count on my support. I have no pride of authorship. I am not trying to pass a "Jenner bill." I am just trying to get a job done—a job that urgently needs doing.

The hearings will be concluded on Senate bill 2646.

(Whereupon, at 4:50 p m., the committee adjourned, subject to the call of the Chair.)

APPENDIX I

7 Wall 506 (U. S. 1868)

EX PARTE MCCARDLE.

1. The appellate jurisdiction of this court is conferred by the Constitution, and not derived from acts of Congress; but is conferred "with such exceptions, and under such regulations, as Congress may make;" and, therefore, acts of Congress affirming such jurisdiction, have always been construed as excepting from it all cases not expressly described and provided for.
2. When, therefore, Congress enacts that this court shall have appellate jurisdiction over final decisions of the Circuit Courts, in certain cases, the act operates as a negation or exception of such jurisdiction in other cases; and the repeal of the act necessarily negatives jurisdiction under it of these cases also.
3. The repeal of such an act, pending an appeal provided for by it, is not an exercise of judicial power by the legislature, no matter whether the repeal takes effect before or after argument of the appeal.
4. The act of 27th of March, 1868, repealing that provision of the act of 6th of February, 1867, to amend the Judicial Act of 1789, which authorized appeals to this court from the decisions of the Circuit Courts, in cases of *habeas corpus*, does not except from the appellate jurisdiction of this court any cases but appeals under the act of 1867. It does not affect the appellate jurisdiction which was previously exercised in cases of *habeas corpus*.

Statement of the case.

APPEAL from the Circuit Court for the Southern District of Mississippi.

The case was this:

The Constitution of the United States ordains as follows:

"§ 1. The judicial power of the United States shall be vested in one *Supreme Court*, and in such inferior courts as the Congress may from time to time ordain and establish."

"§ 2. The judicial power shall extend to all cases in law or equity arising under this Constitution, the laws of the United States," &c.

And in these last cases the Constitution ordains that,

"The Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make."

With these constitutional provisions in existence, Congress, on the 5th February, 1867, by "An act to amend an act to establish the judicial courts of the United States, approved September 24, 1789," provided that the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdiction, in addition to the authority already conferred by law, should have power to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States. And that, from the final decision of any judge, justice, or court inferior to the Circuit Court, appeal might be taken to the Circuit Court of the United States for the district in which the cause was heard, and from the judgment of the said Circuit Court to the Supreme Court of the United States.

This statute being in force, one McCardle, alleging unlawful restraint by military force, preferred a petition in the court below, for the writ of *habeas corpus*.

Statement of the case.

The writ was issued, and a return was made by the military commander, admitting the restraint, but denying that it was unlawful.

It appeared that the petitioner was not in the military service of the United States, but was held in custody by military authority for trial before a military commission, upon charges founded upon the publication of articles alleged to be incendiary and libellous, in a newspaper of which he was editor. The custody was alleged to be under the authority of certain acts of Congress.

Upon the hearing, the petitioner was remanded to the military custody; but, upon his prayer, an appeal was allowed him to this court, and upon filing the usual appeal-bond, for costs, he was admitted to bail upon recognizance, with sureties, conditioned for his future appearance in the Circuit Court, to abide by and perform the final judgment of this court. The appeal was taken under the above-mentioned act of February 5, 1867.

A motion to dismiss this appeal was made at the last term, and, after argument, was denied.*

Subsequently, on the 2d, 8d, 4th, and 9th March, the case was argued very thoroughly and ably upon the merits, and was taken under advisement. While it was thus held, and before conference in regard to the decision proper to be made, an act was passed by Congress,† returned with objections by the President, and, on the 27th March, repassed by the constitutional majority, the second section of which was as follows:

"And be it further enacted, That so much of the act approved February 5, 1867, entitled 'An act to amend an act to establish the judicial courts of the United States, approved September 24, 1789,' as authorized an appeal from the judgment of the Circuit Court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court, on appeals which have been, or may hereafter be taken, be, and the same is hereby repealed."

* See *Ex parte McCordle*, 6 Wallace, 818.

† Act of March 27, 1868, 15 Stat. at Large, 44.

Argument against the operation of the act.

The attention of the court was directed to this statute at the last term, but counsel having expressed a desire to be heard in argument upon its effect, and the Chief Justice being detained from his place here, by his duties in the Court of Impeachment, the cause was continued under advisement. Argument was now heard upon the effect of the repealing act.

Mr. Sharkey, for the appellant:

The prisoner alleged an illegal imprisonment. The imprisonment was justified under certain acts of Congress. The question then presents a case arising under "the laws of the United States;" and by the very words of the Constitution the judicial power of the United States extends to it. By words of the Constitution, equally plain, that judicial power is vested in one Supreme Court. This court, then, has its jurisdiction directly from the Constitution, not from Congress. The jurisdiction being vested by the Constitution alone, Congress cannot abridge or take it away. The argument which would look to Congressional legislation as a necessity to enable this court to exercise "the judicial power" (any and every judicial power) "of the United States," renders a power, expressly given by the Constitution, liable to be made of no effect by the inaction of Congress. Suppose that Congress never made any exceptions or any regulations in the matter. What, under a supposition that Congress must define when, and where, and how, the Supreme Court shall exercise it, becomes of this "judicial power of the United States," so expressly, by the Constitution, given to this court? It would cease to exist. But this court is coexistent and co-ordinate with Congress, and must be able to exercise the whole judicial power of the United States, though Congress passed no act on the subject. The Judiciary Act of 1789 has been frequently changed. Suppose it were repealed. Would the court lose, wholly or at all, the power to pass on every case to which the judicial power of the United States extended? This act of March 27th, 1868, does take away the whole appellate power of

Argument against the operation of the act.

this court in cases of *habeas corpus*. Can such results be produced? We submit that they cannot, and this court, then, we further submit, may still go on and pronounce judgment on the merits, as it would have done, had not the act of 27th March been passed.

But however these general positions may be, the case may be rested on more special grounds. This case had been argued in this court, fully. Passing then from the domain of the bar, it was delivered into the sacred hands of the judges; and was in the custody of the court. For aught that was known by Congress, it was passed upon and decided by them. Then comes, on the 27th of March, this act of Congress. Its language is general, but, as was universally known, its purpose was specific. If Congress had specifically enacted 'that the Supreme Court of the United States shall never publicly give judgment in the case of *McCardle*, already argued, and on which we anticipate that it will soon deliver judgment, contrary to the views of the majority in Congress, of what it ought to decide,' its purpose to interfere specifically with and prevent the judgment in this very case would not have been more real or, as a fact, more universally known.

Now, can Congress thus interfere with cases on which this high tribunal has passed, or is passing, judgment? Is not legislation like this an exercise by the Congress of judicial power? *Lanier v. Gallatas** is much in point. There a motion was made to dismiss an appeal, because by law the return day was the 4th Monday in February, while in the case before the court the transcript had been filed before that time. On the 15th of March, and *while the case was under advisement*, the legislature passed an act making the 20th of March a return day for the case; and a motion was now made to reinstate the case and hear it. The court say:

"The case had been submitted to us before the passage of that act, and was beyond the legislative control. Our respect for the

* 18 Louisiana Annual, 175.

Argument for the operation of the act.

General Assembly and Executive forbids the inference that they intended to instruct this court what to do or not to do whilst passing on the legal rights of parties in a special case already under advisement. 'The utmost that we can suppose is,' &c.

In *De Chastellux v. Fairchild*,* the legislature of Pennsylvania directed that a new trial should be granted in a case already decided. Gibson, C. J., in behalf of the court, resented the interference strongly. He said:

"It has become the duty of the court to temporize no longer. The power to order new trials is judicial. But the power of the legislature is not judicial."

In *The State v. Fleming*,† where the legislature of Tennessee directed two persons under indictment to be discharged, the Supreme Court of the State, declaring that "the legislature has no power to interfere with the administration of justice in the courts," treated the direction as void. In *Lewis v. Webb*,‡ the Supreme Court of Maine declare that the legislature cannot dispense with any general law in favor of a particular case.

Messrs. L. Trumbull and M. H. Carpenter, contra :

1. The Constitution gives to this court appellate jurisdiction in any case like the present one was, only with such exceptions and under such regulations as Congress makes.

2. It is clear, then, that this court had no jurisdiction of this proceeding—an appeal from the Circuit Court—except under the act of February 5th, 1867; and so this court held on the motion to dismiss made by us at the last term.§

3. The act conferring the jurisdiction having been repealed, the jurisdiction ceased; and the court had thereafter no authority to pronounce any opinion or render any judgment in this cause. No court can do any act in any case, without jurisdiction of the subject-matter. It can make no difference at what point, in the progress of a cause, the

* 16 Pennsylvania State, 18.

† 8 Greenleaf, 323.

‡ 7 Humphreys, 152.

§ 6 Wallace, 318.

Opinion of the court.

jurisdiction ceases. After it has ceased, no judicial act can be performed. In *Insurance Company v. Ritchie*,* the Chief Justice, delivering the opinion of the court, says:

"It is clear, that when the jurisdiction of a cause depends upon the statute, the repeal of the statute takes away the jurisdiction."

And in that case the repealing statute, which was passed during the pendency of the cause, was held to deprive the court of all further jurisdiction. The causes which were pending in this court against States, were all dismissed by the amendment of the Constitution denying the jurisdiction; and no further proceedings were had in those causes.† In *Norris v. Crocker*,‡ this court affirmed and acted upon the same principle; and the exhaustive argument of the present Chief Justice, then at the bar, reported in that case, and the numerous authorities there cited, render any further argument or citation of cases unnecessary.§

4. The assumption that the act of March, 1868, was aimed specially at this case, is gratuitous and unwarrantable. Certainly the language of the act embraces all cases in all time; and its effect is just as broad as its language.

The question of merits cannot now, therefore, be passed upon. The case must fall.

The CHIEF JUSTICE delivered the opinion of the court.

The first question necessarily is that of jurisdiction; for, if the act of March, 1868, takes away the jurisdiction defined by the act of February, 1867, it is useless, if not improper, to enter into any discussion of other questions.

It is quite true, as was argued by the counsel for the petitioner, that the appellate jurisdiction of this court is not derived from acts of Congress. It is, strictly speaking, con-

* 5 Wallace, 544.

† *Hollingsworth v. Virginia*, 3 Dallas, 378.

‡ 18 Howard, 429.

§ *Rox v. Justices of London*, 8 Burrow, 1456; *Yeaton v. United States*, 6 Cranch, 281; *Schooner Rachel v. United States*, 6 Id. 329; *United States v. Preston*, 8 Peters, 57; *Com. v. Marshall*, 11 Pickering, 360.

Opinion of the court.

ferred by the Constitution. But it is conferred "with such exceptions and under such regulations as Congress shall make."

It is unnecessary to consider whether, if Congress had made no exceptions and no regulations, this court might not have exercised general appellate jurisdiction under rules prescribed by itself. For among the earliest acts of the first Congress, at its first session, was the act of September 24th, 1789, to establish the judicial courts of the United States. That act provided for the organization of this court, and prescribed regulations for the exercise of its jurisdiction.

The source of that jurisdiction, and the limitations of it by the Constitution and by statute, have been on several occasions subjects of consideration here. In the case of *Durousseau v. The United States*,* particularly, the whole matter was carefully examined, and the court held, that while "the appellate powers of this court are not given by the judicial act, but are given by the Constitution," they are, nevertheless, "limited and regulated by that act, and by such other acts as have been passed on the subject." The court said, further, that the judicial act was an exercise of the power given by the Constitution to Congress "of making exceptions to the appellate jurisdiction of the Supreme Court." "They have described affirmatively," said the court, "its jurisdiction, and this affirmative description has been understood to imply a negation of the exercise of such appellate power as is not comprehended within it."

The principle that the affirmation of appellate jurisdiction implies the negation of all such jurisdiction not affirmed having been thus established, it was an almost necessary consequence that acts of Congress, providing for the exercise of jurisdiction, should come to be spoken of as acts granting jurisdiction, and not as acts making exceptions to the constitutional grant of it.

The exception to appellate jurisdiction in the case before us, however, is not an inference from the affirmation of other

* 6 Cranch, 812; *Wiscart v. Dauchy*, 8 Dallas, 821.

Opinion of the court.

appellate jurisdiction. It is made in terms. The provision of the act of 1867, affirming the appellate jurisdiction of this court in cases of *habeas corpus* is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception.

We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.

What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle.

Several cases were cited by the counsel for the petitioner in support of the position that jurisdiction of this case is not affected by the repealing act. But none of them, in our judgment, afford any support to it. They are all cases of the exercise of judicial power by the legislature, or of legislative interference with courts in the exercising of continuing jurisdiction.*

On the other hand, the general rule, supported by the best elementary writers,† is, that "when an act of the legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed." And the effect of repealing acts upon suits under acts repealed, has been determined by the adjudications of this court. The subject was fully considered in *Norris v. Crocker*,‡ and more recently in *Insurance Company v. Ritchie*.§ In both of these cases it was held that no judgment could be rendered in a suit after the repeal of the act under which it was brought and prosecuted.

* *Lanier v. Gallatas*, 18 Louisiana Annual, 175; *De Chastellux v. Fairchild*, 16 Pennsylvania State, 18; *The State v. Fleming*, 7 Humphreys, 162; *Lewis v. Webb*, 8 Greenleaf, 326.

† *Dwarris on Statutes*, 638. ‡ 18 Howard, 420. § 6 Wallace, 641.

Statement of the case.

It is quite clear, therefore, that this court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer:

Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.*

The appeal of the petitioner in this case must be

DISMISSED FOR WANT OF JURISDICTION.

* *Ex parte McCordle*, 6 Wallace, 324.

6 Cranch 307 (U. S. 1810)

DUROUSSEAU and others v. UNITED STATES.

Appellate jurisdiction.—Embargo-bond.

The appellate powers of the supreme court of the United States, are given by the constitution, but they are limited and regulated by the judiciary act, and other acts passed by congress on the subject.¹

This court has appellate jurisdiction of decisions in the district courts of Kentucky, Ohio, Tennessee and Orleans, even in causes properly cognisable by the district courts of the United States.

To an action of debt for the penalty of an embargo-bond, it is a good plea, under the act of congress of the 12th of March 1808, § 8, that the party was prevented from relanding the goods in the United States, by unavoidable accident.

United States v. Hall, *ante*, p. 171, re-affirmed.

ERROR to the District Court of the United States for the district of Orleans.

This was a suit brought by the United States against *Duroseau and others, upon a bond, given in pursuance of the act of congress of [308 December 22d, 1807, usually called the embargo act. (2 U. S. Stat. 451.) The bond bore date the 16th of May 1808, and the condition was, that the goods therein mentioned should be "relanded in the United States, at the port of Charleston, or at some other port of the United States, the dangers of the seas excepted."

The proceedings in the court below were according to the forms of the civil law, by petition or libel and answer. The libel was in the nature of an action of debt for the penalty of the bond, and the answer was in the nature of a special plea, stating facts which were supposed to be sufficient evidence that the defendants were prevented, by the dangers of the seas, from relanding the goods in the United States.

The answer or plea stated, that the vessel sailed from New Orleans with intent to proceed to the port of Charleston, and that in the due prosecution

¹ Ex parte Vallandigham, 1 Wall. 251; Daniels v. Railroad Co., 8 Id. 254; Ex parte McCordie, 7 Id. 506; Merrill v. Petty, 10 Id. 346; Murdock v. Memphis, 20 Id. 620; United States v. Young, 64 U. S. 359; Railroad Co. v. Grant, 98 Id. 401.

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of her voyage from New Orleans to Charleston, she was, "on the 26th of May 1808, and on divers days from the said 26th of May until the 1st of June then next following, upon the high seas, by unavoidable accident, by force of the winds and waves, so much injured and endamaged, that upon the said 1st day of June, for the preservation of the said vessel and cargo, and the lives of her crew and passengers, it was found necessary to put into the port of Havana, to refit the said vessel for her voyage aforesaid; and that the persons administering the government at the said port of Havana, by force of arms, and against the will and consent of these defendants, and of the captain and supercargo of the said vessel, and all other persons having the charge and direction of the said vessel or cargo whatever, did detain the said vessel and cargo at the said port of Havana, and by superior force, did prevent the said vessel, with her cargo, from pursuing her said voyage to the port of Charleston aforesaid, or from going to any other port of the United States, and landing the said cargo therein, pursuant to the condition of the said bond, and did also, by force so as aforesaid, prevent, and have *309] always hitherto prevented, the said cargo, or any part thereof, from being sent in any other manner to the said United States and landed therein, pursuant to the condition of the said bond; and these defendants aver, that the damages and injuries aforesaid sustained by the said vessel were unavoidable, and by force of the winds and waves; and that by reason of the detention, and continuation thereof, as aforesaid, by superior force as aforesaid, they could not, at any time heretofore, nor can they yet, land the said goods, wares and merchandises in the said United States, pursuant to the condition of the said bond in the said petition set forth; by reason whereof, and also by force of the statutes in such case made and provided, these defendants are, as they are advised, discharged from the payment of the said sum of money in the said bond or obligation mentioned, or any part thereof; these defendants, therefore, pray, that a jury may be impanelled to inquire of the facts aforesaid, should they be denied by the United States, and that these defendants may be hence dismissed with their reasonable costs and damages in this behalf most wrongfully expended," &c.

To this answer, the attorney for the United States filed a general demurrer, and the court below, without argument, rendered judgment for the United States; whereupon, the defendants sued out their writ of error.

Rodney, Attorney-General, and *Jones*, for the United States, contended, that this court has no jurisdiction, because there can be no writ of error to, or appeal from, the decisions of the district court of Orleans.

By the act of congress passed March 26th, 1804, entitled an act erecting Louisiana into two territories, and providing for the temporary government thereof (2 U. S. Stat. 285, § 8), it is enacted, that "there shall be established in the said territory a district court, to consist of one judge, who shall reside therein, and be called the district judge, and who shall hold, in the city of Orleans, four sessions annually;" "he shall in all things have the same jurisdiction and powers, which are by law *310] given to, or may be exercised by, the judge of Kentucky district." By the judiciary act of September 24th, 1789 (1 U. S. Stat. 77, § 10), the district court, besides the ordinary jurisdiction of a district court, has "jurisdiction of all other causes except of appeals and writs of error, hereinafter made cognisable in a circuit

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court, and shall proceed therein in the same manner as a circuit court, and writs of error and appeals shall lie from decisions therein to the supreme court, in the same causes, as from a circuit to the supreme court, and under the same regulations." By the 9th section of the same act, the district courts have "exclusive original cognisance of all suits for penalties and forfeitures incurred under the laws of the United States."

Hence, it appears, that writs of error will lie to the Kentucky district court in those causes only in which it acts in the capacity of a circuit court. The word "therein," means in causes other than those of which the district courts generally had cognisance under the 9th section of the act.

This court, in the cases of *Clarke v. Bazadone*, 1 Cr. 212, and *Bollman and Swartout*, 4 Ibid. 78, disclaimed any appellate jurisdiction not expressly given by law; and by a late act (2 U. S. Stat. 354, 489), extending jurisdiction in certain cases to state judges and state courts, the jurisdiction is given without appeal; which shows that congress are not anxious that there should be an appeal from all the courts to which they have given jurisdiction. There is no appeal from the judge of the district of Orleans, in cases where he exercises only the district court jurisdiction. In Kentucky, there was no circuit court. The district judge, although he exercised the powers and jurisdiction of a circuit court, yet he did not hold a circuit court. His court was merely a district court. The courts of the United States can exercise no jurisdiction not expressly given by statute. *3 Dall. 337. Although this suit was upon a bond, yet it was in fact [*311 a suit for a penalty or forfeiture, like the case of the auctioneer's bond in 2 Anst. 586, 587. This is as much a penalty as if it had been merely declared by the statute, without having been put into the form of a bond.

E. Livingston, contra.—This court has jurisdiction, in consequence of its being the supreme court, and the other an inferior court. The terms supreme and inferior are correlative, and imply a power of revision in the superior court.

The judiciary act of 1789 gives a writ of error from the supreme court to the district court of Kentucky, in all cases where a writ of error would lie to a district court from a circuit court, as well as in those cases where a writ of error lies generally from the supreme court to a circuit court. The word "therein," means in that court, and not those cases only in which that court exercises the jurisdiction of a circuit court.

The act of congress gives the Orleans judge the same jurisdiction and powers as are given to the Kentucky judge. If it had been intended to give him the same jurisdiction, without limiting his power by the right of appeal, congress would not have used the word powers. The same powers, means no greater powers; but if the Kentucky judge had limited powers, and the Orleans judge has unlimited powers, the powers cannot be the same.

O. Lee, on the same side, cited the case of *Morgan v. Callender*, 4 Cr. 370, in which this court decided, that it has jurisdiction in cases of appeal from the district court of Orleans. He also suggested the inconvenience which would result from having a revenue court in Orleans, not subject to the control of the supreme court; and from a difference of construction in the

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laws respecting *trade, commerce and revenue in different parts of the territories of the United States.

Jones, in reply, observed, that the inconvenience arising from the want, of uniformity of decision already exists with respect to all cases under \$2000 value, in which there can be no appeal or writ of error.

March 15th, 1810. *MARSHALL*, Ch. J., delivered the opinion of the court, upon the question of jurisdiction, as follows:—"This is the first of several writs of error to sundry judgments rendered by the court of the United States for the territory of Orleans. The attorney-general having moved to dismiss them, because no writ of error lies from this court to that in any case, or, if in any case, not in such a case as this; the jurisdiction of this court becomes the first subject for consideration.

The act erecting Louisiana into two territories establishes a district court in the territory of Orleans, consisting of one judge, who "shall in all things, have and exercise the same jurisdiction and powers which are, by law, given to, or may be exercised by, the judge of Kentucky district."

On the part of the United States, it is contended, that this description of the jurisdiction of the court of New Orleans does not imply a power of revision in this court, similar to that which might have been exercised over the judgments of the district court of Kentucky; or, if it does, that a writ of error could not have been sustained to a judgment rendered by the district court of Kentucky, in such a case as this.

On the part of the plaintiffs, it is contended, that this court possesses a constitutional power to revise and correct the judgments of inferior courts; *313] or, if not so, that such a power is implied in the act by which the *court of Orleans is created, taken in connection with the judicial act; and that a writ of error would lie to a judgment rendered by the court for the district of Kentucky, in such a case as this.

Every question originating in the constitution of the United States claims, and will receive, the most serious consideration of this court. The third article of that instrument commences with organizing the judicial department. It consists of one supreme court, and of such inferior courts as congress shall, from time to time, ordain and establish. In these courts, is vested the judicial power of the United States. The first clause of the second section enumerates the cases to which that power shall extend. The second clause of the same section distributes the powers previously described. In some few cases, the supreme court possesses original jurisdiction. The constitution then proceeds thus: "In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the congress shall make."

It is contended, that the words of the constitution vest an appellate jurisdiction in this court, which extends to every case not excepted by congress; and that if the court had been created, without any express definition or limitation of its powers, a full and complete appellate jurisdiction would have vested in it, which must have been exercised in all cases whatever. The force of this argument is perceived and admitted. Had the judicial act created the supreme court, without defining or limiting its jurisdiction, it

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must have been considered as possessing all the jurisdiction which the constitution assigns to it. The legislature would have exercised the power it possessed of creating a supreme court, as ordained by the constitution; and in omitting to exercise the right of excepting from its constitutional powers, would have necessarily left those powers undiminished. [*314]

The appellate powers of this court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject. When the first legislature of the Union proceeded to carry the third article of the constitution into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the supreme court. They have not, indeed, made these exceptions in express terms. They have not declared, that the appellate power of the court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it.

The spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent. It is upon this principle, that the court implies a legislative exception from its constitutional appellate power, in the legislative affirmative description of those powers.

Thus, a writ of error lies to the judgment of a circuit court, where the matter in controversy exceeds the value of \$2000. There is no express declaration that it will not lie, where the matter in controversy shall be of less value. But the court considers this affirmative description as manifesting the intent of the legislature to except from its appellate jurisdiction, all cases decided in the circuits, where the matter in controversy is of less value, and implies negative words. This restriction, however, being implied by the court, and that implication being founded on the manifest intent of the legislature, can be made only where that manifest intent appears. It ought not to be made, for the purpose of defeating the intent of the legislature. [*315]

Having made these observations on the constitution, the court will proceed to consider the acts on which its jurisdiction, in the present case, depends; and, first, to inquire, whether it could take cognisance of this case, had the judgment been rendered by the district court of Kentucky?

The ninth section of the judicial act describes the jurisdiction of the district courts. The tenth section declares that the district court of Kentucky, "besides the jurisdiction aforesaid," shall exercise jurisdiction over all other causes, except appeals and writs of error, which are made cognisable in a circuit court, and shall proceed therein in the same manner as a circuit court: "and writs of error and appeals shall lie from decisions therein, to the supreme court, in the same causes as from a circuit court to the supreme court, and under the same regulations."

It is contended, that this suit, which is an action on a bond conditioned to be void on the relanding of goods within the United States, is one of which the district courts have exclusive jurisdiction, and that a writ of error would not lie to a judgment given in such a case. This court does not concur with

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the attorney-general in the opinion that a circuit court has no original jurisdiction in a case of this description. But it is unnecessary to say anything on this point, because it is deemed clear, that a writ of error is given in the case, however this question might be decided.

It would be difficult to conceive an intention in the legislature to discriminate between judgments rendered by the district court of Kentucky, while exercising the powers of a district court, and those rendered by the same court, while exercising circuit powers, when it is *demonstrated, *316] that the legislature makes no distinction in the cases from their nature and character. Causes of which the district courts have exclusive original jurisdiction are carried into the circuit courts, and then become the objects of the appellate jurisdiction of this court. It would be strange, if, in a case where the powers of the two courts are united in one court, from whose judgments an appeal lies, causes, of which the district courts have exclusive original jurisdiction, should be excepted from the operation of the appellate power. It would require plain words to establish this construction.

But the court is of opinion, that the words import no such meaning. The construction given by the attorney-general to the word "therein," as used in the last instance, in the clause of the tenth section, which has been cited, is too restricted. If, by force of this word, appeals were given only in those causes in which the district court acted as a circuit court, exercising its original jurisdiction, the legislature would not have added the words, "in the same causes as from a circuit court." This addition, if not an absolute repetition, could only serve to create doubt, where no doubt would otherwise exist. The plain meaning of these words is, that wherever the district court decides a cause which, if decided in a circuit court, either in an original suit, or on an appeal, would be subject to a writ of error from the supreme court, the judgment of the district court shall, in like manner, be subject to a writ of error.

This construction is, if possible, rendered still more obvious, by the subsequent part of the same section, which describes the jurisdiction of the district court of Maine in the same terms. Apply the restricted interpretation to the word, "therein," in that instance, and the circuit court of Massachusetts would possess jurisdiction over causes in which the district court of Maine acted as a circuit court; and not over those in which it acted as a district court; a construction which is certainly not to be tolerated. *Had *317] this judgment been rendered by the district court of Kentucky, the jurisdiction of this court would have been perfectly clear.

The remaining question admits of more doubt. It is said, that the words used in the law creating the court of Orleans, describe the jurisdiction and powers of that court, not of this, and that they give no express jurisdiction to this court. Hence, it is inferred, with considerable strength of reasoning, that no jurisdiction exists. If the question depended singly upon the reference made in the law, creating the court for the territory of Orleans, to the court of Kentucky, the correctness of this reasoning would perhaps be conceded. It would be found difficult to maintain the proposition, that investing the judge of the territory of Orleans with the same jurisdiction and powers which were exercised by the judge of Kentucky, imposed upon that jurisdiction the same restrictions arising from the power of a superior court, as were imposed on the court of Kentucky.

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But the question does not depend singly on this reference; it is influenced by other very essential considerations. Previous to the extension of the circuit system to the western states, district courts were erected in the states of Tennessee and Ohio, and their powers were described in the same terms with those which describe the powers of the court of Orleans. The same reference is made to the district court of Kentucky. Under these laws, this court has taken jurisdiction of a cause brought by writ of error from Tennessee. It is true, the question was not moved, and consequently, still remains open. But can it be conceived to have been the intention of the legislature, to except from the appellate jurisdiction of the supreme court, all the causes decided in the western country, except those decided in Kentucky? Can such an intention *be thought possible? Ought it [*318 to be inferred from ambiguous phrases?

The constitution here becomes all important. The constitution and the laws are to be construed together. It is to be recollected, that the appellate powers of the supreme court are defined in the constitution, subject to such exceptions as congress may make. Congress has not expressly made any exceptions; but they are implied from the intent manifested by the affirmative description of its powers. It would be repugnant to every principle of sound construction, to imply an exception against the intent. This question does not rest on the same principles as if there had been an express exception to the jurisdiction of this court, and its power, in this case, was to be implied from the intent of the legislature. The exception is to be implied from the intent, and there is, consequently, a much more liberal operation to be given to the words by which the courts of the western country have been created.

It is believed to be the true intent of the legislature, to place those courts precisely on the footing of the court of Kentucky, in every respect, and to subject their judgments, in the same manner, to the revision of the supreme court. Otherwise, the court of Orleans would, in fact, be a supreme court. It would possess greater and less restricted powers than the court of Kentucky, which is, in terms, an inferior court.

The question of jurisdiction being decided, it was stated by the counsel, that the seven following cases on the docket, viz., the cases of *Bera* and others, *Connelly* and others, *Custries* and others, *Gibbs* and others, *Childs* and others, *Clayand* and others, and *Keene* and others, against the United States, all from New Orleans, stood upon the same pleas of unavoidable accident; excepting that in the cases of *Bera* and others, and *Connelly* and others, the accident was capture by the British, and prevention by superior force from relanding the goods *in the United States. The bond in [*319 *Bera's* case was dated the 21st of March 1808. The condition was the same as in the case of *Durousseau*.

P. B. Key, E. Livingston, C. Lee and *R. G. Harper*, for the plaintiffs in error.—These cases are all within the benefit of the act of congress passed the 12th of March 1808, § 3 (2 U. S. Stat. 474), which enacts, "that in every case where a bond hath been or shall be given to the United States, under this act, or under the act entitled 'an act laying an embargo on all ships and vessels in the ports and harbors of the United States,' or under the act supplementary to the last-mentioned act, with condition that certain goods,

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wares and merchandise, or the cargo of a vessel, shall be relanded in some port of the United States; the party or parties to such bond shall, within four months after the date of the same, produce to the collector of the port from which the vessel had been cleared with such goods, wares, merchandise or cargo, a certificate of the relanding of the same, from the collector of the proper port; on failure whereof, the bond shall be put in suit, and in every such suit, judgment shall be given against the defendant or defendants, unless proof shall be produced of such relanding, or of loss by sea, or other unavoidable accident."

It is contended, that this act means loss by sea, or loss by other unavoidable accident; but this construction is contradicted by the punctuation of the statute. If it had been intended to have the construction contended for, it would have been pointed thus: unless proof shall be produced of such relanding or of loss, by sea or other unavoidable accident." The court can no more alter the punctuation of a statute than the words. To give it the construction contended for, is to make the legislature speak nonsense; it would make them say the sea is an accident. We consider this point as settled by the case of *United States v. Hall and Worth*, at this term (*ante*, p. 171).

*320] **Jones*, contra.—The statute enlarges the obligation of the bond. The officer is bound to take the bond exactly in the form prescribed by the statute. There is only one act which prescribes the form of the bond; but there are several acts which modify its effect. The third embargo act has annexed a new meaning to the condition of the bond. A bond taken under a known law, has the meaning and effect declared by that law. The act contemplates two excuses, viz., loss by perils of the sea, and loss by superior force; but at all events, there must be a loss. But in this case, there is not a sufficient averment of a necessity even of going into the Havana, and there is no averment of a loss. The detention at Havana, and not the injury by the winds and waves, is averred to be the reason why they could not comply with the condition of the bond.

If a vessel be driven by a storm upon the coast of an enemy, and there captured, it is not a loss by perils of the sea. *Greene v. Elmalle*, Peako Cas. 212. The remote cause is never stated as the cause of the loss. And an averment of loss by capture cannot be supported by evidence of a loss by perils of the sea. *Kulen Kemp v. Vigne*, 1 T. R. 304; *Mutthie v. Potts*, 3 Bos. & Pul. 23; 1 T. R. 130.

The third section of the third embargo act (2 U. S. Stat. 474), requires more strict proof than had been before required. The legislature was competent to say what degree of proof should be required of a *bond fide* excuse. They have supposed that nothing but the loss of the thing itself could be satisfactory evidence of the impossibility of complying with the condition of the bond. This is also the true grammatical construction of the sentence. After saying, proof of relanding, or of loss by sea, the word "of" is omitted. If proof of other unavoidable accident was intended to be admitted

*321] *as an excuse, in the same manner as proof of loss by sea, the language would have been, proof of relanding, or of loss by sea, or of other unavoidable accident. If proof of unavoidable accident was intended as an excuse, they would have said, or other unavoidable accident, which

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should actually render it impossible to reland the goods in the United States.

But as the clause now stands, if our opponents are right in their construction, proof of unavoidable accident will be an excuse, although it be not such an accident as would necessarily render, or should actually have rendered, it impossible to comply with the condition of the bond, whether it produce loss, or not, and whether it prevented the relanding, or not. It does not appear by the plea, that the defendants did not made a great profit by the voyage.

E. Livingston, in reply.—We are entitled to the benefit of the exception of dangers of the seas, in the condition of the bond, and also to the benefit of the exception of unavoidable accident in the statute. The plea states as strong a case of necessity as that of the case of *United States v. Hall and Worth*, decided by this court, at this term. We have made out a clear case both under the exception of dangers of the seas, and under the provision of the statute, in case of unavoidable accident. No man can be bound to do an impossibility.

Insurance cases do not apply to the present; there, the contract enumerates a great number of risks, and courts and litigants employ themselves in classing losses under one or another of those risks. In every other kind of contract, the expression, "dangers of the seas," means every accident that can happen at sea. In a bill of lading, the master contracts to deliver the goods at a certain place, the dangers of the seas excepted. Nobody ever supposed he would be liable, if the goods should be captured or seized by the superior force of public enemies. The case cited from *Bunbury* was upon a statute which required proof that the goods perished in the sea; but our statute has no such clause.

MARSHALL, Ch. J., delivered an opinion to the following effect:—The court considered many of the points in these cases while they had the case of *United States v. Hall and Worth* under consideration, and upon the present argument, I understand it to be the unanimous opinion of the court, that the law is for the plaintiffs in error, in all these cases. I cannot precisely say, what are the grounds of that opinion; I can only state the reasons which have prevailed in my own mind.

It is true, as contended on the part of the United States, that the legislature is competent to declare what evidence shall be received of the facts offered in excuse for a violation of the letter of a statute. I also agree with the counsel for the United States, that the words of the statute, "loss by sea or other unavoidable accident," mean loss by sea, or loss by other unavoidable accident. But the question is, what sort of loss is meant? It must be such a loss as necessarily prevents the party from complying with the condition of the bond. It is not necessary, that it should be an actual destruction of the property, but such a loss only as necessarily prevents the relanding of the goods.

This statute is not like that upon which the prosecution was founded in the case cited from *Bunbury*. Our statute does not require evidence that the goods have "perished in the sea." It only requires proof of such a loss, by an unavoidable accident, as prevents the relanding of the cargo, according to the condition of the bond. When the property is cap-

tured, and taken away by the superior force of a foreign power, so as to prevent the relanding, it is lost, within the meaning of the statute, by an unavoidable accident, although the owner may have received a compensation for it.

JOHNSON, J.—I agree with the court, in the result of the opinion, but not altogether upon the grounds stated by the Chief Justice. If the act in question will admit of two constructions, that should be adopted, which is most consonant with the general principles of reason and justice. I cannot suppose, that the legislature meant to do an unjust or an unreasonable act. No man can be bound to do impossibilities. The legislature must be understood to mean, that the party should be excused, by showing the occurrence of such circumstances as rendered it impossible to perform the condition of the bond. To make his liability depend upon the mere point of ultimate loss or gain, would be unreasonable in the extreme.

LIVINGSTON, J.—I concur in the reversal of these judgments, but not in the construction which the Chief Justice puts upon the third section of the act of March 1808.

If the relanding of the cargo in the United States had been prevented by any unavoidable accident whatever, although the goods themselves were not lost, it would, in my opinion, have furnished a good defence to this suit. If the Spanish government had forced a sale of the property, and the proceeds had actually come to the hands of the owners, it would have made no difference. Loss by sea is one excuse; unavoidable accident, whether followed by loss, or not, is another.

*824] ***WASHINGTON and TODD, Justices, agreed in opinion with Judge Livingston.**

Judgment reversed.

8 Wall 85 (U. S. 1868)

EX PARTE YERGER.

- 1 In all cases where a Circuit Court of the United States has, in the exercise of its original jurisdiction, caused a prisoner to be brought before it, and has, after inquiring into the cause of detention, remanded him to the custody from which he was taken, this court, in the exercise of its appellate jurisdiction, may, by the writ of *habeas corpus*, aided by the writ of *certiorari*, revise the decision of the Circuit Court, and if it be found unwarranted by law, relieve the prisoner from the unlawful restraint to which he has been remanded.
2. The second section of the act of March 27th, 1868, repealing so much of the act of February 5th, 1867, as authorized appeals from the Circuit Courts to the Supreme Court, does not take away or affect the appellate jurisdiction of this court by *habeas corpus*, under the Constitution and the acts of Congress prior to the date of the last-named act.

ON motion and petition for writs of *habeas corpus* and *certiorari*, the case being thus:

The Constitution ordains in regard to the judiciary as follows:

"The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. The judicial power shall extend to all cases in law or equity arising under this Constitution, the laws of the United States," &c.

"In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

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It makes provision, also, in regard to the writ of *habeas corpus*, thus:

"The privilege of the writ of *habeas corpus* shall not be suspended unless when in cases of rebellion or invasion the public safety may require it."

With these provisions in force, as fundamental law, the first Congress by the 14th section of the act of September 24th, 1789,* to establish the judicial courts of the United States, after certain enactments relating to the Supreme Court, the Circuit Courts, and the District Courts of the United States, enacted:

"That all the before-mentioned courts shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not especially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law, and that either of the Justices of the Supreme Court, as well as Judges of the District Courts, shall have power to grant writs of *habeas corpus* for the purpose of and inquiry into the cause of commitment: *Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in jail unless they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

By statute of 1833,† the writ was extended to prisoners confined under any authority, whether State or National, for any act done or omitted in pursuance of a law of the United States, or of any order, process, or decree of any judge or court of the United States; and by an act of 1842,‡ to prisoners, being subjects or citizens of foreign states, in custody under National or State authority for acts done or omitted by or under color of foreign authority, and alleged to be valid under the law of nations.

The writ was, however, much further extended, by an act of the 5th February, 1867,§ entitled "An act to 'amend' the

* 1 Stat. at Large, 81.

† 4 Id. 684.

‡ 5 Id. 539.

§ 14 Id. 885

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Judiciary Act of 1789, above quoted." This act of 1867, provided :

"That the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty, in violation of the Constitution, or of any treaty or law of the United States," &c.

And after providing for the awarding and hearing of the writ, the act proceeds :

"From the final decision of any judge, justice, or courts inferior to the Circuit Court, *appeal* may be taken to the Circuit Court of the United States for the district in which the said cause is heard, and from the judgment of said Circuit Court to the Supreme Court of the United States."

Finally, by an act of March 27th, 1868,* passed after an appeal in a particular case, the subject of much party discussion, under the above-quoted act of 1867, from the Circuit Court to the Supreme Court of the United States, had been argued before this latter court, had been taken into advisement by it—a history more particularly set forth in *Ex parte McCordle*†—Congress passed an act providing by its second section :

"That so much of the act, approved February 5th, 1867, entitled 'An act to amend an act to establish the judicial courts of the United States, approved September 24th, 1789,' as authorized an *appeal* from the judgment of the Circuit Court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court on *appeals* which have been or may hereafter be taken, be, and the same is hereby, repealed."

In this state of constitutional and statutory provisions, a writ of *habeas corpus* upon the prayer of one Yerger, addressed to the Circuit Court of the United States for the Southern District of Mississippi, was directed to certain military officers

* 16 Stat. at Large, 44.

† 7 Wallacé, 509.

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holding the petitioner in custody, commanding them to produce his body, and abide the order of the court.

In obedience to this writ, the petitioner was brought into court by Major-General R. S. Granger, who made return in due form, certifying the cause of detention to be, that the petitioner had been arrested, and was held for trial, upon a charge of murder, by a *military commission*, under the act of Congress of the 2d of March, 1867, "to provide for the more efficient government of the rebel States."

Upon this return, the petitioner was ordered into the custody of the marshal, and the court proceeded to hear argument. It was admitted on the part of the United States, that the petitioner was a private citizen of the State of Mississippi; that he was being tried by the military commission, without a jury, and without presentment or indictment by a grand jury; and, that he was not, and never had been, connected with the army and navy of the United States, or with the militia in active service in time of war or invasion.

Upon this case, the Circuit Court adjudged that the imprisonment of the petitioner was lawful, and passed an order that the writ of *habeas corpus* be dismissed, and that the prisoner be remanded to the custody of the military officer by whom he had been brought into court, to be held and detained for the purposes, and to answer the charge set forth in the return.

To obtain the reversal of that order, and relief from imprisonment, the petitioner now asked for a writ of *certiorari* to bring here for review the proceedings of the Circuit Court, and for a writ of *habeas corpus* to be issued, under the authority of this court, to the officers to whose custody he was remanded.

The questions therefore were:

1. Whether the action of the Circuit Court was to be regarded as the cause of the commitment, to which the act of 1789 applies the writ of *habeas corpus*; and whether, if found unlawful, relief might be granted, although the original imprisonment was by military officers for the purpose of a trial before a military commission.

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2. If the court possessed this jurisdiction, had it been taken away by the 2d section of the act of March, 1868?

Upon the suggestion of the Attorney-General, made in view of the importance of the questions which would probably arise, if the case was brought to hearing, the court ordered preliminary argument upon the jurisdiction of the court to issue the writ prayed for; the only question, therefore, raised in the present stage of the case.

Messrs. P. Phillips and Carlisle, in support of the motion, conceding that this court could grant the writ only in the exercise of the appellate jurisdiction, yet argued, that the writ of *habeas corpus*, being a bulwark of freedom, demanded a liberal interpretation of clauses in the Constitution and statutes relating to it, so as to allow and preserve the writ, rather than to withhold or destroy it; that the grant of the writ as here invoked was in the exercise of an appellate power; that, as was decided in *Ex parte Milligan*,* in the face of a powerful argument by Mr. Stanbery to the contrary, proceeding in *habeas corpus* was a suit, a process of law, by which the party sought to obtain his rights. The proceeding in the Circuit Court was therefore a suit; and, undoubtedly, there had been an order in it; an order, namely, that the writ of *habeas corpus* be dismissed, and the prisoner remanded to answer the charge set forth in the return. Yerger, the prisoner in this case, was, therefore, at this time, in the possession of the military authorities, in virtue of an order of the Circuit Court. The review by this court of such an order, was an exercise of appellate power, and of no other power.

It was, therefore, unnecessary to invoke such cases as *In re Kaine*.†

But if the exercise of the power which was asked, were not the exercise of a power in review of a decision of the Circuit Court, that case would still authorize this application. What was that case? *Kaine* was arrested as an alleged fugitive from justice, and brought before a *United States Com-*

* 4 Wallace, 2.

† 14 Howard, 103.

Argument in favor of jurisdiction.

missioner, who made an order committing him to custody, to abide the order of the President. A writ of *habeas corpus* was then issued by the Circuit Court of the United States for the Southern District of New York. Kaine was brought before that court. After a hearing, the writ was dismissed, and Kaine was remanded and continued in the custody of the marshal under the arrest and commitment *by the process of the commissioner*.

An application was finally made in this court for a writ of *habeas corpus* and a *certiorari* to the Circuit Court, in order to review the order made by that court, remanding the prisoner to the custody of the marshal.

On the hearing of this motion, the writ was refused, not because of any doubt of the jurisdiction of the court to award the writ, but because a majority of the court was of opinion that on the *merits* the prisoner was not entitled to his discharge. No member of the court expressed an opinion that the court did not have power, in the exercise of its appellate jurisdiction, to award the writ in order to "inquire into the cause of the commitment" made by the Circuit Court, and to review the judgment of that court; which, this court considered, had been made by the order of remand to the commissioner; though no power might exist in this court to review directly the act of the commissioner himself. On the contrary, the jurisdiction was plainly asserted.

In *Ex parte Wells*,* convicted of murder, and whose sentence was commuted by the President to imprisonment for life, a *habeas corpus* was issued by the Circuit Court. On the return, the position taken by the prisoner that the pardon was absolute and the condition void, was overruled. The writ was dismissed and the prisoner remanded. On application to this court for *habeas corpus* to reverse this proceeding, all the judges, but Curtis and Campbell, JJ., maintained the jurisdiction. Curtis, J., refers to his denial of the jurisdiction in Kaine's case. It will be seen that this denial is placed on the ground that "the custody of the prisoner was at no time

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changed." He admits "that when a prisoner is brought into court, he is in the power and under the control of the court; but unless the court make some order, changing the custody, the original custody continues."

The question being, whether the order remanding to custody made by the Circuit Court is the "cause of commitment" referred to in the act of 1789, and so subject to the appellate jurisdiction, by means of the *habeas corpus*, the turning-point in the opinion of the dissenting judge is, whether the Circuit Court has made an order, when the prisoner is produced, changing the original custody. If it has, then it is admitted, that when he is remanded to the original custody, the order or judgment effecting this is the "cause of commitment," and may be reviewed in this court under the provisions of the act of 1789.

The entry in this case is precisely of that character which gives jurisdiction according to the test made by Curtis, J.

When the prisoner was brought into court, he was ordered into the custody of the marshal of the district, and there he remained until he was remanded.

No judge of this court, since its organization, except Baldwin, J., has ever doubted the jurisdiction in such a case as this. That judge fell into the error of holding that the appellate jurisdiction of this court could only be exercised by appeal or writ of error. This opinion was given by him on an application for mandamus (in *Ex parte Crane*), but the court granted the writ.

Independent of authority, it is clear, on principle, that the exercise of the appellate power is not limited to any particular form. When the object is to revise a judicial proceeding the mode is wholly unimportant, and a writ of *habeas corpus*, mandamus, certificate of division, writ of error, appeal, or *certiorari* may be used, if the legislature so determine.*

On the second point, the counsel contended that the act of 1867 did not repeal the act of 1789, but, on the contrary, recognized it. Its title was "to amend" that act. It

* 2 Story's Commentaries on the Constitution, 570.

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gave powers in addition to those given by the old act; including an appeal to this court. A repeal is not to be presumed where the language left the intention of the legislature doubtful.* The act of 1868 took away nothing but the appeal here. But even if the act of 1867 repealed the act of 1789, and the act of 1868 repealed that of 1867, the old act would be revived; a repeal of a repealing statute reviving the original statute.

Mr. Hoar, Attorney-General of the United States, contended that the addressing of the writ to General Granger would be an exercise of original jurisdiction alone. He does not hold the prisoner under any order or decree of the Circuit Court, but holds him by military power. The order of remand made no new commitment, and issued no new process as an instrument for it, but only pronounced the old process valid, and consequently the continuance of the commitment under it legal. The custody was at no time changed. Certainly, when a prisoner is brought into court upon the return of a *habeas corpus ad subjiciendum*, he was then in the power and under the control of the court. The court might admit him to bail, and might also take order for the future production of the prisoner without bail; but in all cases, until the court made some order changing the custody, either for the care or security of the prisoner, or founded on the illegality of his commitment, the original custody continued. In this case no such order was made. It might as well be said, when a child is left in possession of his father after a hearing on *habeas corpus* seeking to get him out of it, that the father holds his child by judgment of the court, as here that the prisoner is in General Granger's custody by judgment of the Circuit Court. In the case of the child, the father holds the child in virtue of his parental right, which the court perceiving, has asserted. So in the case of the petitioner, the court has simply let him alone; left him where it found him. This being the case, the writ will not lie; for certainly this

* *City of Galena v. Amy*, 5 Wallace, 705.

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court cannot exercise appellate control over the proceeding of a military commission.

The decision *In re Kaine* has no bearing. The refusal was on merits. Any admission or assertion of jurisdiction in such a case is of no value. Some judges are fond of *dicta* and irrelative assertion and argument. When denying an application on merits, they will concede that they have jurisdiction, and *vice versa*. But the point adjudged is the only matter of value, and *In re Kaine*, this point was, that the case was without merits. *Metzger's case*,* on the other hand, seems much in point. It was the case of an application for the writ by a prisoner committed to the custody of the marshal by the district judge, at his chambers, under the French treaty of extradition.

This court refused the writ on the ground that there is no form in which an appellate power can be exercised by it over the proceedings of a district judge at his chambers. The court say: "He exercises a special authority, and the law has made no provision for the revision of his judgment. It cannot be brought before the District or Circuit Court; consequently, cannot, in the nature of an appeal, be brought before this court. The exercise of an original jurisdiction only could reach such a proceeding, and this has not been given by Congress, if they have the power to confer it."

The *habeas corpus* issued with the *certiorari* as an adjunct to the appellate power, is only permitted where the custody of the prisoner is an essential part of the judgment or decree from which the appeal is taken.

The repeal by the statute of March 27th, 1868, of so much of the act of February 5th, 1867, as granted appellate power to this court in cases of this nature, was intended and should be construed as taking away, not the whole appellate power in cases of *habeas corpus*, but the appellate power in cases to which that act applied. It did not mean merely to substitute a cumbrous and inconvenient form of remedy for a direct and simple one.†

* 5 Howard, 176

† Ex parte McCardle, 7 Wallace, 506.

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Reply.—1. The prisoner *was* in the custody of General Granger. The *habeas corpus* below took him out of that custody. He went into the custody of the court; the custody was changed into its charge completely. If the court had liberated him, would he not have been liberated by decree of the court? Why, when instead of being liberated, he is sent away into the custody of General Granger, is he not so sent by decree of the court? If General Granger were sued by Yerger for false imprisonment, could not, and would not the order of remand be pleaded in bar? In all cases of judicial decree, the decree does but pronounce an old right valid, and continue an original title. A. sues B. to recover land which B. and his ancestors for generations have owned and been possessed of. The court gives judgment for B. Does B. not hold the land by decree of the court? Yet the court has only left him where he was. Perceiving a right to it, the court has asserted it. The case of *Kaine* was subsequent to that of *Metzger*, and a peculiar case at best, and controls it.

2. The argument of the Attorney-General confounds "appeal," a specific form of remedy given by the act of 1867, with "appellate power," which existed in another form, and was conferred by a prior act. But after all, it only asks that the appellate power may be considered as repealed in cases to which that act (the act of 1867) applied. But this act is more comprehensive than any act whatever.

The CHIEF JUSTICE delivered the opinion of the court.

The argument, by the direction of the court, was confined to the single point of the jurisdiction of the court to issue the writ prayed for. We have carefully considered the reasonings which have been addressed to us, and I am now to state the conclusions to which we have come.

The general question of jurisdiction in this case resolves itself necessarily into two other questions:

1. Has the court jurisdiction, in a case like the present, to inquire into the cause of detention, alleged to be unlawful, and to give relief, if the detention be found to be in fact

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unlawful, by the writ of *habeas corpus*, under the Judiciary Act of 1789?

2. If, under that act, the court possessed this jurisdiction, has it been taken away by the second section of the act of March, 27, 1868,* repealing so much of the act of February 5, 1867,† as authorizes appeals from Circuit Courts to the Supreme Court?

Neither of these questions is new here. The first has, on several occasions, received very full consideration, and very deliberate judgment.

A cause, so important as that which now invokes the action of this court, seems however to justify a reconsideration of the grounds upon which its jurisdiction has been heretofore maintained.

The great writ of *habeas corpus* has been for centuries esteemed the best and only sufficient defence of personal freedom.

In England, after a long struggle, it was firmly guaranteed by the famous Habeas Corpus Act of May 27, 1679,‡ “for the better securing of the liberty of the subject,” which, as Blackstone says, “is frequently considered as another Magna Charta.”§

It was brought to America by the colonists, and claimed as among the immemorial rights descended to them from their ancestors.

Naturally, therefore, when the confederated colonies became united States, and the formation of a common government engaged their deliberations in convention, this great writ found prominent sanction in the Constitution. That sanction is in these words:

“The privilege of the writ of *habeas corpus* shall not be suspended unless when in cases of rebellion or invasion the public safety may require it.”

The terms of this provision necessarily imply judicial action. In England, all the higher courts were open to ap-

* 16 Stat. at Large, 44.

† 14 Id. 885.

‡ 8 British Stat. at Large, 897; 3 Hallam's Constitutional History, 19

§ 8 Commentary, 185.

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plicants for the writ, and it is hardly supposable that, under the new government, founded on more liberal ideas and principles, any court would be, intentionally, closed to them.

We find, accordingly, that the first Congress under the Constitution, after defining, by various sections of the act of September 24, 1789, the jurisdiction of the District Courts, the Circuit Courts, and the Supreme Court in other cases, proceeded, in the 14th section, to enact, "that all the before-mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs, not specially provided by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."* In the same section, it was further provided "that either of the Justices of the Supreme Court, as well as Judges of the District Courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment; provided that writs of *habeas corpus* shall in no case extend to prisoners in jail, unless they are in custody, under, or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

That this court is one of the courts to which the power to issue writs of *habeas corpus* is expressly given by the terms of this section has never been questioned. It would have been, indeed, a remarkable anomaly if this court, ordained by the Constitution for the exercise, in the United States, of the most important powers in civil cases of all the highest courts of England, had been denied, under a constitution which absolutely prohibits the suspension of the writ, except under extraordinary exigencies, that power in cases of alleged unlawful restraint, which the Habeas Corpus Act of Charles II expressly declares those courts to possess.

But the power vested in this court is, in an important particular, unlike that possessed by the English courts. The jurisdiction of this court is conferred by the Constitution,

* 1 Stat. at Large, 81.

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and is appellate; whereas, that of the English courts, though declared and defined by statutes, is derived from the common law, and is original.

The judicial power of the United States extends to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made under their authority, and to large classes of cases determined by the character of the parties, or the nature of the controversy.

That part of this judicial power vested in this court is defined by the Constitution in these words:

“In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.”

If the question were a new one, it would, perhaps, deserve inquiry whether Congress might not, under the power to make exceptions from this appellate jurisdiction, extend the original jurisdiction to other cases than those expressly enumerated in the Constitution; and especially, in view of the constitutional guaranty of the writ of *habeas corpus*, to cases arising upon petition for that writ.

But, in the case of *Marbury v. Madison*,* it was determined, upon full consideration, that the power to issue writs of mandamus, given to this court by the 13th section of the Judiciary Act, is, under the Constitution, an appellate jurisdiction, to be exercised only in the revision of judicial decisions. And this judgment has ever since been accepted as fixing the construction of this part of the Constitution.

It was pronounced in 1803. In 1807 the same construction was given to the provision of the 14th section relating to the writ of *habeas corpus*, in the case of *Bullman and Swartwout*.†

The power to issue the writ had been previously exercised

* 1 Cranch, 137.

† 4 Id. 100.

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in *Hamilton's case** (1795), and in *Burford's case*† (1806), in neither of which cases does the distinction between appellate and original jurisdiction appear to have been made.

In the case of *Bollman and Swartwout*, however, the point was brought distinctly before the court; the nature of the jurisdiction was carefully examined, and it was declared to be appellate. The question then determined has not since been drawn into controversy.

The doctrine of the Constitution and of the cases thus far may be summed up in these propositions:

(1.) The original jurisdiction of this court cannot be extended by Congress to any other cases than those expressly defined by the Constitution.

(2.) The appellate jurisdiction of this court, conferred by the Constitution, extends to all other cases within the judicial power of the United States.

(3.) This appellate jurisdiction is subject to such exceptions, and must be exercised under such regulations as Congress, in the exercise of its discretion, has made or may see fit to make.

(4.) Congress not only has not excepted writs of *habeas corpus* and *mandamus* from this appellate jurisdiction, but has expressly provided for the exercise of this jurisdiction by means of these writs.

We come, then, to consider the first great question made in the case now before us.

We shall assume, upon the authority of the decisions referred to, what we should hold were the question now for the first time presented to us, that in a proper case this court, under the act of 1789, and under all the subsequent acts, giving jurisdiction in cases of *habeas corpus*, may, in the exercise of its appellate power, revise the decisions of inferior courts of the United States, and relieve from unlawful imprisonment authorized by them, except in cases within some limitations of the jurisdiction by Congress.

It remains to inquire whether the case before us is a

* 8 Dallas, 17.

† 8 Cranch, 448.

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proper one for such interposition. Is it within any such limitation? In other words, can this court inquire into the lawfulness of detention, and relieve from it if found unlawful, when the detention complained of is not by civil authority under a commitment made by an inferior court, but by military officers, for trial before a military tribunal, after an examination into the cause of detention by the inferior court, resulting in an order remanding the prisoner to custody?

It was insisted in argument that, "to bring a case within the appellate jurisdiction of this court in the sense requisite to enable it to award the writ of *habeas corpus* under the Judiciary Act, it is necessary that the commitment should appear to have been by a tribunal whose decisions are subject to revision by this court."

This proposition seems to assert, not only that the decision to be revised upon *habeas corpus* must have been made by a court of the United States, subject to the ordinary appellate jurisdiction of this court, but that having been so made, it must have resulted in an order of commitment to civil authority subject to the control of the court making it.

The first branch of this proposition has certainly some support in *Metzger's case*,* in which it was held that an order of commitment made by a district judge at chambers cannot be revised here by *habeas corpus*. This case, as was observed by Mr. Justice Nelson in *Kaine's case*,† stands alone; and it may admit of question whether it can be entirely reconciled with the proposition, which we regard as established upon principle and authority, that the appellate jurisdiction by *habeas corpus* extends to all cases of commitment by the judicial authority of the United States, not within any exception made by Congress.

But it is unnecessary to enter upon this inquiry here. The action which we are asked to revise was that of a tribunal whose decisions are subject to revision by this court in ordinary modes.

* 5 Howard, 176.

† 14 Ib. 108.

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We need consider, therefore, only the second branch of the proposition, namely, that the action of the inferior court must have resulted in a commitment for trial in a civil court; and the inference drawn from it, that no relief can be had here, by *habeas corpus*, from imprisonment under military authority, to which the petitioner may have been remanded by such a court.

This proposition certainly is not supported by authority.

In *Kaine's case* all the judges, except one, asserted, directly or indirectly, the jurisdiction of this court to give relief in a case where the detention was by order of a United States commissioner. The lawfulness of the detention had been examined by the Circuit Court for the Southern District of New York upon a writ of *habeas corpus*, and that court had dismissed the writ and remanded the prisoner to custody. In this court relief was denied on the merits, but the jurisdiction was questioned by one judge only. And it is difficult to find any substantial ground upon which jurisdiction in that case can be affirmed, and in this denied.

In *Wells's case*,* the petitioner was confined in the penitentiary, under a sentence of death, commuted by the President into a sentence of imprisonment for life. He obtained a writ of *habeas corpus* from the Circuit Court of the District of Columbia, was brought before that court, and was remanded to custody. He then sued out a writ of *habeas corpus* from this court, and his case was fully considered here. No objection was taken to the jurisdiction, though there, as here, it was evident that the actual imprisonment, at the time of the petition for the writ, was not under the direction of the court by whose order the prisoner was remanded, but by a different and distinct authority.

In this case of *Wells*, Mr. Justice Curtis again dissented, and, on the point of jurisdiction, Mr. Justice Campbell concurred with him. The other judges, though all, except one, were of opinion that the relief asked must be denied, agreed in maintaining the jurisdiction of the court. Judge Curtis,

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who regarded the question as left undetermined in *Kaine's case*, admitted that the jurisdiction was asserted in this, and stated the ground of judgment affirming jurisdiction to be that, "as the Circuit Court had had the prisoner before it, and has remanded him, this court, by a writ of *habeas corpus*, may examine that decision and see whether it be erroneous or not."

Since this judgment was pronounced, the jurisdiction, in cases similar to that now before the court, has not hitherto been questioned.

We have carefully considered the argument against it, made in this case, and are satisfied that the doctrine heretofore maintained is sound.

The great and leading intent of the Constitution and the law must be kept constantly in view upon the examination of every question of construction.

That intent, in respect to the writ of *habeas corpus*, is manifest. It is that every citizen may be protected by judicial action from unlawful imprisonment. To this end the act of 1789 provided that every court of the United States should have power to issue the writ. The jurisdiction thus given in law to the Circuit and District Courts is original; that given by the Constitution and the law to this court is appellate. Given in general terms, it must necessarily extend to all cases to which the judicial power of the United States extends, other than those expressly excepted from it.

As limited by the act of 1789, it did not extend to cases of imprisonment after conviction, under sentences of competent tribunals; nor to prisoners in jail, unless in custody under or by color of the authority of the United States, or committed for trial before some court of the United States, or required to be brought into court to testify. But this limitation has been gradually narrowed, and the benefits of the writ have been extended, first in 1838,* to prisoners confined under any authority, whether State or National, for any act done or omitted in pursuance of a law of the United

* 4 Stat. at Large, 634.

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States, or of any order, process, or decree of any judge or court of the United States; then in 1842* to prisoners being subjects or citizens of foreign States, in custody under National or State authority for acts done or omitted by or under color of foreign authority, and alleged to be valid under the law of nations; and finally, in 1867,† to all cases where any person may be restrained of liberty in violation of the Constitution, or of any treaty or law of the United States.

This brief statement shows how the general spirit and genius of our institutions has tended to the widening and enlarging of the *habeas corpus* jurisdiction of the courts and judges of the United States; and this tendency, except in one recent instance, has been constant and uniform; and it is in the light of it that we must determine the true meaning of the Constitution and the law in respect to the appellate jurisdiction of this court. We are not at liberty to except from it any cases not plainly excepted by law; and we think it sufficiently appears from what has been said that no exception to this jurisdiction embraces such a case as that now before the court. On the contrary, the case is one of those expressly declared not to be excepted from the general grant of jurisdiction. For it is a case of imprisonment alleged to be unlawful, and to be under color of authority of the United States.

It seems to be a necessary consequence that if the appellate jurisdiction of *habeas corpus* extends to any case, it extends to this. It is unimportant in what custody the prisoner may be, if it is a custody to which he has been remanded by the order of an inferior court of the United States. It is proper to add, that we are not aware of anything in any act of Congress, except the act of 1868, which indicates any intention to withhold appellate jurisdiction in *habeas corpus* cases from this court, or to abridge the jurisdiction derived from the Constitution and defined by the act of 1789. We agree that it is given subject to exception and regulation by Congress; but it is too plain for argument that the denial

* 5 Stat. at Large, 589.

† 14 Id. 385.

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to this court of appellate jurisdiction in this class of cases must greatly weaken the efficacy of the writ, deprive the citizen in many cases of its benefits, and seriously hinder the establishment of that uniformity in deciding upon questions of personal rights which can only be attained through appellate jurisdiction, exercised upon the decisions of courts of original jurisdiction. In the particular class of cases, of which that before the court is an example, when the custody to which the prisoner is remanded is that of some authority other than that of the remanding court, it is evident that the imprisoned citizen, however unlawful his imprisonment may be in fact, is wholly without remedy unless it be found in the appellate jurisdiction of this court.

These considerations forbid any construction giving to doubtful words the effect of withholding or abridging this jurisdiction. They would strongly persuade against the denial of the jurisdiction even were the reasons for affirming it less cogent than they are.

We are obliged to hold, therefore, that in all cases where a Circuit Court of the United States has, in the exercise of its original jurisdiction, caused a prisoner to be brought before it, and has, after inquiring into the cause of detention, remanded him to the custody from which he was taken, this court, in the exercise of its appellate jurisdiction, may, by the writ of *habeas corpus*, aided by the writ of *certiorari*, revise the decision of the Circuit Court, and if it be found unwarranted by law, relieve the prisoner from the unlawful restraint to which he has been remanded.

This conclusion brings us to the inquiry whether the 2d section of the act of March 27th, 1868, takes away or affects the appellate jurisdiction of this court under the Constitution and the acts of Congress prior to 1867.

In *McCurdle's case*,* we expressed the opinion that it does not, and we have now re-examined the grounds of that opinion.

The circumstances under which the act of 1868 was passed were peculiar.

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On the 5th of February, 1867, Congress passed the act to which reference has already been made, extending the original jurisdiction by *habeas corpus* of the District and Circuit Courts, and of the several judges of these courts, to all cases of restraint of liberty in violation of the Constitution, treaties, or laws of the United States. This act authorized appeals to this court from judgments of the Circuit Court, but did not repeal any previous act conferring jurisdiction by *habeas corpus*, unless by implication.

Under this act, one McCardle, alleging unlawful restraint by military force, petitioned the Circuit Court for the Southern District of Mississippi for the writ of *habeas corpus*. The writ was issued, and a return was made; and, upon hearing, the court decided that the restraint was lawful, and remanded him to custody. McCardle prayed an appeal, under the act, to this court, which was allowed and perfected. A motion to dismiss the appeal was made here and denied. The case was then argued at the bar, and the argument having been concluded on the 9th of March, 1869, was taken under advisement by the court. While the cause was thus held, and before the court had time to consider the decision proper to be made, the repealing act under consideration was introduced into Congress. It was carried through both houses, sent to the President, returned with his objections, repassed by the constitutional majority in each house, and became a law on the 27th of March, within eighteen days after the conclusion of the argument.

The effect of the act was to oust the court of its jurisdiction of the particular case then before it on appeal, and it is not to be doubted that such was the effect intended. Nor will it be questioned that legislation of this character is unusual and hardly to be justified except upon some imperious public exigency.

It was, doubtless, within the constitutional discretion of Congress to determine whether such an exigency existed; but it is not to be presumed that an act, passed under such circumstances, was intended to have any further effect than that plainly apparent from its terms.

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It is quite clear that the words of the act reach, not only all appeals pending, but all future appeals to this court under the act of 1867; but they appear to be limited to appeals taken under that act.

The words of the repealing section are, "that *so much* of the act approved February 5th, 1867, as *authorizes* an appeal from the judgment of the Circuit Court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court on appeals which have been, or may be hereafter taken, be, and the same is hereby repealed."

These words are not of doubtful interpretation. They repeal only so much of the act of 1867 as authorized appeals, or the exercise of appellate jurisdiction by this court. They affected only appeals and appellate jurisdiction authorized by that act. They do not purport to touch the appellate jurisdiction conferred by the Constitution, or to except from it any cases not excepted by the act of 1789. They reach no act except the act of 1867.

It has been suggested, however, that the act of 1789, so far as it provided for the issuing of writs of *habeas corpus* by this court, was already repealed by the act of 1867. We have already observed that there are no repealing words in the act of 1867. If it repealed the act of 1789, it did so by implication, and any implication which would give to it this effect upon the act of 1789, would give it the same effect upon the acts of 1833 and 1842. If one was repealed, all were repealed.

Repeals by implication are not favored. They are seldom admitted except on the ground of repugnancy; and never, we think, when the former act can stand together with the new act. It is true that exercise of appellate jurisdiction, under the act of 1789, was less convenient than under the act of 1867, but the provision of a new and more convenient mode of its exercise does not necessarily take away the old; and that this effect was not intended is indicated by the fact that the authority conferred by the new act is expressly declared to be "in addition" to the authority conferred by the former acts. Addition is not substitution.

Opinion of the court.

The appeal given by the act of 1867 extended, indeed, to cases within the former acts; and the act, by its grant of additional authority, so enlarged the jurisdiction by *habeas corpus* that it seems, as was observed in the McCardle case, "impossible to widen" it. But this effect does not take from the act its character of an additional grant of jurisdiction, and make it operate as a repeal of jurisdiction theretofore allowed.

Our conclusion is, that none of the acts prior to 1867, authorizing this court to exercise appellate jurisdiction by means of the writ of *habeas corpus*, were repealed by the act of that year, and that the repealing section of the act of 1868 is limited in terms, and must be limited in effect to the appellate jurisdiction authorized by the act of 1867.

We could come to no other conclusion without holding that the whole appellate jurisdiction of this court, in cases of *habeas corpus*, conferred by the Constitution, recognized by law, and exercised from the foundation of the government hitherto, has been taken away, without the expression of such intent, and by mere implication, through the operation of the acts of 1867 and 1868.

The suggestion made at the bar, that the provision of the act of 1789, relating to the jurisdiction of this court by *habeas corpus*, if repealed by the effect of the act of 1867, was revived by the repeal of the repealing act, has not escaped our consideration. We are inclined to think that such would be the effect of the act of 1868, but having come to the conclusion that the act of 1789 was not repealed by the act of 1867, it is not necessary to express an opinion on that point.

The argument having been confined, by direction of the court, to the question of jurisdiction, this opinion is limited to that question. The jurisdiction of the court to issue the writ prayed for is affirmed.

APPENDIX II

(The American Law Review, January-February, March-April 1913)

By Charles Warren, Boston, Mass.

LEGISLATIVE AND JUDICIAL ATTACKS ON THE SUPREME COURT OF THE UNITED STATES— A HISTORY OF THE TWENTY-FIFTH SEC- TION OF THE JUDICIARY ACT.

A striking change in the Federal Judiciary Act has been recently advocated by various Bar Associations and in the platform of the new political party—a change which might radically modify the relations of the Federal and State governments. Since its adoption in 1789, the 25th Section of that Act which granted the United States Supreme Court a limited jurisdiction on appeal from decisions of State courts, has never been materially changed.¹ This jurisdic-

¹ See Act of September 24, 1789, Section 25; 1 U. S. Stats. at Large, p. 85: "A final judgment or decree in any suit in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity, or where is drawn in question the validity of a statute of or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of such their validity; or where is drawn in question the construction of any clause of the Con-

stitution, or of a treaty or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission,—may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error."

No appeal lies unless authorized by Congress, see *Clarke v. Bazadone*, 1 Cranch 212, in 1803, where it was held that in absence of statute no writ of error lay to the General Court for the Territory Northwest of the Ohio.

tion is now practically confined to cases where a State court has decided in favor of the constitutionality of a State law or proceeding. The new proposal now made is to extend the power of the Supreme Court so as to give it jurisdiction over appeals from State courts which decide against such constitutionality. The reason for such a change in the power of the Supreme Court lies in the increasing tendency of certain State courts to hold State laws unconstitutional, and the broader trend of the National Supreme Court decisions towards upholding the constitutionality of statutes. The decision of the New York Court of Appeals in the *Ives* case invalidating the New York form of a workman's compensation law,² has given an especial impetus to the feeling that some method ought to be found by which an appeal from such a decision might be taken to the National Supreme tribunal.

The necessity for any such radical change in the Judiciary Act would, however, not have arisen if the State courts had more generally followed the sensible doctrine announced as early as 1844 by Chief Justice Gibson in the *Pennsylvania Supreme Court*:³

"Yet the case is by no means a clear one; and as the decision of it involves the validity of other acts of the same stamp, it is worthy of being brought before the Supreme Court of the Nation. To put the case in train for that, it would be necessary for us to sustain the statute at all events, for the appellate jurisdiction of that court extends no further than to cases in which the federal constitution, or an act of Congress, is supposed to be repugnant; or in other words, it extends no farther than is necessary to maintain the supremacy of Federal legislation. As an erroneous judgment, adverse to the authority of the State legislature, would be irremediable, we have deemed it our duty, in cases of difficulty or doubt, to put our judgment in such a shape as would make it the subject of a writ of error. In this instance, however, the judgment falls in with the current of our opinion; and if it is erroneous, it will give us pleasure to have it corrected by the constitutional guardian of Federal authority."

The grave predicament in which State legislation was left by an adverse decision of a State court unappealable to the Federal Supreme Court, was a subject of much com-

² *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 276.

³ *Moore v. Chadwick*, 8 W. S. 49.

plaint early in our legal history, of which the following is a striking illustration. In 1819, to avert complete financial ruin of the debtor classes, the Kentucky Legislature passed various laws staying levy of executions, and forbidding sale on execution for less than two-thirds of an appraised value. In 1820, the Kentucky Court of Appeals held these statutes unconstitutional as impairing the obligation of contract.⁴ The decisions were followed by violent protests, leading to an attempt to impeach the judges, and to legislation abolishing the Court. No appeal, however, to the United States Supreme Court was possible. Five years later, the same questions were presented in two cases arising in the Federal Circuit Court and appealed to the Supreme Court.⁵ The latter Court refused to decide the point, because it held that the statutes, whether constitutional or not, could not apply to process in the Federal courts. Thus there was a complete deadlock, and no method possible of obtaining any opinion from the Supreme Court which should definitely settle an important legal question. It was twenty-three years before a case arose in which the Supreme Court could give its opinion. Finally, in a case arising on similar statutes in Illinois as late as 1843, the point was decided and these laws held unconstitutional.⁶ An effort was made in Congress as early as 1824 to extend the right of appeal to the Supreme Court; but it was not pressed, in view of the violent antagonism which already existed even to the limited jurisdiction then granted by the Judiciary Act. As this antagonism continued for eighty years after the adoption of the Act in 1789, it is a singular development of American public opinion that an extension of the Federal jurisdiction should now meet with favor.

The history of the struggle of the State courts and legislatures against this 25th Section is full of vivid interest, and its details have not been fully covered by legal historians heretofore. Between 1789 and 1860 the courts of

⁴ Blair v. Williams, 4 Litt. 35. (1825); Bank v. Halstead, 10 Wheat.

⁵ Wyman v. Southard, 10 Wheat. 1 51 (1825).

⁶ Bronson v. Kinzie, 1 How. 311 (1843).

seven States denied the constitutional right of the United States Supreme Court to decide cases on writs of error to State courts—Virginia, Ohio, Georgia, Kentucky, South Carolina, California and Wisconsin. The Legislatures of all these States (except California), and also of Pennsylvania and Maryland, formally adopted resolutions or statutes against this power of the Supreme Court. Bills were introduced in Congress on at least ten occasions to deprive the Court of its jurisdiction—in 1821, 1822, 1824, 1831, 1846, 1867, 1868, 1871, 1872 and 1882.

The State courts very early denied the jurisdiction of the Federal courts, granted by the Act. The earliest example to which reference can be found is mentioned by Nathaniel Macon of North Carolina in a speech in the House of Representatives in 1802:⁷

"We have heard much about the judges and the necessity of their independence. I will state one fact to show that they have power as well as independence. Soon after the establishment of the Federal courts, they issued a writ . . . to the Supreme Court of North Carolina, directing a case then pending in the State court to be brought into the Federal court. The State judges refused to obey the summons and laid the whole proceeding before the Legislature, who approved their conduct."

The next collision between the State courts and the United States courts was in Pennsylvania in 1798, when the Supreme Court of that State, in *Respublica v. Cobbett*,⁸ through Chief Justice McKean, refused to allow the removal of an action to the Federal Circuit Court, saying: "If a State should differ with the United States about the construction" of the powers granted by the Constitution, "there is no common umpire but the people who should adjust the affair by making amendments in the constitutional way, or suffer from the defect. . . . There is no provision in the Constitution that in such a case the judges of the Supreme Court of the United States shall control and

⁷ See Debates in the Congress of the United States on the Bill for Repealing the Law "for the More Convenient Organization of the

Courts of the United States" during the First Session of the Seventh Congress (Albany, 1802).

⁸ 3 Dall. 462.

be conclusive." Eleven years later, in 1809, Pennsylvania came into still more serious judicial conflict with the Federal Judiciary. In *U. S. v. Judge Peters*,⁹ on an application for mandamus to the United States District Court, Chief Justice Marshall stated that "with great attention and with serious concern" the Court had considered the facts which showed that the State of Pennsylvania had enacted a law directing its officials to disregard "any process whatever issued out of any Federal court" in relation to the matter at issue. Power in State legislatures to annul judgments of Federal courts would, said Marshall, make the Constitution itself "a solemn mockery; so fatal a result must be deprecated by all, and the people of Pennsylvania, not less than the citizens of every other State, must feel a deep interest in resisting principles so destructive of the Union and in averting consequences so fatal to themselves." The decision in this case was not accepted, however, by the State of Pennsylvania until after the State troops had been actively arrayed against the service of the Federal writ. The Pennsylvania Legislature, thereupon, passed, April 3, 1809,¹⁰ a resolution calling for an amendment to the Constitution establishing an "impartial tribunal to determine disputes between the General and State governments;" and the other States were invited to join in bringing about such an amendment. Pennsylvania met with no support, however, and resolutions of disapproval of this proposition were passed by the Legislatures of Tennessee, New Hampshire, Vermont, Kentucky, New Jersey, Maryland, Ohio, Georgia, North Carolina and Virginia. The latter State, in its reply, declared that "a tribunal is already provided by the Constitution of the United States (to-wit, the Supreme Court) more eminently qualified to decide the disputes aforesaid in an enlightened and impartial manner than any other tribunal which could be created."¹¹ This attitude of Virginia in 1809 is especially

⁹ 5 Cranch 115.

¹⁰ The Pennsylvania Legislature of the following year, passed similar resolutions, Feb. 3, 1810.

¹¹ See *State Documents on Federal Relations*, by Herman V. Ames (1911).

noticeable in view of its leadership in attack on the Supreme Court seven years later.

With these exceptions it was twenty-seven years after the enactment of the Judiciary Act before the constitutionality of the 25th Section was actively questioned. In the meantime, the Supreme Court had, without serious opposition of counsel or of State courts, taken jurisdiction of writs of error to such courts in sixteen cases; reviewing, in 1796, a judgment of the Superior Court of Rhode Island; in 1797, a judgment of the Court of Appeals of Maryland; in 1798, of the Supreme Court of Errors of Connecticut; in 1805 and 1806, of the Court for the trial of impeachments and correction of errors, of New York; in 1806, of the Court of Equity of South Carolina; of the Supreme Court of Ohio in 1808, of Maryland in 1809, of Maryland in 1810, of New Jersey in 1812, of Connecticut in 1813, of Virginia in 1813, of Massachusetts in 1813, 1814 and 1815.¹² Nevertheless, the apparent acquiescence in the power of the Supreme Court was evidently due to the fact that of these sixteen writs of error only two had involved the direct question of the repugnancy between the Federal Constitution and a State statute—in one, a Connecticut case (*Calder v. Bull*) the law being upheld; in the other (*New Jersey v. Wilson*) the law being invalidated. Of the fourteen other cases, in nine the construction of a Federal statute was involved; in three, a treaty; and in two, the Judiciary Act was held not to apply.

In 1816, however, the jurisdiction of the Supreme Court under the 25th Section was vigorously denied by the highest court of Virginia in the noted case of *Martin v. Hunter's Lessee*.¹³ Although all subsequent State court opposition to this Section has been based on this case, a study of the

¹² See *Olney v. Arnold*, 3 Dallas 208; *Clerke v. Harwood*, 3 Dallas 342; *Calder v. Bull*, 3 Dallas 386; *Hallett v. Jenks*, 3 Cranch 210; *Sands v. Knox*, 3 Cranch 499; *Gordon v. Caldcloach*, 3 Cranch 268; *Mathews v. Zane*, 4 Cranch 382; *Owings v. Norwood*, 5 Cranch 344; *Smith v. Maryland*, 6 Cranch 286;

New Jersey v. Wilson, 7 Cranch 169; *Palmer v. Allen*, 7 Cranch 650; *Fairfax v. Hunter*, 7 Cranch 603; *Otis v. Bacon*, 7 Cranch 589; *Crowell v. McFaden*, 8 Cranch 94; *Prince v. Bartlett*, 8 Cranch 432; *Otis v. Watkins*, 9 Cranch 339.

¹³ 2 Cranch 305.

facts shows clearly that the Virginia State court was not fighting entirely for abstract principles of law or States' Rights. Immense landed property values, the Virginia confiscation acts, the unpopular British debts treaties, the personal fortunes of John Marshall and his relations with his political rival, Judge Spencer Roane, the resentment towards a decision in favor of British claimants in a country which had just emerged from a second war with England—all these factors were involved. The question directly at issue was the title to certain rich timber and tobacco lands on the Potomac River in Shenandoah County and the Northern neck of Virginia, formerly belonging to Lord Fairfax, who had died in 1781 in England and devised his Virginia estates to his nephew, Denny Martin. The State of Virginia, however, under claim of having confiscated the estates in 1777, granted a part of the land in 1789 to David Hunter, who brought suit in ejectment against Martin in the Winchester District Court in Virginia in 1791,¹⁴ basing his claim first on the original invalid title of Lord Fairfax, second on the confiscation by Virginia, and third on the inability of an alien to devise land to an alien. John Marshall (later the Chief Justice) represented Martin in the case.¹⁵ In April, 1794, the District Court rendered a decision in favor of the Fairfax claimant, and the case was appealed to the Virginia Court of Appeals, where it was argued in May, 1796.¹⁶ In December of that year, Marshall, then a member of the Virginia Legislature, secured the passage of an act confirming a compromise of the Fairfax claims entered into between the State and the Fairfax purchasers, each

¹⁴ *Hunter v. Fairfax's Devisee*, 1 Munf. 218.

¹⁵ Marshall had previously represented certain Virginia citizens who claimed as purchasers under Lord Fairfax. See *Hite v. Fairfax*, 4 Call, 42 (1786).

¹⁶ In 1796, the case of *Hunter v. Fairfax's Devisee* was in some way before the United States Supreme Court, the Virginia Court apparently having decided against the claimant Hunter. A postponement

of the case was granted against the opposition of Martin's counsel, Charles Lee of Virginia and Jared Ingersoll of Philadelphia—two of the leading lawyers at the Federal Bar; for it appeared that Alexander Campbell of Virginia, Hunter's attorney, had died, and the Supreme Court, saying that the matter was "of great moment," did not wish to proceed. See *Hunter v. Fairfax's Devisee*, 3 Dall. 305; *Hunter v. Fairfax's Devisee*, 1 Munf. 218.

party relinquishing certain lands. The Act specifically recited that Marshall had "become one of the purchasers of the lands of Mr. Fairfax, and authorized to act for them all."¹⁷ In 1801, Marshall became Chief Justice of the United States. Eight years later, October 25, 1809, the case of *Hunter v. Fairfax's Devisee* was argued for the second time in the Virginia Court of Appeals by John Wickham against Daniel Call, thirteen years having elapsed since the first argument there. The delay apparently was due to the fact that it was supposed that the Legislative compromise had settled the whole affair. The decision of the Virginia Court of Appeals was rendered April 23, 1810, by Judge Fleming and Judge Spencer Roane—the latter a bitter Anti-Federalist, son-in-law of Patrick Henry, and hotly opposed to Marshall in politics. His opinion sustained the claimant Hunter and demolished the Fairfax title; and he freely condemned those who had failed to abide by the compromise (including Marshall himself).¹⁸ The importance of the case was such that a writ of error was at once sued out in the United States Supreme Court. The record of the case was certified by the Virginia Court of Appeals in response to the Federal writ without the slightest demur to the power or jurisdiction of the Federal Court to issue such a writ. The lack of opposition by the State Court was probably due to the fact that it was in this very year that the Virginia Legislature had expressly refused to join with Pennsylvania in its attack on the Supreme Court, and had expressly resolved that the Supreme Court was

¹⁷ See Revised Code of the Laws of Virginia (1819), Vol. I., pp. 352, 353, The Statutes at Large of Virginia, Vol. II., pp. 22, 23. It appears that Marshall, shortly after the Jay Treaty of 1794, had bought out the claim of Martin, the devisee of Fairfax, in London through his brother, James M. Marshall. For detailed story of the participation of Marshall in the contest, see History of the Supreme Court, by Gustavus Myers (1912).

¹⁸ "The compromise act was intended to settle and determine this

among other suits then depending in this Court. . . . Of the compromise the said purchasers have already availed themselves by reversing two judgments in favour of the Commonwealth. . . . I can never consent that the appellees, after having got the benefit thereof, should refuse to submit thereto or pay the equivalent. . . . Such a cause cannot be justified on the principles of good justice or good faith." See *Hunter v. Fairfax's Devisee*, 1 Munf. p. 232.

eminently qualified to adjudicate questions arising between the State and the Federal Government.

The case was argued in the United States Supreme Court under the name of *Fairfax's Devisee v. Hunter's Lessee*¹⁹ in the Spring of 1812, before the outbreak of war with Great Britain, Charles Lee and Walter Jones appearing for the Fairfaxes and Robert Goodloe Harper for Hunter. Chief Justice Marshall and Judge Bushrod Washington (both being of Virginia and the former apparently having an interest in the suit) were absent at the time of argument. The opinion was not given until the very end of the next term, March 15, 1813, the Court having thus taken over a year to consider. It was written by Judge Story, and Brockholst Livingston and Gabriel Duvall concurred. Judge William Johnson dissented. Chief Justice Marshall and Judge Todd were absent; and as Judge Washington had been absent at the time of the argument, the opinion was in reality probably that of a minority of the Court—three out of seven. Under these circumstances, the decision reversing the judgment of the Virginia Court of Appeals was not likely to command great respect in Virginia, even if the jurisdiction of the Supreme Court under the 25th Section of the Judiciary Act had been conceded. Such jurisdiction, however, was far from being conceded, for when the mandate from the United States Supreme Court was issued, the Virginia Court of Appeals refused to obey the mandate.. The case was argued in the State Court on March 31-April 6, 1814, and is reported as *Hunter's Lessee v. Martin, Devisee of Fairfax*.²⁰ An interesting statement of the argument is made by the Reporter as follows:

"Soon after the case of *Hunter v. Fairfax's Devisee*, reported in 1 Munford 218-238, was decided, the appellee, Martin, obtained a writ of error from the Supreme Court requiring the Court of Appeals of Virginia to certify the record for re-examination by that court. The Honorable William Fleming, President of this Court, complied with the writ by certifying a transcript 'Improvidentally,' as was afterwards decided by himself as well as the other Judges. The Supreme Court of the United States took cognizance of the case, and, having reversed the judgment,

¹⁹ 7 Cranch 602.

²⁰ 4 Munf. 1.

issued a mandate. . . . The question whether this mandate should be obeyed excited all that attention from the bench and bar which its great importance truly merited, and at the request of the Court was solemnly argued by Leigh and Wirt for Martin, devisee of Fairfax, and by Williams, Nicholas and Hay on the other side. (Note—Messrs. Leigh, Wirt and Williams were employed by the parties; Messrs. Nicholas and Hay expressed their sentiments in consequence of a request from the Court to the members of the bar generally.)

The great abilities manifested in this argument on both sides occasion particular regret that, in consequence of its extraordinary length (for it occupied no less than six days of the term), the *Reporter* is compelled to omit it. Saturday, December, 15, 1815, the Judges pronounced their opinions *seriatim*."

Judge Cabell said the Court "should decline obedience to the mandate;" Judge Brooke that "obedience to the mandate ought to be refused;" Judge Fleming that "it is inexpedient for this Court to obey the mandate;" Judge Roane that "this Court is both at liberty and is bound to follow its own convictions on the subject."

The following was entered as the Court's opinion:

"The Court is unanimously of opinion that the appellate power of the Supreme Court of the United States does not extend to this Court under a sound construction of the Constitution of the United States;—that so much of the 25th Section of the Act of Congress to establish the judicial courts of the United States as extends the appellate jurisdiction of the Supreme Court to this Court, is not in pursuance of the Constitution of the United States; that the writ of error in this case was improvidently allowed under the authority of that Act; that the proceedings thereon in the Supreme Court were *coram non iudice* in relation to this Court; and that obedience to its mandate be declined by this Court."

It is to be noted that although argued in April, 1814, no decision was rendered until a year and a half later, in December, 1815. A note made by the Reporter is of peculiar interest, as recalling a fact not generally known: "This opinion was prepared and ready to be delivered shortly after the argument. The crisis referred to has now happily passed away." The reference to a "crisis alluded to" is shown in the following extract from Judge Spencer Roane's opinion. He was son-in-law of Patrick Henry, and naturally a hot States' Rights advocate.

"The question which now arises upon this mandate is of the first impression in this court, and of the greatest moment. The Court conse-

quently invited the members of the Bar to investigate it for its reformation, several of whom, in addition to the appellee's counsel, discussed it accordingly in a very full and able manner; since which it has received the long and deliberate consideration of the court. This course of the Court, to say nothing of its general character, should have spared the appellee's counsel the trouble of exhorting this High Tribunal to divest itself of all improper prejudices in deciding on this important question. Those counsel were also pleased to warn us of the consequences of a decision, one way, in reference principally to the anarchical principles prevalent at the time of the argument in a particular section of the Union. They ought to have remembered that this Court did not select the time for bringing this case to a decision, and that it is not for it to regard political consequences in rendering its judgments. They should also have recollected that there is a Charybdis to be avoided as well as a Scylla; that a centripetal, as well as a centrifugal principle, exists in the government; and that no calamity would be more to be deplored by the American people than a vortex in the general government which should engulf and sweep away every vestige of the State constitutions."

It is a curious fact that these allusions by the Reporter and by Judge Roane to a "crisis" and to "anarchical principles" refer to the political conditions existing in Massachusetts in 1814, where the Federalists in their opposition to the War of 1812 and to President Madison's administration were thought to be planning a dissolution of the Union.

The refusal of the Virginia Court of Appeals was brought before the United States Supreme Court in 1815 and argued by Walter Jones of the District of Columbia against St. George Tucker of Virginia and Samuel Dexter of Massachusetts. The decision was not rendered until the next term in 1816. The two Virginia judges, Marshall and Bushrod Washington, did not sit. The other five judges, in an opinion written by Judge Story, unanimously sustained the power of the Supreme Court to decide cases on writ of error to the highest State court, and the constitutionality of the Judiciary Act in this respect. The questions involved, he said "are of great importance and delicacy; perhaps it is not too much to affirm that upon their right decision rest some of the most solid principles—principles which have hitherto been supposed to sustain and protect the Constitution itself;" and that the opinion had "been weighed with every solicitude to come to a correct

result, and matured after solemn deliberation." The Court did not go to the extreme of issuing compulsory process to the Virginia Court of Appeals; but exercised the right, expressly given to it by the Judiciary Act, of issuing its mandate directly to the inferior District Court of Virginia.

It is a singular fact that the next court to cast a doubt upon the powers of the Supreme Court should have been the conservative Supreme Court of Massachusetts. Yet, in *Wetherbee v. Johnson*²¹ in 1817, Chief Justice Parker, in holding unconstitutional a Federal customs-duty statute giving right of appeal direct from a State court to the Federal Circuit Court, commented thus on the Judiciary Act:

"Whether this mode of revising judgments of the Supreme Court of a State, is justified by the Constitution, has been a question of much doubt and argument; and the power claimed by the Supreme Court of the United States, under this section of the law, has been denied by the highest court of law in Virginia. The justices of that Court think it never was the intention of the Constitution of the United States to consider the Supreme Courts of the several States as tribunals inferior to the Courts of the United States; or that a privilege was given to a defendant who had submitted to the jurisdiction of a State court, taken his trial there, and finally failed in his defense, to harass his adversary by intercepting the remedy, which he may have obtained at great expense, and carrying his case to a tribunal whose sessions would be at the seat of the national government, perhaps a thousand miles distant from the place of his residence.

Whether the Court of the United States, or the Court of Virginia, are right on this important question, the present case does not call upon us to decide."

The year 1819 marks the beginning of a series of bitter attacks on the Supreme Court. On February 8, 9 and 10, 1819, the question of the power of the States to pass bankrupt laws had been argued in that Court in *Sturgis v. Crowninshield*,²² and on February 17, 1819 (fifteen days after the decision of the Dartmouth College Case), an opinion had been rendered by Chief Justice Marshall which at the time was supposed to decide that the National Government alone had the constitutional power to enact a bankrupt law, and that the States did not possess this power. It appeared later that the first reports as to the extent of

²¹ 14 Mass. p. 417.

²² 4 Wheat. 193.

decision was inaccurate and exaggerated, and that the Court in reality had only gone so far as to hold unconstitutional such State bankruptcy laws as discharged contracts entered into before their passage. The news of the decision, however, being wrongfully reported at first, caused the greatest perturbation throughout the country; for such a decision, which supposedly deprived the States of their previous powers over bankruptcy, was a very serious matter. As Judge Johnson (then a member of the Court) said later, in *Cook v. Moffatt*,²³ in 1847: "The decision . . . took the States and the profession by surprise. It was a matter of astonishment that up to that time the States had all been wrong."

The *New York Evening Post* of February 23, 1819, said of the decision: "It causes a very considerable sensation in the city, and we do not wonder at it." Later, the *Post* published a letter from Washington, describing the argument of the case, in which it said: "The decision . . . is no doubt to be lamented in regard to the temporary evils it must inflict. The *New York Gazette* of March 1 said that "the decision has excited serious and alarming apprehensions." The *Columbian Centinel* in Boston, March 6, said that it "created much excitement and alarm." *Niles Register* of February 27, in a long editorial upon the case, said: "This opinion has given much alarm to many persons."

It was while this alarming decision was ringing in the ears of the country that the Supreme Court rendered its decision, March 6, 1819, in *McCulloch v. Maryland*,²⁴ and on a writ of error reversed the Maryland Court of Appeals and invalidated the State law taxing the Bank of the United States. At once the bitterest opposition of the opponents of Federal jurisdiction was aroused. *Niles Register* said, March 13, 1819: "A deadly blow has been struck at the sovereignty of the States." The *Richmond Enquirer* said: "If such a spirit as breathes in this opinion is forever to

²³ 5 How. 295.

²⁴ 4 Wheat. 316.

preside over the Judiciary, then indeed it is high time for the State to tremble." Chief Justice Marshall wrote to Judge Story, March 24, 1819: "Our opinion in the Bank case has roused the sleeping spirit of Virginia, if indeed it ever sleeps. It will, I understand, be attacked in the papers with some asperity; and as those who defend it never write for the public, it will remain undefended and of course be considered damnably heretical;"²⁵ and on May 27, 1819, he wrote: "This opinion in the Bank case continues to be denounced by the democracy in Virginia."

The *Natchez Press* in Mississippi said:²⁶

"In our humble opinion, the last vestige of the sovereignty and independence of the individual States composing the National Confederacy is obliterated at one fell sweep. But we know not that it matters much, —for our privileges as a people have been of late so frittered away that we may as well enter at once the form of a Constitution of which the spirit has been murdered. In truth, the idea of any country's long remaining free that tolerates incorporated banks in any guise or under any auspices, is altogether delusive."

Formal resolutions of the Legislature of Ohio in 1820 charged that the case was manufactured to bolster up the bank's credit:

"This agreed case was manufactured in the summer of the year 1818, and passed through the County Court of Baltimore County and the Court of Appeal of the State of Maryland in the same season, so as to be got upon the docket of the Supreme Court of the United States for argument at their February term, 1819. It is only by management and concurrence of parties that causes can be thus expeditiously brought to a final hearing in the Supreme Court.

It must be remembered that through the extravagant and fraudulent speculations of those entrusted with conducting the concerns of the bank, that it stood, at the close of the year 1818, upon the very brink of destruction. At this critical juncture of its affairs, it was a maneuver of consummate policy to draw from the Supreme Court of the United States a decision that the institution itself was constitutionally created; and that it was exempt from the taxing power of the States.

This decision served to prop its banking credit. It is truly an alarming circumstance, if it be in the power of an aspiring corporation and an unknown and obscure individual thus to elicit opinions compromising the vital interests of the United States that compose the American Union."

²⁵ See Massachusetts Historical Society Proceedings, 2nd Ser. Vol. XIV.

²⁶ See Niles Register, Vol. XVI, May 22, 1819.

On the other hand, the *National Intelligencer* of April 22, commenting on the alarm created in the South by the McCulloch decision, said :

"The tendency of the language applied by some of the public journals to the late decision is to create unnecessary alarm in the public mind. The entire ruin and prostration of the State government is the sombre prophecy of those who regard the principles of this decision with a sort of patriotic horror, and whose fancies seem startled by an empty phantom. We behold not the smallest ground for all this apprehension and evil augury."

And a South Carolina Judge said, in a case involving the right of the State to tax the shares of the Bank of the United States:²⁷

"But why this alarm at the exercise of the legitimate powers of the General Government. The jealousy of the States is ample means to prevent or resist it. If the powers of Congress are too great, they may be abridged by an amendment of the Constitution. If they are abused, they may be controlled by the judiciary. But to give to one government the power of passing laws and to another right to resist them or defeat their operations . . . would necessarily lead to a contest of power."

Nevertheless, antagonism towards jurisdiction of the Supreme Court on writs of error to the State courts was so hot that a resolution was introduced in the Virginia Legislature, December 22, 1819, calling on her Senators to procure a Constitutional amendment to create a special tribunal "for the decision of questions, in which the powers and authorities of the General Government and those of the States, where they are in conflict, shall be decided."²⁸

The next State to contest the jurisdiction of the Supreme Court was Ohio. The Legislature of that State had, very early in its history, displayed its opposition to the doctrine of the right of a court to decide on the constitutionality of statutes; and in 1807-08, it had attempted to impeach two judges of the Superior Court who had set aside an Ohio law.²⁹ Now, in 1819, the State officials of Ohio deliberately refused obedience to an injunction of the Federal Circuit

²⁷ Judge Nott in *Bulow v. City Council of Charleston*, 1 N. & McC. 527 (1819).

²⁸ See *Niles Register*, Vol. XVII., pp. 311-314, 447.

²⁹ See *Sketch of Calvin Pease*, in *Western Law Monthly*, Vol. V., (1863); also *Lewis Cass in Green Bag*, Vol. XVI.

Court which had declared invalid a statute of Ohio taxing the banknotes of the Bank of the United States. This decision, based on the Maryland decision by the Supreme Court, and the actions in contempt by the Ohio officials, came before the Supreme Court under the name of *Osborn v. Bank of the United States*, and the constitutional jurisdiction was vigorously asserted by Chief Justice Marshall in his noted opinion in 1824. Meanwhile, however, before his decision, the Legislature of Ohio in 1820 adopted formal resolutions explicitly refusing to be bound by *McCulloch v. Maryland*, and denying the doctrine "that the Federal Courts are exclusively vested with jurisdiction to declare in the last resort the true interpretation of the Constitution of the United States," and hotly reasserting the famous nullification resolutions of Kentucky of 1798 and 1799. Copies of these resolutions were transmitted to Congress and to the various States. In the former body no action was taken, except to print.³⁰ No State except Kentucky endorsed these resolutions; and Massachusetts, in 1822, passed resolutions specifically upholding the power of the Supreme Court under the Judiciary Act.

Virginia was the next State to move against the Court because of its assumption of jurisdiction in the famous criminal case of *Cohens v. Virginia*.³¹ On the issue of a writ of error to the State Court in Virginia, the Legislature had indignantly passed resolves (February 19, 1821), denying the appellate jurisdiction of the Supreme Court and saying that it had "no rightful authority under the Constitution to examine and correct the judgment for which the Commonwealth has been 'cited and admonished to be and appear at the Supreme Court of the United States' and that the General Assembly do hereby enter their most solemn protest against the jurisdiction of that Court over the matter."³² The Legislature further resolved that the counsel who were to represent the State before the Court

³⁰ See *Annals of Congress*, 16th Congress, 2nd Session, 1820-21, pp. 377, 1683.

³¹ *Cohens v. Virginia*, 6 Wheat. 264.

³² *Niles Register*, Vol. XX., pp. 118, 129.

"be limited (in sustaining the rights of the State and in the discharge of the duties required of them) alone to the question of jurisdiction; and if the jurisdiction of the Court should be sustained, that they will consider their duties as at an end."³³

The *Richmond Enquirer* endorsed these resolutions, vigorously saying that they presented "one of the most important questions in the whole range of the judiciary department. The principle which it asserts seems to be essential to the existence and preservation of State rights and the true foundation of our political system."

The case was argued in the Supreme Court on motion to dismiss the writ, February 13, 19, 20, 1821, with much ability and acrimony by Philip P. Barbour (later Judge of the Supreme Court) and Alexander Smythe of Virginia, and by William Pinkney of Maryland and David B. Ogden of New York for Cohens.³⁴ Two weeks later, March 3, Chief Justice Marshall gave his decision, upholding the supremacy of the Federal Court on appeals from State courts in criminal as well as civil cases when any Federal question was involved. It was received with the gravest concern by the adherents of States' Rights, and became at once a furious, flaming political issue. *Niles Register*, on March 17, 1821, said:

"We had no manner of doubt that the State Sovereignty would be taught to bow to the Judiciary of the United States. So we go. It seems as if almost everything that occurs had for its tendency that which every reflecting man deprecates."

Spencer Roane, presiding Judge of the Virginia Court of Appeals, wrote for the *Richmond Enquirer* a series of violent papers under the signature of "Algernon Sidney," which, Jefferson wrote, "pulverized every word that had been delivered by Judge Marshall;"³⁵ and which *Niles Reg-*

³³ See *Niles Register*, Vol. XX., p. 417, Feb. 24, 1821; see also Vol. XIX., pp. 211, 340.

³⁴ It may be noted that on the argument on the merits, Barbour and Smythe retired and it was

argued by Daniel Webster for Virginia against D. B. Ogden and William Wirt for Cohens, the former winning.

³⁵ See Letter to Judge William Johnson, June 12, 1823.

ister described as a "fine display of talent and profound reasoning."³⁶ On the other hand, Marshall wrote to Judge Story, June 15, 1821, that Roane surpassed "all party writers who have ever made pretensions to any decency of character. . . . He really is the champion of dismemberment."³⁷

A month later, July 13, 1821, Marshall wrote of Roane's "coarseness and malignity," and continued:

"Two other gentlemen have appeared in the papers on this subject; one of them is deeply concerned in pillaging the purchaser of the Fairfax estate, in which goodly work he fears no other obstruction than what arises from the appellate power of the Supreme Court; and the other is a hunter after office, who hopes by his violent hostility to the union which in Virginia assumes the name of regard for State rights, and by his devotion to Algernon Sidney, to obtain one. In support of the sound principles of the Constitution and of the Union of the States, not a pen is drawn in Virginia; the tendency of things verges rapidly to the destruction of the government and the re-establishment of a league of Sovereign States. I look elsewhere for safety."

On September 18, 1821, Marshall wrote that a "deep design to convert our Government into a mere league of States has taken strong hold of a powerful and violent party in Virginia. The attack upon the judiciary is in fact an attack upon the Union. . . . The whole attack, if not originating with Mr. Jefferson, is obviously approved and guided by him. . . . An effort will certainly be made to repeal the 25th Section of the Judiciary Act." Marshall's prophecy was well founded.

The *Richmond Enquirer*, the leading newspaper of Virginia, voiced public sentiment in violent opposition to the doctrine of the case, even going so far as to propose in the autumn of 1821 the passage of a bill in the State Legislature, heavily penalizing "any person who should enforce within the Commonwealth any judgments of the Supreme Court or any other foreign tribunal which reviews a judgment of the courts of this Commonwealth, or who shall enforce within this Commonwealth any act or pretended act of the

³⁶ Niles Register, July 7, 1821.

³⁷ Mass. Hist. Soc. Proc., 2nd Series, Vol. XIV., (1900-1901).

Legislature of the District of Columbia controvening any of the statutes of this Commonwealth."

The Governor of Virginia, in his message to the Legislature in December, 1821, called its attention to the "encroachments of the Supreme Court." A resolution in the House of Delegates of Virginia, calling for a constitutional amendment to deprive the United States Supreme Court of its power to pass on the validity of State statutes, failed to pass, in February, 1822, by a very small majority;³⁸ and a bill was actually introduced in Congress by a Virginia Representative in April, 1822, for the repeal of the 25th Section of the Judiciary Act.

South Carolina now joined in the assaults on the Federal Judiciary. In 1823, Judge William Johnson of the United States Supreme Court, himself a South Carolina man, held unconstitutional a statute of that State dealing with the entrance of free negroes. In his decision in this case in the Circuit Court—*Elkinson v. DeLiesseline*—he turned a deaf ear to the pleas for the denial of the right of the Federal Court to pass on State statutes, saying:³⁹

"The plea of necessity is urged, and of the existence of that necessity, we are told, the State alone is to judge. Where is this to land us? Is it not asserting the right in each State to throw off the Federal constitution at its will and pleasure? If it can be done as to any particular article, it can be done as to all; and like the old confederation, the Union becomes a mere rope of sand."

The heated spirit in which the decision was received, may be seen from the following letter from Marshall to Judge Story, September 26, 1823:⁴⁰

"Our brother Johnson, I perceive, has hung himself on a democratic snag, in a hedge composed entirely of thorny State Rights in South Carolina. . . . You have, I presume, seen his opinion in the *National Intelligencer*, and could scarcely have supposed that it would have excited so much irritation as it seems to have produced. The subject is one of much feeling, in the South. . . . The decision has been con-

³⁸ See *Niles Register*, Vol. XXI., February 13, 1822.

³⁹ Federal Cases No. 4366. See also opinion of Judge Johnson published in full in the *New York Daily Ad-*

vertiser in August, 1823; also *Niles Register*, Vol. XXV., p. 12.

⁴⁰ Unpublished letter in the Story Papers in possession of the Mass. Hist. Soc.; see also *Niles Register*, Vol. XXIV., p. 392.

sidered as another act of judicial usurpation; but the sentiment has been avowed that, if this be the constitution, it is better to break that instrument than submit to the principle.

. . . Thus, you see, fuel is continually added to the fire at which the exaltés are about to roast the judicial department." . . .

The next year, 1824, the Legislature of South Carolina adopted formal resolutions (similar to those of Ohio in 1820 and Kentucky and Georgia in 1823), denying the jurisdiction of the Federal Court.⁴¹ *Niles Register*, viewing with alarm the "unhappy collision" likely to result between the Federal Government and the State, in an able editorial, December 18, 1824, endorsed the plan already suggested in Congress of transferring appellate jurisdiction in such cases to the Senate of the United States:

. . . "There is one very important effect that results from conflicting cases between the constitution and laws of the United States and of the several States. As yet, they have been decided and settled by the Supreme Court, but its decisions, though acquiesced in, have not always satisfied what may be called State pride. This, however, is not the worst of it; for in the progress of time, the exposition of the Constitution of the United States may more depend on the opinions of the Supreme Court than on its own very carefully defined powers. It is not in human affairs to hope for perfection; and it is impossible to draw up any instrument such as the Constitution, without leaving some points that will bear different and opposing constructions; better that they should be established by the people through the representatives of the State in the Senate than be made to depend on the opinions of a mere majority of the judges of the Supreme Court, who, however honorable and learned they may be, cannot be put down as infallible. It would appear essential to the public harmony that some plan should be adopted by which the decisions of the judges should be subjected to a solemn revision whenever they undertake to settle constitutional questions; and this revisionary power would, perhaps, be best confided to the Senate which has, or is presumed to have, many of the ablest and best citizens of the different States among its members, who certainly would not dishonor the Supreme Court, if appointed to its Bench."

The State of Kentucky now joined Virginia, Ohio and South Carolina in an attack on the Supreme Court. On March 5, 1821, that Court, in the case of *Green v. Biddle* (appealed from the Federal Circuit Court and not arising on writ of error to the State court), held unconstitutional certain statutes of Kentucky called the "occupying claim-

⁴¹ *Niles Register*, Vol. XXVII., Dec. 18, 25, 1824; Jan. 8, 1825.

ant laws"—laws which were considered to be vitally necessary for the protection of landowners living in a State where land titles were inordinately intricate. This decision aroused wild excitement in the State; and as no counsel had appeared for the defendant in the Supreme Court, Henry Clay, the leader of the Kentucky Bar, was requested to ask the Court for a reargument.⁴² The Legislature met in October, 1821, and formally remonstrated against the decision, terming it "incompatible with the constitutional powers of the State." Similar resolutions were passed in 1822.⁴³ Meanwhile, the case was re-argued in the Supreme Court, very elaborately during six days, March 7-13, 1822. The Supreme Court was now thoroughly alive to the seriousness of the issue. It had been so bitterly attacked by Ohio and by Virginia for what had been termed its encroachment on State sovereignty in *McCulloch v. Maryland* in 1819 and *Cohens v. Virginia* in 1821, that it gave the fullest consideration to this Kentucky case. No decision was rendered for a whole year; but on February 27, 1823, it again held these Kentucky statutes to be unconstitutional.⁴⁴ How desirous the Court had been of sustaining the statutes, if it could have done so with due regard to its conscientious belief in what the law was, is to be seen from the remarks of Judge Bushrod Washington who wrote the opinion:

"We hold ourselves answerable to God, our consciences and our country, to decide this question according to the dictates of our best judgment, be the consequences of the decision what they may. If we have ventured to entertain a wish as to the result of the investigation which we have laboriously given to the case, it was that it might be favorable to the validity of the laws; our feeling being always on that side of the question unless the objections to them are fairly and clearly made out."

A letter from Judge Story to Judge Todd (the Kentucky member of the Supreme Court who was ill during this term of Court), written March 14, 1823, speaks of the "tough business" before the Court, and of the solicitude which he had felt over the Kentucky cases:

⁴² Niles Register, Vol. XX., March 17, 1821.

⁴³ Niles Register, Vol. XXI., p. 404.
⁴⁴ Niles Register, Vol. XXIV., p. 3.

"We have missed you exceedingly during this term, and particularly in the Kentucky causes, many of which have been continued solely on account of your absence. God grant that your health may be restored and that you may join us next year. Poor Livingston has been very ill of a peripneumony and is still very ill; whether he will ever recover is doubtful. . . . Judge Washington has also been quite sick and was absent for a fortnight; he is now recovered. The Chief Justice has been somewhat indisposed; so that we have been a crippled Court. Nevertheless, we have had a great deal of business to do, and, as you will see by the Reports, tough business. We wanted your firm vote on many occasions. . . .

The Occupying Claimant Law has at last been definitely settled after many struggles. I see no reason to take back our opinion, though for one I felt a solicitude to come to that result if I could have done it according to my views of great principles. I could not change my opinion, and I have adhered to it. Judge Johnson was the only dissentient Judge in the Court, and you will see what his peculiar opinions were."

As a result of this decision, when the Kentucky Legislature met in December, 1823, resolutions were adopted solemnly protesting against the "erroneous, injurious and degrading doctrines of the opinion" as "ruinous in their practical effects to the good people of the Commonwealth, and subversive of their dearest and most valuable rights."⁸ Congress was urged to pass a law requiring concurrence of two-thirds of the members of the Court in any case involving a constitutional question. Again, in 1824, January 7, the Kentucky Legislature adopted vigorous resolutions denouncing the Supreme Court, claiming the power to legislate for herself, and calling on Congress to change the Federal judicial system. Congress having failed to act, the Legislature, January 12, 1825, adopted still further resolutions demanding changes in the Supreme Court; and later in the year the House of Representatives passed resolutions calling upon the Governor to inform them "of the mode deemed most advisable in the opinion of the Executive to refuse obedience to the decisions and mandates of the Supreme Court of the United States, considered erroneous and unconstitutional, and whether in the opinion of the Executive it may be advisable to call forth the

⁸ See Niles Register, Vol. XXV., Nov. 29, 1823; Dec. 27, 1823; Jan. 3, 1824.

physical power of the State to resist the execution of the decision of the Court, or in what manner the mandates of said Court should be met by disobedience."⁴⁶ Fortunately, no physical resistance was ever actually made; but the Kentucky Court of Appeals absolutely declined to be bound by the decision in *Green v. Biddle*, basing, however, its decision on a peculiar circumstance connected with that case. In *Bodley v. Gaither*,⁴⁷ in November, 1828, the Kentucky Court said that *Green v. Biddle* "was decided by three only of the judges of the Supreme Court of the United States, and being the opinion of less than a majority of the judges (seven being the full number) cannot be considered as having settled any constitutional question." This statement was later reiterated frequently in debates in Congress and by many historians. It is probable, however, that it was not based on fact; for the docket and records of the Supreme Court itself show that at the hearing of *Green v. Biddle* six judges (all except Washington) were present; and that at the date of the rendering of the opinion, Marshall, Washington, Duvall, Story and Johnson were present; as the latter dissented, the opinion was apparently that of four judges; and Washington, who wrote the opinion, states specifically "the above is the opinion of a majority of the Court."⁴⁸

⁴⁶ *Niles Register*, Vol. XXIX., pp. 228, 229, Dec. 10, 1825.

⁴⁷ 3 T. B. Mun. 57.

⁴⁸ See speech of Representative Wickliffe, January 11, 1826, in Congressional Debates, Vol. II., Part 1. The same statement was reiterated in *Fisher v. Cockerell*, 5 T. B. Munroe 129, in June, 1827. The subsequent history of *Green v. Biddle* is curious. When *Fisher v. Cockerell* was appealed to the Supreme Court of the United States in 1831, it was hoped that a direct controlling decision could be made of the questions at issue. *Green v. Biddle* had come up from the Federal Circuit Court. This new case came up on writ of error from the State Court of Appeals. The Supreme Court, however, avoided

making a decision and held that, on the technical point that the question was not expressly presented on the record in the State court, its jurisdiction was not made out, and it dismissed the case. See *Fisher v. Cockerell*, 5 Pet. 248.

Thereupon the State courts continued to ignore the Supreme Court, and no further steps were taken to obtain another ruling in the latter court. Meanwhile the Kentucky Legislature had, in 1824, passed an extraordinary statute forfeiting the title of every person owning one hundred acres or more unless he should clear and fence a certain portion within a year, and awarding the forfeited title to the person in possession, the forfeiture to be released if the claimant would agree

Meanwhile, the people of Kentucky had been further agitated by a decision of the United States Supreme Court in 1825 which overthrew, so far as the Federal courts were concerned, the elaborate system of relief and stay laws affecting executions which had been enacted by Kentucky in aid of debtors during the hard times of 1819-1820.⁴⁰ In July, 1825, a great convention was held at which resolutions were passed stating that the Constitution did not authorize the courts to alter or interfere with the execution laws of a State, and that Congress should reorganize the Supreme Court so as to preserve the sovereignty of the State and the right of the people to rule themselves.⁴¹ Such bitter antagonism to the decisions was manifested that the Bank of the United States, in whose favor they were rendered, did not dare take out mandates from the Supreme Court for two years after the decision.⁴² An article in the *North American Review* in 1827 shows the sentiment of the times.⁴³

"The decision in *Wayman v. Southard* on one of the Kentucky 'Stop Laws' in relief of debtors, and some other decisions of the Supreme Court have given great dissatisfaction to some of the people of Kentucky, and provoked much virulent declamation against the Court itself. During the late session of Congress, some member intimated that a judicial tyranny was secretly creeping in upon us."

Meanwhile, apprehension at the trend of the Supreme Court's decisions had spread even to the State of New York. In 1824, in the great case of *Gibbons v. Ogden*,

to abide by the State occupant laws. This act was stated in its preamble to be intended to counteract the decision of the Supreme Court. This act was held unconstitutional by the Kentucky Court of Appeals in *Gaines v. Buford*, 1 Dana 481, in 1833. (See also *Shepard v. McIntire*, 5 Dana 574, in 1837). The Court said, however: "The situation of our land titles and the hardships which the occupant would suffer from an eviction without compensation for his improvements, were powerful appeals to the sympathy of the Legislature. . . . Under these circumstances it is not

surprising that the Legislature should have been willing to adopt a severe remedy for evils of alarming magnitude to those of our citizens subject to the sinister operation of the decision of the Supreme Court against our occupant laws."

* *Wayman v. Southard*, 10 Wheat. 1 (1825); *Bank of the United States v. Halstead*, 10 Wheat. 51.

"See *The Argus*, July 13, 1825.

"See Letter of Daniel Webster to Nicholas Biddle, March 19, 1827.

"See Review of Kent's Commentaries by Willard Phillips, *North American Review*, Vol. XXIV. (1827).

Chief Justice Marshall had held unconstitutional the New York Steamboat Monopoly statute, and had laid the foundation for all time for the broad Federal control over interstate commerce. That same year, in a case before the New York State court in which the exact scope of that decision was at issue, Thomas Addis Emmet, the great Republican lawyer, vehemently voiced the States' Rights views in his argument, as follows:⁵¹

"The opposite counsel have accused us of endeavoring to array this State against the Union. . . . The accusation is a stale effort to excite prejudices against our cause. . . . Enlightened men have viewed the progress of the Union towards consolidation with a fearful solicitude. If the liberties of this country are to be long preserved, it must be done by upholding the rights of the States; and (with the utmost respect I say it), if some of the principles laid down by the Chief Justice in the case of *Gibbons v. Ogden* are not overruled within twenty years, the Constitution will before then have verged towards a form of government which many good men dread and which assuredly the people never chose.

There is a pretty general impression that the decisions of that Court on constitutional law tend to such a result. . . . If that impression be correct, the consequences are much to be lamented; for such a course pursued by that Court (the value and importance of which ought to be estimated most highly), may well aid in its own destruction, and possibly in that of the fabric of our government. . . .

It is upon States' Rights we stand and States' Rights are State liberty. They are more—they are in this land the bulwarks of individual and personal liberty; they are the outposts of the Constitution. While they are preserved entire, our federative Union will stand against the shocks of time and the approaches of despotism. But let them be broken down or suffered to moulder away, and a consolidated power must succeed in governing this mighty empire. Consolidation will be the euthanasia of our Constitution."

The attacks upon the Supreme Court were not confined, however, to fulminations from State legislatures or direct disobedience by State courts; for, in Congress, Southern leaders, alarmed at the repeated decisions of Chief Justice Marshall and his Court sustaining the legislative and judicial branches of the Federal Government as against the States, introduced measure after measure intended to curb

⁵¹ See *North River Steamboat Co. v. Livingston*, 1 Hopk. Ch. 149, (1824). See also the answer of

Chief Justice Savage to this argument in *North River Steamboat Co. v. Livingston*, 3 Cow. 941 (1824).

the exercise of the powers of the Court. The first move was made by Richard M. Johnson of Kentucky, who introduced in the Senate, December 12, 1821, an amendment to the Constitution, as follows: "In all cases where a State shall be a party, and in all controversies in which a State may desire to become a party in consequence of having the Constitution or laws of such State questioned, the Senate of the United States shall have appellate jurisdiction." In his speech he stated that he introduced it because of the "serious consequences which had lately taken place between several of the States and the Judiciary of the United States," and more especially because of the "disastrous" decision in *Green v. Biddle*.⁶⁴ In another long speech, January 14-15, 1822, assailing the Federal Judiciary, he employed every argument which at the present day is being used in behalf of the doctrines of recall of judges and of judicial decisions. "At this time," he said, "there is unfortunately a want of confidence in the Federal Judiciary in cases that involve political power; and this distrust may be carried to other cases." . . . "There is a manifest disposition on the part of the Federal Judiciary to enlarge to the utmost stretch of constitutional construction the powers of the Federal Government." . . . "Judges, like other men, have their political views. . . . Why, then, should they be considered any more infallible or their decisions any less subject to investigation and reversion? . . . Every department which exercises political power should be responsible to the people. . . . The short though splendid history of this government furnishes nothing that can induce us to look with a very favorable eye to the Federal Judiciary as a safe depository of our liberties." He attacked the decisions in *McCulloch v. Maryland*, *Cohen v. Virginia* and *Green v. Biddle* as "subject of much animadversion and dissatisfaction," prostrating the States and in effect legislating for the people and regulating the interior policy of the States. There must be a

⁶⁴See *Annals of Congress*, 17th Congress, 1st Sess. Vol. I., pp. 23, 68.

remedy, he said, "for this serious encroachment upon the first principles of self-government of the States." . . . "Some interposition is necessary. The preservation of harmony requires it. The security of our liberties demands it." Senator John Holmes of Maine followed with a speech endorsing these views, saying that "the judges of the courts of the United States are too independent for the public good." He denied, however, that the Senate would be the proper appellate tribunal. No action was taken on the proposition. Later in the year, Andrew Stevenson, a Virginia Congressman, introduced in the House of Representatives a resolution that the Committee on Judiciary be instructed to report a bill to repeal the 25th Section of the Judiciary Act, saying that he offered it "in a spirit of peace and forbearance, and from a sense of duty to himself and his State."⁵⁵ This was the direct outcome of the decision of the Supreme Court in *Cohens v. Virginia*.

The next year, after the second decision in *Green v. Biddle* (1823), Senator Johnson of Kentucky introduced a resolution to instruct the Judiciary Committee to inquire into the expediency of amending the Judiciary Act so as to require concurrence of seven judges in any opinion involving the validity of State statutes or acts of Congress. He stated that "tremendous evils might result to the country from the powers imparted to its judiciary, when a whole State might be convulsed to its very center by a judicial decision. . . . Some remedy must, ere long, be adopted to preserve the purity of our political institutions." On March 11, 1824, Senator Martin Van Buren reported a bill which, as amended, provided for concurrence by seven judges out of ten, and required each judge to express and record a separate opinion. The bill was laid on the table, however, in April, 1824, and was never acted upon.

Meanwhile, Representative Charles A. Wickliffe of Kentucky, on January 2, 1824, offered a resolution to instruct

⁵⁵ *Annals of Congress*, 17th Congress, 1st Sess. Vol. 2.

the Judiciary Committee to inquire into the expediency of either repealing entirely the 25th Section of the Judiciary Act, or modifying it "so that the writ of error shall be awarded to either party without reference to the manner in which the question shall have been decided by the Supreme Court of the State." This latter suggestion is interesting; for it embodied the exact proposal of amendment now being made, viz: that appeals to the Supreme Court should lie on State court decisions adverse to the constitutionality of a State law, as well as on decisions in favor. Daniel Webster reported for the Committee against both propositions, and they were lost. The project to require concurrence of a majority of the judges, Webster appears to have favored. The following letters from him to Judge Story, relating to this struggle, are of interest. Writing April 10, 1824, he said:⁶⁶

"I shall call up some bills reported by our Committee as soon as possible. The gentlemen of the West will propose a clause requiring the assent of a majority of all the judges to a judgment which pronounces a State law void as being in violation of the Constitution or laws of the United States. Do you see any great evil in such a provision, Judge Todd told me he thought it would give great satisfaction in the West."

May 4, 1824, he wrote:

"We had the Supreme Court before us yesterday, rather unexpectedly, and a debate arose which lasted all day. *Cohens v. Virginia*, *Green v. Biddle*, etc., were all discussed. Most of the gentlemen were very temperate and guarded; there were, however, some exceptions, especially Mr. Randolph, whose remarks were not a little extraordinary. Mr. Barbour reargued *Cohen's* case; Mr. Letcher and Mr. Wickliffe did the same for *Green v. Biddle*. I said some few things, *co instante*, which I thought the case called for. The proposition for the concurrence of five judges will not prevail."

Thereupon, another attempt was made to avoid the use of writs of error to State courts by a singular method proposed in a bill introduced by Senator Isham Talbot of Kentucky, February 13, 1824, allowing parties in all suits involving a Federal or constitutional question, before trial in the State courts, to remove the suits to the Federal courts. This also failed.

⁶⁶ See Writings and Speeches of Daniel Webster, Vol. XVII.

One reason for the defeat of all these measures was undoubtedly the fact that just at this juncture the Supreme Court decided the case involving the great conflict between the State of Ohio and the Bank of the United States—*Osborn v. Bank of the United States*. This case had been pending before the Court for several years, but owing to the illness and death of various judges and the illness of Attorney General Wirt, it had not been argued. In 1823, on the death of Judge Brockholst Livingston of New York, an attempt was made to strengthen and balance the Court by adding some man of pronounced States' Rights views; and Smith Thompson, a New York Democrat (formerly Chief Justice of the State), was appointed.⁵⁷ The argument of the *Osborn* case was begun on the day after the close of the argument in the great New York Steamboat case of *Gibbons v. Ogden*, on February 10, 1824; and, as in the latter case, a galaxy of eminent lawyers were engaged. For *Osborn* appeared John C. Wright and Charles Hammond, leaders of the Ohio Bar. The Bank's counsel was Henry Clay, then just becoming one of the leaders of the Federal Bar.⁵⁸ The case was re-argued on March 10 and 11, 1824, by the following counsel against the Bank—Robert Goodloe Harper, the talented Maryland lawyer; Ethan Allen Brown, a former Judge of the Ohio Supreme Court, and Governor of the State; and John C. Wright. For the Bank of the United States there appeared Daniel Webster, then fresh from his triumph in *Gibbons v. Ogden* (this case having been decided in the interim, on March 2), and from his recent powerful argument in *Ogden v. Saunders* (the case which was to settle for all time the respective power of the Federal and State Governments on the subject

⁵⁷ It is interesting to note that Ex-Chancellor James Kent and Chief Justice Ambrose Spencer of New York, and Jeremiah Mason of New Hampshire were also considered. See letter of William Wirt to President Monroe, May 5, 1823, advising Kent, and letter of Daniel Webster to Judge Story, April 6, 1823.

⁵⁸ Judge Story wrote to Judge Todd on March 14, 1823: "Your friend Clay has argued before us with a good deal of ability; and if he were not a candidate for higher offices, I should think he might attain great eminence at this Bar. But he prefers the fame of popular talents to the steady fame of the Bar."

of bankruptcy, first argued March 3-5, 1824), and John Sergeant, the long-time leader of the Philadelphia Bar and the Bank's regular counsel. Decision was rendered by Chief Justice Marshall on March 19, 1824, only one week after the argument, upholding the Bank in all its contentions and re-affirming *McCulloch v. Maryland*; and by this fateful decision, the narrow limits to the power of the Federal Court, so strenuously urged by the States' Rights men, were overthrown and demolished. The mighty reasoning of the Chief Justice in his insistence upon the supremacy of the powers of the National Government, gave the death blow to the bills then pending in Congress for the amendment and repeal of the 25th Section of the Judiciary Act.

The next year, however, the fight broke out again. Representative Robert P. Letcher of Virginia called up a resolve introduced by him at the last session requiring concurrence of five of the seven judges in decisions invalidating State statutes; but no action was had. On a bill in the Senate to amend the Judiciary Act by providing for three additional circuits and three new Supreme Court judges, violent attacks were made on the Supreme Court, especially on its decisions invalidating State laws for impairing the obligation of contracts, by Senators Johnson and Talbot of Kentucky, February 10-16, 1825, and by Senator John H. Eaton of Tennessee. "According to the views of the Judiciary," said Johnson, "it is in the power of the tribunals of the country to arrange, prostrate and annul not only a single law, but whole systems of law—not laws of yesterday, but laws sanctioned by experience, consecrated by all the departments of State legislation, and acquiesced in by all good citizens. . . . I am informed that questions are impending before the Supreme Court which involve the constitutionality of every law of our State which has been passed during the last four or five years." Talbot attacked the decisions of the Court upholding the Bank of the United States, saying: "Maryland, Kentucky and Ohio in their turns have had to en-

counter the power and influence of that great engine of political power—the Bank; have been severely attacked, have been successively vanquished in the contest.”⁹⁹

In the House of Representatives, on a similar bill reported by Webster, December 22, 1825, a very heated debate arose. The charge that the Supreme Court’s decision overthrowing the Kentucky land law system had been rendered by a minority of the judges of the court—three out of seven—was repeated.¹⁰⁰ Amendments offered by John Forsyth of Georgia and Wickliffe and Thomas P. Moore of Kentucky requiring a majority of all the judges to concur in opinions invalidating State statutes, were defeated. It was also charged by Virginia Congressmen that the provision of the bill increasing the number of Supreme Court judges from seven to ten was an attempt by Kentucky to facilitate the packing of the Court to reverse the obnoxious decision. The bill passed the House, January 25, 1826, by a vote of 132 to 59.

How live an issue in the West this Judiciary question was may be inferred from a letter of Webster to Story, January 29, 1826:

“The judiciary bill will probably pass the Senate as it left our House. There will be no difficulty in finding perfectly safe men for the new appointment. The contests on those constitutional questions in the West have made men fit to be judges.”

In the Senate, the bill was reported by Senator Martin Van Buren, April 7, 1826, in an elaborate speech in which he severely criticized the Supreme Court for its broad construction of the phrase “impairment of obligation of contract.” . . . “a brief provision,” which he said had given to the jurisdiction of the Court a “tremendous sweep. . . . There are few States in the Union upon whose acts the seal of condemnation has not from time to time been placed by the Supreme Court. The sovereign authorities of Vermont, New Hampshire, New York, New Jersey, Penn-

⁹⁹ See Congressional Debates, Vol. I., 1824-25.

¹⁰⁰ See Congressional Debates, Vol. II., part 1, 1825-26, Dec. 22, 1825, January 6, 11, 12, 17, 25, 1826.

sylvania, Maryland, Virginia, North Carolina, Missouri, Kentucky and Ohio have in turn been rebuked and silenced by the overruling authority of this Court." He did not complain, however, of the correctness of the Court's views of the law, and he admitted that, under the Constitution, their jurisdiction was justified; but, he said, if the question of conferring this jurisdiction should now arise for the first time, he would say that "the people of the States might with safety be left to their own legislatures and the protection of their own courts."

Van Buren was followed by Senator Rowan of Kentucky, who moved to amend the bill so as to require the concurrence of seven out of ten judges in all cases. He delivered a vicious attack upon the Court and upon the United States Bank. "The States of Maryland, Ohio and Kentucky," he said, "were successively trodden down by this political juggernaut, the Bank—the creature of the perverted corporate powers of the Federal Government, the protégée of the Judges;" and the Court "in construing this monster into legitimacy, construes the States out of their sovereign taxing power." He described the Court as "placed above the control of the will of the people, in a state of disconnection with them, inaccessible to the charities and sympathies of human life, subject in the exercise of their powers to the restraints—ostensibly of the law and the Constitution, but really to those of their own will only." He complained of the blind devotion to the judges by the American people—a "self-destroying idolatry." Rowan's amendment, like so many prior ones of a similar nature, was defeated; and the bill itself was finally lost.⁶¹

The next year, Wickliffe of Kentucky, on January 22, 1827, introduced a separate bill in the House to require concurrence of five out of seven judges.⁶² His speech was elaborate and more conservative than most. He disclaimed

⁶¹ For interesting view of this struggle over the judiciary see letter of Webster to Story, April 8,

1825, Dec. 31, 1825, May 8, 1826, Dec. 26, 1826.

⁶² See Congressional Debates, Vol. III., 1826-27.

any intention "to weaken the exercise of judicial power by the Supreme Court," and stated his wish was "to give it more confidence by requiring more unanimity upon those great constitutional questions which it may be called upon to decide and consequently to secure to the States their constitutional rights."

In the course of his speech occurs one very interesting passage: "What is at this very moment transpiring in another part of this Capitol? The validity of the New York insolvent laws, which have been enacted for thirty years in that State, which laws have received the highest judicial sanctions in the courts of the State, depend upon the opinion of a single judge of the Supreme Court—the Court heretofore being equally divided upon the question." The case referred to was the famous *Ogden v. Saunders*⁶³—the great case in which, after two arguments, one in 1824 and one in January, 1827, just before Wickliffe's speech, the Supreme Court was closely divided as to the constitutional power of the State to pass a bankrupt law. The decision given three weeks later, February 19, 1827, was, on the constitutional point, actually that of four judges out of seven, Marshall, Story and Duvall being the dissenters. As the Court, however, upheld instead of denying the power of the State, no protest was made at its decision.

Two years later, however—January 21, 1829—the Judiciary Committee of the House of Representatives, through Philip P. Barbour of Virginia (later a Judge of the Supreme Court himself), reported a bill requiring concurrence of five judges out of seven in holding any legislative act or State constitution to be invalid.⁶⁴ The report was a somewhat vigorous assault on the Supreme Court, and a Massachusetts Congressman opposed a motion to print it on the ground that if the bill should not pass "the public circulation of such a report was calculated only to spread discontent in the public mind and shake the con-

⁶³ 12 Wheat. 213.

⁶⁴ See Congressional Debates, Vol. V., 1828-29, p. 153, p. 23.

fidence of the people in the Judiciary." Barbour replied that he was anxious to produce in the minds of the people "an increased degree of contentment and of confidence in the decisions of that dread tribunal which pronounced upon their interests the last instance."

In 1831 there occurred the most determined and the most dangerous attack on the Supreme Court and its jurisdiction under the 25th Section. It came as a result of a combination of conditions—the soreness over the Court's decision invalidating the financial system of Missouri; the bitterness of Georgia at the Court's attempted jurisdiction in the Cherokee Indian cases; and the growing Nullification movement in South Carolina.

In the Missouri case, *Craig v. Missouri*,⁶⁵ Chief Justice Marshall, in the capsheaf of his great constitutional opinions, had held invalid the Missouri law authorizing issue of loan certificates.⁶⁶ The case had been argued for the State by Senator Thomas F. Benton in a speech replete with phrases of indignation at the exercise by the Court of jurisdiction under the 25th Section, and at the outrage that

⁶⁵ 4 Pet. 410, in 1830.

⁶⁶ It is interesting to note that one year after *Craig v. Missouri* was brought and decided in the Missouri State Court, the Supreme

Court of Missouri itself, in *Mansker v. State*, 1 Mo. 321 (1824), held the Loan Certificate Act to be unconstitutional, but also held that the defense could be set up.

any State should be forced to appear before it. "The State of Missouri," he said, "has been 'summoned' by a writ from the Court under a 'penalty' to be and appear before this Court. In the language of the writ she is 'commanded' and 'enjoined' to appear. Language of this kind does not seem proper when addressed to a sovereign State, nor are the terms fitting, even if the only purpose of the process was to obtain the appearance of the State. . . . The State of Missouri has done no act which was not within the full and ample powers she possesses as a free, sovereign and independent State." Further, Benton said that he had "found a gentleman from another State imputing to Missouri an act fraught with injustice and immorality. Such a course was not calculated to promote harmony and to secure continuance of the Union. If, in questions of this kind, or if in any cases, the character of a sovereign State shall be made the subject of such imputation, this peaceful tribunal would not be enabled to procure the submission of the States to its jurisdiction; and contests about civil rights would be settled amid the din of arms rather than in these halls of national justice."

The very truculent words of the last sentence were a plain echo of the Nullification doctrines which were being announced in the State of South Carolina. Such sentiments were more suitable to be addressed to a political meeting than to the Supreme Court. To such arguments, Chief Justice Marshall in his opinion holding the State statute unconstitutional, gave a very spirited though dignified reply:

"In the argument, we have been reminded by one side of the dignity of a sovereign State; of the humiliation of her submitting herself to this tribunal; of the dangers which may result from inflicting a wound on that dignity; by the other, of the still superior dignity of the people of the United States, who have spoken their will in terms which we cannot misunderstand.

To these admonitions we can only answer that if the exercise of that jurisdiction which has been imposed upon us by the Constitution and laws of the United States shall be calculated to bring on those dangers which have been indicated, or if it shall be indispensable to the preservation of the Union, and consequently of the independence and liberty

of these States, these are considerations which address themselves to those departments which may with perfect propriety be influenced by them. This department can listen only to the mandates of law, and can tread only that path which is marked out by duty."

In a letter to Judge Story, written a few months after this decision, October 15, 1830, Marshall prophesied the repeal of the 25th Section, or a possible reversal of the Supreme Court's decision on the subject:

"I find our brother McLean could not acquiesce in the decision of the Court in the Missouri case. I am sorry for this, and am sorry too to observe his sentiments on the 25th Section of the Judicial Act. I have read in the last volume of Mr. Peters the three dissenting opinions delivered in that case, and think it requires no prophet to predict that the 25th Section is to be repealed, or, to use a more fashionable phrase, to be nullified by the Supreme Court of the United States,""

That Marshall's fears were justified was shown when at the next session of Congress a most determined attack on this 25th Section was made by the States' Rights men. A bill for its repeal was introduced in December, 1830. It was interestingly referred to in two letters by Story—the first to his friend George Ticknor of Boston, January 22, 1831:

"There has been an effort to procure a repeal of the twenty-fifth Section of the Judiciary Act. The majority of the Judiciary Committee have agreed to report in favor of the repeal; but there will be a counter report from the minority. And it is now whispered that the demonstrations of public opinion are so strong that the majority will conclude not to present their report. If the twenty-fifth Section is repealed, the Constitution is practically gone. . . . You may depend that many of our wisest friends look with great gloom to the future. Pray read on the subject of the twenty-fifth section the opinion of the Supreme Court in *Hunter v. Martin*, 1 Wheaton's Reports. It contains a full survey of the judicial powers of the General Government, and Chief Justice Marshall concurred in every word of it."

And again, more fully, in a letter to his wife, January 28, 1831:

"A most important and alarming measure . . . to repeal the 25th section of the Judiciary Act. If it should prevail (of which I have not any expectation), it would deprive the Supreme Court of the power to revise the decisions of the State courts and State Legislatures in all cases in which they were repugnant to the Constitution of the United

States, so that all laws passed and all decisions made, however destructive to the National Government, would have no power of redress. The introduction of it shows the spirit of the times."

The repeal bill was reported favorably to the House by Warren R. Davis of South Carolina from the Judiciary Committee, but there was a strong minority report made by James Buchanan (the chairman, who had succeeded Daniel Webster in that position), and two others.⁶⁸ Nothing in Buchanan's career cast more distinction upon him than the great constitutional argument contained in this report; and it was largely due to his efforts that the bill was finally defeated by a vote of 138 to 51, all but 6 of the 51 votes coming from Southern States. The violence of feeling on the subject is to be seen from the language of the debate. Thomas F. Foster, of Georgia, said for the Committee that it had not been "plotting treason," but that the powers of the Court were so "vast and alarming" that the constantly increasing evil of interference of Federal with State authorities must be checked." Henry Daniel, of Kentucky, said:

"The strides of Federal usurpation begin to alarm the most indolent. The spirit of indignation has already gone abroad in the land, and the people are now seeking a remedy for the evil. It cannot be stifled nor subdued.

. . . The exercise of power by virtue of the 25th Section strikes directly at the root of State sovereignty and levels it with the dust. The repeal of this Section, however, was scarcely determined upon before the majority was assailed in all the forms of newspaper slang and virulence by the prostituted tools of the old Federal party. The writing editor of the National Journal—the putrid offal of Piccadilly—casts his mite of nauseous verbage into the common reservoir of slander."

William F. Gordon, of Virginia, said: "Nothing would tend so much to compose the present agitation of this country, and allay the prevailing excitement," as the repeal of that section. On the other hand, Philip Doddridge, of Virginia, said that he considered the proposition to repeal "as equivalent to a motion to dissolve the Union."⁶⁹

⁶⁸ See James Buchanan as a Lawyer in Univ. of Penn. Law Review (May, 1912).

⁶⁹ See Congressional Debates, Vol. VII., January 24, 29, February 7, 9, 17, 25, 1831. Speeches of Foster,

A reflection of these attacks in Congress upon the Court may perhaps be seen in the firm words of Chief Justice Marshall in a case arising on writ of error to the State Court of Appeals of Kentucky this same year.⁷⁰

"In the argument we have been admonished of the jealousy with which the States of the Union view the revising power intrusted by the Constitution and laws of the United States to this tribunal. To observations of this character, the answer uniformly given has been that the course of the judicial department is marked out by law. We must tread the direct and narrow path prescribed for us. As this court has never grasped at ungranted jurisdiction, so will it never, we trust, shrink from the exercise of that which is conferred on us."

An attack in a different form was defeated in Congress in this year, 1831, and again in 1832, when resolutions of Joseph Lecompte, of Kentucky, calling on the Judiciary Committee to inquire into the expediency of amending the Constitution so as to limit the term of office of Federal Judges, were defeated by votes of 115 to 61, and 141 to 27.

It is evident that the Supreme Court itself took warning by the character of some of the measures introduced to change its methods. As late as 1824 a decision was rendered by a minority of the Court—in the case of *Renner v. Bank of Columbia*.⁷¹ But by the year 1834, Chief Justice Marshall states the practice of the Court to be as follows: "The practice of this Court is not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved unless four judges concur in opinion, thus making the decision that of a majority of the whole Court" (seven).⁷² Accordingly, Marshall announced that three great cases then pending would be continued. It is interesting to note that if the Court had followed the precedent which (it was charged) had been set in 1823, in *Green v. Biddle*, and had delivered its opinion by

Daniel, Gordon and Dodderidge were on later motion to print 6000 copies of the two reports, which motion was carried by a vote of 140 to 32.

⁷⁰ *Fisher v. Cockerell*, 5 Pet. 259.

⁷¹ 9 Wheat. 591.

⁷² *New York v. Miln*, 8 Pet., p. 122 (1834). In 1835 (9 Pet. 85) Marshall said, in answer to an inquiry

whether the Court had come to a final decision as to re-argument of the cases involving constitutional questions, that as the Court was then composed it would not take up these cases (two of the judges being absent and only three of the remaining five concurring in opinion).

a mere majority of the judges present, the whole course of American legal history would have been changed; for the constitutional cases then pending were *Charles River Bridge v. Warren Bridge*, *New York v. Miln*, and *Briscoe v. Bank of the Commonwealth of Kentucky*—cases of immense importance, involving the subjects of monopoly, interstate commerce, and States' Rights, and all three of which the Supreme Court, under Taney as Chief Justice, in 1837 (after Marshall's death), decided quite contrary to the view held by Marshall in 1834.

While these Congressional attacks were pending, a very serious conflict had arisen between the Supreme Court and the State of Georgia, the latter absolutely declining to recognize the jurisdiction of the Court. Georgia had long been a recalcitrant State in its relation to the judiciary. In 1793, in *Chisholm v. Georgia*, it had refused to recognize the right of the Supreme Court to entertain a suit against a State, had declined to appear before the Court, and its House of Representatives had passed an act providing that any Federal Marshal or other persons attempting to execute any process of the Supreme Court in such suit, should be "deemed guilty of felony, and shall suffer death without the benefit of clergy, by being hanged."

In 1815, its Legislature had, by formal resolution, protested against the assumption by the judges of the State Superior Court of the power to pass on the constitutionality of a State statute, saying: "The extraordinary power . . . if yielded by the General Assembly whilst it is not given by the Constitution or laws of the State, would be an abandonment of the dearest rights and liberties of the people, which we their representatives are bound to guard and protect inviolate."

In 1823 the Georgia Legislature, approving the doctrine of the Ohio resolutions attacking the Bank of the United States and the Supreme Court, passed a resolution calling for restriction of the powers of the Federal Courts by Constitutional amendment.⁷³

⁷³ See *Niles Register*, Vol. XXIII., January 10, 1824.

In 1827, the Governor of the State (Troup) had written to the Senators and Congressmen that:

"I consider all questions of mere sovereignty as matter for negotiation between the State and the United States until the competent tribunal shall be assigned by the Constitution itself for the adjustment of them. According to my limited conception, the Supreme Court is not made by the Constitution of the United States the arbiter in controversies involving rights of sovereignty between the States and the United States."

In 1830, Georgia put these doctrines into practice by an act of direct disobedience to the Federal Supreme Court. A Cherokee Indian—Corn Tassel—was arrested, tried, and sentenced to be hanged for murder under a State law which the United States authorities had long deemed to be unconstitutional as being in violation of a treaty.

Application was at once made to the United States Supreme Court for a writ of error to the State trial court, on the ground of the illegality of the State laws. The writ was issued; and a subpoena in *Tassel v. Georgia*, dated December 12, 1830, was served on the Governor of Georgia, December 22. Governor Gilmer treated this writ from the National Supreme Court with utter disdain, and transmitted it to the Legislature then sitting, with a message in which he referred to the subpoena as "a copy of a communication received this day purporting to be signed by the Chief Justice of the United States, and to be a citation of the State of Georgia to appear before the Supreme Court on the second Monday of January next to answer to that tribunal for having caused a person who had committed murder within the limits of the State to be tried and convicted therefor." And he declared that any attempt to execute the writ would be resisted with all the force at his command, saying: "If the judicial power thus attempted to be exercised by the courts of the United States is submitted to or sustained, it must eventuate in the utter annihilation of the State Governments."¹⁴

The Legislature at once passed a violent resolution bitterly denouncing the action of the Supreme Court; and it

¹⁴ See *Niles Register*, Vol. XXXIX., October 2, 1830; January 8, 1831; January 15, 1831.

requested and enjoined the Governor and every officer of the State to disregard any and every mandate and process that should be served upon them. Two days later, on December 24, 1830, Tassel was executed, the State of Georgia, its judges and sheriffs thus openly disregarding the processes of the Supreme Court. This action apparently met the approval of the newspaper which was President Jackson's personal mouthpiece—*The United States Telegraph*—for that organ declared editorially that "the position in which the Supreme Court is placed by the proceedings of Georgia demonstrates the absurdity of the doctrine which contends that the Court is clothed with supreme and absolute control over the States."

The sympathy of other States holding extreme views of States' Rights, and of outrage at the interference of the Supreme Court, was shown at this time by a resolution offered in the House of Delegates of Maryland for an amendment of the National Constitution, so as to provide for the decision of all cases in which the constitutionality of a State law should be brought in question, by a two-thirds vote of the United States Senate.⁷⁵

Three days after the illegal execution of Tassel, a subpoena was served on the Governor of Georgia in a suit brought by the Cherokee Nation to enjoin the State officials from enforcing the alleged unconstitutional laws.⁷⁶ No counsel appeared for the State of Georgia at the argument before the Supreme Court, March 11, 1831. In spite of the powerful addresses made by John Sergeant of Philadelphia, and William Wirt, the Court held that it had no jurisdiction. Six months later, however, the question of the constitutionality of the Georgia statutes was directly presented to the Supreme Court by a petition for a writ of error to the State Superior Court, on an appeal by two clergymen tried and sentenced under these laws. The Supreme Court issued the writ, October 27, 1831, and it was served on the Governor of Georgia, November 27.

⁷⁵ See Niles Register, Vol. XXXIX., p. 357, January 15, 1831.

⁷⁶ Cherokee Nation v. Georgia, 5 Peters 1.

On the day after his receipt of the Federal subpoena, Governor Lumpkin transmitted it to the Georgia Legislature, saying: " "

"In exercising the duties of that department of government which devolve on me, I will disregard all unconstitutional requisitions of whatever character or origin they may be; and to the best of my abilities will protect and defend the rights of the State and use the means afforded to me to maintain its laws and constitution."

The Legislature, as in the prior case, responded by passing resolutions of rebellion, December 9, 1831:

"That any attempt to reverse the decision of the Superior Court . . . by the Supreme Court of the United States, will be held by this State as an unconstitutional and arbitrary interference in the administration of her original laws, and will be treated as such. That the State of Georgia will not compromise her dignity as a sovereign State or so far yield her rights as a member of the Confederacy as to appear in, answer to, or in any way become a party to any proceedings before the Supreme Court, having for their object a reversal or interference with the decisions of the State Courts in criminal matters."

And it instructed the Governor to pay no attention to any subpoena or mandate of the Supreme Court, and required him "with all the power and means placed at his command to resist and repel any and every invasion, from whatever direction it may come, upon the administration of the criminal laws of the State." Accordingly, the State of Georgia entered no appearance by counsel. William Wirt and John Sergeant, however, appeared for the missionary appellants; and the case was argued, February 20, 1832. Two weeks after the argument Chief Justice Marshall, on March 3, 1832, rendered the opinion of the Court, holding the Georgia statute unconstitutional. The judgment of the Georgia Superior Court convicting the prisoners was reversed; and a special mandate was ordered to issue to that Court, March 5, requiring their release.

The Judges who delivered opinions showed that they were deeply impressed by the gravity of the issue presented to the Court. To the argument that the Supreme

" See Niles Register, Vol. XLI., December 24, 1831.

Court had no power to review final decisions of State courts, Chief Justice Marshall replied:

"It is, then, too clear for controversy that the act of Congress by which this Court is constituted has given it the powers and of course imposed upon it the duty of exercising jurisdiction in this case. This duty, however unpleasant, cannot be avoided. Those who fill the judicial department have no discretion in selecting the subjects to be brought before them."

Judge McLean also said that "this case involves principles of the highest importance, and may lead to consequences which shall have an enduring influence on the institutions of this country."

The popular opinion of the Northern and Eastern States regarding this decision was well expressed by Judge Story in a letter to Professor George Ticknor, of Harvard College, March 8, 1832, as follows:

"We have just decided the Cherokee case, and reversed the decisions of the State Court of Georgia, and declared her laws unconstitutional. The decision produced a very strong sensation in both houses; Georgia is full of anger and violence. What she will do, it is difficult to say. Probably she will resist the execution of our judgment, and if she does I do not believe the President will interfere unless public opinion among the religions of the Eastern and Western and Middle States should be brought to bear strong upon him. The rumor is that he has told the Georgians he will do nothing. I, for one, feel quite easy on this subject, be the event what it may. The Court has done its duty. Let the Nation now do theirs. If we have a Government, let its command be obeyed; if we have not, it is as well to know it at once, and to look to consequences."

There were, however, many old Anti-Federalists in the North who held contrary views, represented by the following editorial from the *Boston Statesman*:

"Of all the attempts made at a 'Federal Consolidation,' this last decree of the Supreme Court on the Georgia question is the boldest; though of all the opinions heretofore given this is the least creditable to the intellectual character of the Court. There is not a constitutional lawyer in the United States who will not be shocked by the heresies which it contains; there is not any man of any capacity who, after a full examination of it, will not pronounce it to be an open defiance of all common sense as well as of law and precedent, and a total perversion of the facts of the case."

The indignation of the State of Georgia at the doctrines of the case was vehemently and passionately expressed in

the newspapers, in public meetings, and in many insurrectionary speeches.

A strongly expressed protest against the decision, written only two days later, urging, however, on the people of Georgia moderation of action, was issued by George M. Troup, then United States Senator from Georgia, as an open letter to the newspapers:¹⁸

"The people of Georgia will receive with indignant feelings, as they ought, the recent decisions of the Supreme Court, so flagrantly violative of their sovereign rights. I hope the people will treat it, however, as becomes them, with moderation, dignity and firmness; and so treating it, Georgia will be unhurt by what will prove to be a *brutum fulmen*. The judges know you will not yield obedience to mandates; and they may desire pretexts for enforcement of them, which I trust you will not give." . . .

Georgia, however, was in no mood to be either passively or actively moderate. The mandate of the Supreme Court was served upon the judge and upon the clerk of the Superior Court; and they paid no attention to it. The two prisoners remained in prison; and everything went on exactly as if the Supreme Court had rendered no decision.

Such contempt of court met with little support in other States, however. *Niles Register* said editorially, March 31, 1832:

"The feeling in Georgia, as shown in the remarks in the newspapers, etc., is to go on—let the consequences be what they may; and we notice some proceedings of the people which exhibit an uncalled for spirit of violence and speak great things about 'force' and 'judicial despotism,' as though a child's play was only concerned in this matter. We are sick of such talks. If there is not power in the Constitution to preserve itself, it's not worth the keeping. But an awful responsibility rests somewhere; and history, too, may give up persons to the infamy of ages."

Other papers advised vigorous action and called upon the Court to request President Jackson to see that its mandate be carried into effect. Judges of the Court itself intimated in private conversation that its future might hang upon such enforced obedience to its decisions. As the Court had adjourned, March 17, 1832, nothing could be done in regular course of legal procedure until it recon-

¹⁸ See *Niles Register*, Vol. XLII., March 31, 1832.

vened in January, 1833. The situation was felt by conservatives to be alarming; for the most extravagant expressions were used on both political sides,

Thus the *Onondaga Standard*, of New York, said in April, 1832:⁷⁰

"In regard to the intimation of Judge McLean that upon the enforcement of this decision depends the resolution of the Court ever to convene again, we have only to say that we trust to heaven they will adhere to their determination. We should rejoice in the events. A new Bench might be organized, into which should enter some portion of the spirit of the age."

Charges were widely made that the Supreme Court's decision was dictated by its political opposition to President Jackson. A Pennsylvania Congressman published in the *York Republican*, April 6, 1832, the following extraordinary attack on Judges Marshall, Story and Smith Thompson and on Henry Clay, Daniel Webster and Edward Everett:^{71a}

"It has been intimated that previous to the decision of the Indian question by the Supreme Court a caucus was held composed of Judges Marshall, Thompson and Story, and Messrs. Clay, Webster, Everett and some few others, and at this caucus Messrs. Clay & Co. urged upon the judges the necessity of sustaining them on the Indian question solely upon political grounds, as nothing would revive the fallen party but a decision against Georgia. The decision of the Court being against law and constitution, those who expected to reap vast benefits from it find it is not strong enough, and to give it additional weight, they solicit Congress to back the court. This is a tacit confession that the opinion of the court lacks that correctness which would bespeak universal submission for it in the country."

This infamous charge, termed by the editor of *Niles Register* "the cap sheaf of all the filth of modern times," was reiterated by the notorious Jacksonian, Isaac Hill of New Hampshire, in the *New Hampshire Patriot*:

"Questions. Previous to the decision of the Supreme Court upon the Indian question, was there not a caucus composed of Judges Marshall, Thompson and Story, and Messrs. Clay, Sergeant, Webster, Everett and some few others?

"Did not Messrs. Clay, etc., urge upon the judges the necessity of their sustaining them on the Indian question solely upon political grounds?

⁷⁰ See *Niles Register*, Vol. XLII., April 14, 1832.

^{71a} See *Niles Register*, Vol. XLII., p. 112.

Did they not avow that nothing would revive their party but a decision against Georgia?

"Did not Mr. Clay and his friends urge that the question must be decided solely in reference to politics?"

Clay, Webster and Everett considered this attack so serious as to necessitate a reply; and accordingly on April 10, 1832, they sent a joint letter to the editor of the *York Republican* as follows:

"We can only say that so far as we or either of us is concerned, or has any knowledge, this whole statement, by whomsoever published or authorized, is false and calumnious. We never attended any such caucus, never heard of any such, and have not the slightest reason to believe that anything of the kind ever took place."

Although *Niles Register*, in printing this letter said editorially, "It may be well, perhaps, to put down a charge so gross; but the thing was so monstrous and base that we can hardly imagine anyone was 'entire' enough to believe it," nevertheless, the political bearing of the case undoubtedly had an influence upon a portion of the American public in its attitude towards Georgia's rebellious acts.

On November 6, 1832, Governor Lumpkin referred in his message to the Legislature to the Worcester case decision as "an attempt to prostrate the sovereignty of the State in the exercise of its constitutional criminal jurisdiction," which would be met with "a spirit of determined resistance;" and he congratulated the people of Georgia for their unanimity in sustaining the State sovereignty. The Legislature thereupon passed a resolve calling on Congress to summon a Federal convention to define the jurisdiction of the Supreme Court.

Finally, however, the whole question was set at rest by the voluntary action of Governor Lumpkin who, January 10, 1833, released the missionaries from imprisonment by a pardon based upon the condition that they should withdraw their suit in the Supreme Court.⁸⁰

⁸⁰For an interesting account of these Cherokee Nation suits written from the Georgian standpoint, see an address in 1896 by John W. Park,

then President of the Georgia State Bar Association, published in the Proceedings of the Association for 1896, entitled Georgia as a Litigant

The next year, the Supreme Court was again defied, when a writ of error, issued October 28, 1834, in the case of James Graves convicted of murder was submitted by Governor Lumpkin to the Legislature. It was disregarded, Graves was hung, and the Supreme Court ignored the proceeding.

Regarding this controversy, it is interesting to read the patriotic words of a great lawyer and a great judge—one who himself was counsel for the State of Ohio when it arrayed itself against the Federal Government in the Osborn case—Charles Hammond.

In April, 1832, when the excitement over the Georgia situation was at its height, Hammond, in an article in the *Cincinnati Gazette*, of which he was editor, commented on the curious fact that when, in 1821, Ohio "was enacting nullification and Supreme Court was restraining her within her constitutional orbit," South Carolina and Georgia then stood by the Supreme Court against Kentucky and Ohio; but that now in 1832 "when South Carolina and Georgia wage the war, Ohio and Kentucky breast it." And he concluded with the following sensible and loyal statement:⁸¹

"During the Ohio contest in which circumstances made me rather a conspicuous actor, I was forcibly struck by a remark in the *National Intelligencer* in relation to the controversy and my part in it. The remark was to this effect: 'If Mr. Hammond is the man we take him to be, we warrant he would give one or two of his fingers to get honorably and safely out of his situation and have the conflict ended.'

I felt that the *Intelligencer* was right, and I doubt not that thousands of the South Carolinians and Georgians feel now in the same way. The fact is, the government of the United States is the source of all our prosperity. Without its salutary restraints, the sectional collisions that unavoidably spring up will soon engender violent feuds terminating in open war.

It is only through the Supreme Court that this salutary restraint can be made impartially and effectually operative. It is somewhere remarked by Chief Justice Marshall that a single State may often seek to control the action of the government of the United States; but no State will ever agree that another State than itself shall exercise this control. Herein is the safety of the Union."

in the Supreme Court of the United States. See also Georgia and State Rights, American Historical Association Proc., 1901, Vol. II.; Georgia and the Cherokees, Amer. Hist.

Mag. and Tenn. Hist. Soc. Proc., 1902, Vol. VII.

⁸¹ See Niles Register, Vol. XLII., p. 318, June 23, 1832.

For many years, however, the State of Georgia theoretically asserted its doctrine that the United States Supreme Court possessed no lawful jurisdiction over appeals from State Courts; and as late as 1854, in *Padelford v. Savannah*,⁸² Judge Benning expressly held that the National Supreme Court "has no appellate or other jurisdiction over this Court, and cannot, therefore, make a precedent for it."

An attempt was made in Congress in 1832 to introduce a bill which specifically recited that the 25th Section should apply to final judgment in criminal cases in State Courts, and that the issue of writs of error by the Supreme Court should suspend the execution of the judgments in the State Court, with severe penalties imposed on persons violating this provision. The effort, however, failed.⁸³

At this time, a still more serious attack upon the jurisdiction of the Supreme Court under the Judiciary Act was made in South Carolina when its Legislature, November 24, 1832, passed the Nullification Ordinance which contained a remarkable section forbidding any appeals to the Supreme Court. It provided that in no case in law or equity decided in the courts of this State involving the validity of this ordinance or of the Acts of Congress "shall any appeal be taken or allowed to the Supreme Court of the United States, nor shall any copy of the record be permitted or allowed for that purpose; and if any such appeal shall be attempted to be taken, the courts of this State shall proceed to execute and enforce their judgments according to the laws and usages of this State without reference to such attempted appeal, and the person or persons attempting to take such appeal may be dealt with as for a contempt of the court."

It is to the honor of the State Court in South Carolina that the legislation of which this bill was a part was held unconstitutional a year later.⁸⁴

⁸² 14 Georgia 440.

VIII., part 2, House of Representatives, Jan. 3, 1832.

⁸³ See Congressional Debates, Vol.

⁸⁴ *State v. McCready*, 2 Hill, 1-282 (March, 1834).

In the same year, when the latest judicial expression of the conflict between Georgia and the Federal Supreme Court over its jurisdiction under the Judiciary Act was made in Georgia (1854), a denial of that jurisdiction was explicitly asserted by the Supreme Court of California. In the case of *Johnson v. Gordon*⁸⁵—little known to the profession of today—that Court refused to allow a writ of error to the Supreme Court of the United States to a party desiring to appeal from the decision of the State Court. Judge Solomon Heydenfeldt in his opinion gave utterance to the following extreme States' Rights views:

"The question of power between the Federal and State Judiciary has been fully discussed on both sides by some of the ablest intellects which our country has produced.

In approaching the subject, therefore, after much consultation we think that little else is left for us to do but to adopt the opinions of the one side or the other. At an early period, Hamilton in the *Federalist*, and afterwards Story and Johnson in the case of *Martin's Heirs v. Hunter's Heirs*, have given us the argument in favor of the extent of power claimed for the Federal Judiciary. This was followed by the same reasoning in the former Judge's *Commentaries on the Constitution*.

On the other side of the question we have, in the case above stated, the exposition of the Supreme Court of Virginia and argument of Mr. Calhoun in his *Discourse on the Constitution and Government of the United States*.

We have read carefully on both sides, and, convinced as we are by the reasoning of the latter, we are forced to the adoption of his conclusions. We have considered the suggestion that the power claimed has been acquiesced in by most, if not all, of the other States, and generally without any attempt to question or resist it; but we see no sufficient reason in this fact for the surrender of a power which belongs to the sovereignty we represent, involving an assumption of that power by another jurisdiction in derogation of that sovereignty. We think, too, that the acquiescence in this usurpation of the Federal Tribunal under an act of Congress not warranted by the Constitution, is not so much owing to a conviction of its propriety as it is to the high character of the Court and the general correctness of its decisions."

Such a direct attack upon the supremacy of the United States Supreme Court, however, was not tolerated in California; and the Legislature passed an act the next year, April 9, 1855, by a nearly unanimous vote of both branches in order to enforce compliance with the sections of the

⁸⁵ 4 Cal. 363.

Federal Judiciary Act which the State Court had declared unconstitutional, and declaring it a misdemeanor for any judge or clerk to act in contravention of them, and subjecting the offenders to impeachment. In a later case before the Supreme Court of California,⁸⁶ in 1858, Judge Peter H. Burnett said that the doctrine settled by the United States Supreme Court—"the highest tribunal known to the Constitution"—as to its supremacy and right to pass on appeals from State courts "was never denied by any State Supreme Court except that of Virginia until the decision of this Court in *Johnson v. Gordon*." The two other judges—David S. Terry, Chief Justice, and Stephen J. Field (who later became a member of the United States Supreme Court)—expressed no opinion on the point whether *Johnson v. Gordon* was to be held as good law in California. It is probable that one of the reasons for the decision in the *Johnson* case was stated by John G. Baldwin, one of the counsel, when he said: "The jurisdiction of the State courts over these matters is particularly at this time very important; the delay and expenses of the Federal courts, especially when great monopolies are concerned able to carry cases to the Supreme Court of the United States, makes litigation in those forums almost a denial of justice."

Later in this same year, however, (1858), Judges Joseph G. Baldwin and Stephen J. Field rendered an opinion in *Ferris v. Coover*,⁸⁷ in which the validity of the 25th section of the Judiciary Act was expressly recognized, and in which they said:

. . . "We do not propose, nor is it necessary for us, to go into an examination of the question so fully and elaborately discussed as to constitutionality of this section of the Act. The argument upon that question has long since been exhausted. The intellects and the various and profound learning of the ablest jurists and statesmen of the Union on one side or the other of this mooted question, have been called into requisition, and nothing new could now be said in support of or in opposition

⁸⁶ *Warner v. Steamship Uncle Sam*, 9 Cal. 697. ⁸⁷ 11 Cal. 175.

to the validity of this law. It is enough for us to say that a long course of adjudication by courts of the highest authority, State and National, commencing almost from the foundation of the Government, and the acquiescence of nearly all the State governments in all of their departments, have given to this doctrine a recognition so strong and authentic that we feel no disposition to deny it at this late day, even if the reasons for such denial were more cogent than they seem to us to be."

(The judges held, however, that the case presented no appealable question under the Act of 1789; and that at all events only the Chief Justice could issue the citation.) Chief Justice Terry, in a dissenting opinion, used the following strong language:

. . . "It has never been admitted in Virginia, has always been repudiated by Georgia, and has lately been questioned by several other States. The decisions of the United States Supreme Court on this question embody the political principles of a party which has passed away. . . . The force and authority of the opinions of the Supreme Court of the United States upon the question of jurisdiction, as well as all others of a political nature, is much weakened by the consideration that the political sentiments of the judges in such cases necessarily gave direction to the decisions of the Courts. The Legislative and Executive power of the Government has passed or was rapidly passing into the hands of men entertaining opposite principles. Regarding the Judicial as the conservative department; believing the possession by the General Government of greater powers than those expressly granted by the Constitution to be absolutely necessary to its stability, they sought by a latitudinarian construction of its provisions to remedy the defects in that instrument, and by a course of judicial decisions to give direction to the future policy of the Union.

. . . Hoary usurpations of power and jurisdiction on the part of the Federal Judiciary, or time-honored encroachments on the reserved rights of the sovereign states, are entitled to no additional respect on account of their antiquity, and should be as little regarded by the State tribunals as if they were but things of yesterday."

About this same time, the State of Ohio again became recalcitrant. In 1855, the Chief Justice of its State Supreme Court (Bartley), sitting in the State district court, rendered a decision denying the appellate jurisdiction of the United States Supreme Court; and he overruled a motion to perfect the record of the State court so that the case might be taken up on writ of error.^{57a} The *American Law Register* termed the doctrines of this case "dangerous in the highest

^{57a} Stunt v. The Ohio, 3 Ohio Decisions Reprints 362 (1855).

degree to the integrity and stability of the government . . . a danger to the Union;" and stated its regret at the appearance of the decision "at a period when every disorganizing agency in the country appears to be at work." It continued:

. . . "Admit that the Federal judiciary may in its time have been guilty of errors, that it has occasionally sought to wield more power than was safe, that it is as fallible as every other human institution—yet it has been and is a vast agency for good; it has averted many a storm which threatened our peace, and has lent its powerful aid in uniting us together in the bonds of law and justice. Its very existence has proved a beacon of safety."^b

As late as 1856, the question whether the State Supreme Court should comply with a mandate of the United States Supreme Court, was actively pending in the State of Ohio as a result of the bitterly opposed decision of the National Supreme Court in *Piqua Branch of The State Bank of Ohio v. Knoop*,⁸⁸ in 1853. In this case the doctrine was announced for the first time that a State legislature had power to exempt corporations from taxation, so that a statute passed by a subsequent legislature was an impairment of the obligation of the contract of exemption and therefore unconstitutional. This important suit had been argued by Henry Stanberry for the Bank and by Rufus P. Spalding and George E. Pugh for the State, at a period when throngs of banks, railroads and insurance companies had been fostered and encouraged by similar tax-exempting statutes. Immense financial interests depended on the decision of the case. Moreover, the question of States' Rights was felt to be closely involved. The opinion of the Court was rendered by Judge John McLean (himself an Ohio man). Judges Catron, Daniel and Campbell—all Southerners and all of them ardent States' Rights men—wrote vigorous dissenting opinions. Judge Catron insisted that the State courts had already denied the power of the legislature to grant tax exemptions, and that their decisions must be followed "to avoid conflict between the

^b American Law Register, N. S. Vol. IV, p. 127 (Jan., 1856). "16 How. 369.

judicial powers of that State and the Union—an evil that prudence forbids.” Judge Campbell referred to the fact that in the cases of *McCulloch v. Maryland*, *Osborn v. Bank of the United States*, and *Weston v. Charleston*, “involving questions of great feeling and interest,” the Court had overthrown the tax laws of the States involved and had “excited a deep and pervading discontent.”

Even greater discontent, however, was produced in the State of Ohio when three years later (in 1856) the United States Supreme Court took the logical step of holding that a State could not constitutionally impair these tax exemption laws by the passage of a new Constitution any more than it could do so by a new statute. Judge Wayne in his opinion in the case of *Dodge v. Woolsey*⁸⁹—a case argued by S. F. Vinton and Henry Stanberry against Rufus P. Spalding—asserted impressively the supremacy of the Federal Constitution and of the Federal Supreme Court over all conflicting decisions and actions of the several States. Judges Catron, Daniel and Campbell entered most violent dissents, the latter saying:

“As to the claim made for the Court to be the final arbiter of these questions of political power, I can imagine no pretension more likely to be fatal to the constitution of the court itself. If this court is to have an office so transcendent as to decide finally the powers of the people over persons and things within the State, a much closer connection and a much more direct responsibility of its members to the people is a necessary condition for the safety of the popular rights. . . . The acknowledgement of such a power would be to establish the alarming doctrine that the empire of Ohio and the remaining States of the Union over their revenues is not to be found in their people but in the numerical majority of the judges of this Court.”

With such a vehement denial of the power of the Court from a judge of the Supreme Court itself, it is not surprising that a strong effort was made in the State of Ohio to persuade the Supreme Court of that State to refuse to obey the mandate issued by the Federal tribunal. Accordingly when the motion was made by Henry Stanberry in the State Court for the entry of the mandate in Piqua

⁸⁹ 18 How. 331.

Branch v. Knoop,⁸⁰ reversing the judgment of the State Court, the State Attorney General, Christopher P. Walcott, urged the Court to decline to enter the mandate. A delay of three years ensued before the Court came to a decision owing to division in the ranks. Finally, however, late in 1856, in *Piqua Bank v. Knoop*,⁸¹ three judges of the Court, the Chief Justice dissenting, decided to recognize the jurisdiction of the United States Supreme Court under the 25th Section of the Judiciary Act, and stated that they were "not prepared to adopt the theory" on which a denial of the jurisdiction of the Federal Court was based. The Chief Justice, Thomas W. Bartley, said, however, in his dissenting opinion, that if the Federal Court could by a writ of error "take such a case from the judicial power of the State . . . and also use the judicial power of the State as its agency to enforce its mandate, the idea of such a thing as State sovereignty under our system of government would be a deceptive fallacy, and the States of the Union nothing more than mere municipal corporations belonging to a consolidated national government." He cited the States of Georgia and Virginia as having always refused to recognize or acquiesce in this power of the Federal Court, and said that the doctrine in its "enormities" and "alarming import . . . wholly prostrates the municipal sovereignty of the people within the State."

The intense agitation of the State of Ohio over the action of the National Supreme Court may be judged by the following striking description given of Ohio in the Warner case in California in 1858 (above described):

"A case recently decided in Ohio was referred to by the appellants' counsel in which the same doctrines are maintained as in *Johnson v. Gordon*. But when it is borne in mind that that State for several years past has been arrayed in hostility to the general government; that this hostility has exhibited itself in the legislative, the judicial and the executive departments of that state; that actual resistance to Federal authority on the part of the people is of common occurrence and is sanctioned and encouraged by legislative enactment and justified by judicial decision—it will readily be understood that the decision referred to is a

⁸⁰ 16 How. 369.

⁸¹ 3 Ohio St. 343.

part of a general system of resistance to the Constitution and laws of the United States, which has already led to the verge of civil war."

The next case in the history of American jurisprudence, in which the rights of the Federal Supreme Court under the Judiciary Act were expressly denied, was the famous case of *Ableman v. Booth*, in Wisconsin, arising from the Fugitive Slave Law agitation. The facts, well known in general, are still more striking in detail. Sherman M. Booth, an abolitionist editor, was charged in 1854 before a United States Commissioner with aiding the escape of a fugitive slave, and was committed to the custody of the United States Marshal, Ableman. A judge of the Supreme Court of Wisconsin, on *habeas corpus*, ordered Booth's discharge. The full State Court upheld this after an able argument by Booth's counsel, Byron Paine, against Edward G. Ryan (both of them later judges of the Wisconsin Supreme Court).² Ableman sued out a writ of error to the United States Supreme Court, returnable December, 1854; and the record was duly certified by the Clerk of the State Court in obedience to this writ of error served on the Clerk, October 30, 1854, and allowed by Chief Justice Edward V. Whiton, November 6, 1854. Meanwhile, Booth was indicted and tried in the United States District Court, found guilty and sentenced. On another *habeas corpus*, the Wisconsin Supreme Court, February 3, 1855,³ ordered his release. In April, 1855, on motion of United States Attorney General, Caleb Cushing, a second writ of error was issued to the Wisconsin Court by the United States Supreme Court, returnable December, 1855. This writ of error was served on the Clerk of the State Court, June 1, 1855; but the Clerk was advised to make no return, and accordingly he put it in his desk and never placed it on the court files. Attorney General Cushing then moved in the United States Supreme Court in May, 1856, that he be allowed to file a copy of the record of the State Court and that the Supreme Court proceed to judgment. He had been

² See *in re Booth*, 3 Wisc.

³ Wisc. 157.

informed by the Clerk of the State Court that the State Court had directed him to make no return; but the Clerk, before such direction, had given a certified copy of the record in March, 1855, to the United States District Attorney. The Supreme Court decided, however, to issue an order to the State Court Clerk to make return. The Clerk still refused to comply, as the State Court on February 5, 1857, had made a formal order instructing him not to make return. There being a complete deadlock, therefore, the Supreme Court, March 6, 1857, allowed the motion of the Attorney General to file copy of the record, "to have the same effect and legal operation as if filed by the Clerk with the writ of error." The case was then docketed, but was not reached for argument until January 19, 1859. Meanwhile, the first *habeas corpus* case in which the Wisconsin Court had recognized the writ of error, had been reached as early as 1857, but had been postponed until both cases could be argued together. The cases were argued by United States Attorney General Jeremiah S. Black, no counsel appearing for the State of Wisconsin. The decision was rendered by Chief Justice Taney two months later, March 7, 1859. He stated that the rights asserted by the State Court to annul the proceedings of the United States Commission and to annul the judgment of an United States District Court, and also to determine that their decision is final and conclusive upon the United States Courts so as to authorize a clerk to disregard and refuse obedience to a writ of error issued pursuant to the Federal Judiciary Act, are "new in the jurisprudence of the United States as well as of the States." He continued, however, with a statement, which in view of the action of Virginia, Georgia and California Courts, was not wholly accurate: "The supremacy of the State Courts over the Court of the United States in cases arising under the Constitution and laws of the United States, is *now for the first time asserted* and acted upon in the Supreme Court of a State." The Chief Justice continued, however, with a most vigorous exposition of the supremacy of the Federal

jurisdiction in cases contemplated by the Judiciary Act and by the Constitution; and except by the State of Wisconsin, Taney's doctrine, following Marshall's in every particular, has never been controverted by an American court.⁹⁴

The Wisconsin State Supreme Court, however, actually refused to comply with the mandates of the Supreme Court. On September 22, 1859—six months after Taney's decision—a motion was made and argued by United States District Attorney, D. A. J. Upham, to file with the State Court Clerk the two mandates from the Supreme Court. The State Court consisted of Chief Justice Luther S. Dixon, Orasmus Cole and Byron Paine. The latter, having previously been counsel for Booth and elected a judge for that reason, took no part. The other two differed in opinion, and hence the motion was not granted, the practical result being that the mandate of the Supreme Court was actually disobeyed. The Chief Justice, however, rendered an opinion, December 14, 1859, in which he pointed out that the former Chief Justice Whitton had entertained no doubt of the appellate jurisdiction of the Federal Supreme Court; also that the Ohio Court in the Knoop case had reached the same conclusion; and he ended his opinion with these courageous words: "My sole purpose has been to be right, to assume such a position as under the Constitution will abide the test of reason and patriotism."⁹⁵

Meanwhile, the Wisconsin Legislature, March 19, 1859, had adopted defiant resolutions, declaring the "assumption of jurisdiction by the Federal judiciary" to be "an act of undelegated power, and therefore without authority and void" . . . "an arbitrary act of power . . . prostrating the rights and liberties of the people at the foot of unlimited power" and further declaring that the several States alone had "the unquestionable right to judge of the extent of the powers delegated by the constitution" . . .

⁹⁴ See *Ableman v. Booth*, United States v. Booth, 18 How. 476, 479; 21 How. 506.

⁹⁵ *In re Booth*, 11 Wisc. 498.

"and that a positive defiance of those sovereignties of all unauthorized acts done or attempted to be done under color of that instrument is the rightful remedy."

The United States Supreme Court reinforced its decision in the *Booth* case by its opinion in a case arising on a writ of error from Massachusetts in 1861, during the Civil War (*Freeman v. Howe*) saying:

"No government could maintain the administration or execution of its laws, civil or criminal, if the jurisdiction of its judicial tribunals were subject to the determination of another. . . . It belongs to the Federal courts to determine the question of their own jurisdiction, the ultimate arbiter, the supreme judicial tribunal of the nation."^a

In reversing the decision of the Massachusetts court, however, the Supreme Court plainly showed its recognition of the antagonism which had been displayed towards its exercise of authority over the State courts, for it used the following singularly conciliatory language: "Upon the whole, after the fullest consideration of the case, and utmost respect for the learning and ability of the court below, we are constrained to differ from it and reverse the judgment."

It was not until 1872 that the appellate jurisdiction of the Supreme Court was again attacked. In *Magwire v. Tyler*,^b it reversed a judgment of the Supreme Court of Missouri for the defendant in a land-patent case, and remanded the cause to that court "with directions to affirm the decree of the inferior State court." Out of deference to the feelings of the Missouri Supreme Court, the form of the mandate was later changed to: "that the cause may be remanded for further proceeding in conformity to the opinion of the Court." The Missouri Court, however, while reversing its decree, proceeded to enter another decree for the defendant. A second writ of error to the Supreme Court was sued out by the plaintiff; and the Court, in its opinion in 1872,^c said that the new decree of the State court "in effect evades the directions given by this

^a 24 Howard 450.

^b 8 Wall. 650.

^c 17 Wall. 253.

court, and practically reverses the judgment and decree which the mandate directed them to execute." The Court said that "judging from the proceedings of the State court under the former mandate . . . it seems to be quite clear that it would be useless to remand the cause a second time."⁹⁸ Such being the fact, the Court felt its duty to be plain, namely, to proceed itself to a final decision and award execution to the prevailing party, just as it had done fifty-seven years before in *Martin v. Hunter* in Virginia, in 1816, and as it had done in the famous Steamboat Monopoly case of *Gibbons v. Ogden* in New York in 1824.⁹⁹

Congress, after its vigorous attack upon the jurisdiction of the Supreme Court in 1830-31, seems not to have been agitated over the question for several years.¹⁰⁰ After the panic of 1837 and the era of repudiation of State debts (1840-1845), many of the States had passed stay-laws for the benefit of debtors, postponing sales on execution and modifying creditors' and mortgagees' rights. The States of Illinois and Indiana had been thrown into intense excitement when, in three decisions, 1843-1845, the Supreme Court held all these acts unconstitutional.¹⁰¹ The resentment of Illinois was shown by its Senator, James Semple, in introducing in the Senate, December 26, 1846, a joint resolution proposing a Constitutional amendment to prohibit the Supreme Court from declaring void "any act of

⁹⁸ This case in various phases had been pending in the courts since 1852. See 25 Mo. 484 (1857); 30 Mo. 202 (1860), *West v. Andrew*, 17 How. 416 (1855); *Magwire v. Taylor*, 1 Black. 195 (1862); 47 Mo. 115 (1870).

⁹⁹ It may be noted that there are three other cases in which, for technical reasons, the State court found itself unable to comply with the mandate of the Supreme Court. See *Palmer v. Allen*, 7 Cranch 550 (1814); (*Palmer v. Allen*, 1 Conn. 100) in Connecticut; *Davis v. Packard*, 8 Pet. 312 (1834), in New York; *Washington, etc., Co. v. McDade*, 135 U. S. 55 (1889) in District of Columbia. Between 1789 and 1860,

two hundred and twenty-two cases were before the Supreme Court on writs of error from State courts. Of these, 65 were dismissed as not coming within the scope of the Judiciary Act; in 68 the judgment of the State court was reversed, and in 89 it was affirmed. (See article at end of opinion of Dixon C. J. in *re Booth*, 11 Wisc., p. 522 (1860).)

¹⁰⁰ See Congressional Globe, 1844-47, pp. 61, 82, 213.

¹⁰¹ See *Bronson v. Kensie*, 1 How. 311 (1843); *McCracken v. Hayward*, 2 How. 608 (1844); *Gantley v. Ewing*, 3 How. 707 (1845); see also *Law Reporter*, Vol. VI., p. 46 (1843).

Congress or of any State Legislature on the ground that it is contrary to the Constitution of the United States or contrary to the Constitution of any particular State." January 19, 1847, Senator John M. Berrien of Georgia introduced a bill to regulate the appellate jurisdiction of the Supreme Court. Both of these measures died in the Committee on Judiciary.

During the Civil War, it was frequently asserted in the Senate of the Confederate States that exercise of Federal appellate jurisdiction over State courts had been a "monstrous despotism"—a leading factor in engendering the dissolution of the Union. On this ground, that Senate, in 1863, repealed section 48 of the provisional Confederate Act of March 16, 1861 (a reproduction of the 25th Section of the Judiciary Act), and left the Confederacy without any Supreme Court.^{101a} The *Richmond Enquirer* presents clearly the Southern attitude towards the obnoxious jurisdiction as follows:

"A vote of the Confederate Senate given on yesterday will have at least as much influence on the destiny and future history of the country as any of the military events now imminent. By that vote the section of the law of the Provisional Congress, defining the powers of the Supreme Court, which gave that body appellate jurisdiction over the Supreme Courts of the several States, was repealed. . . . Had the original law been allowed to stand, prophetic inspiration was not necessary to foresee that the career of the Southern Confederacy would have been but a pursuit of the catastrophe which overwhelmed the late Union. The existence of such a tribunal as the Supreme Court of the United States was a practical denial of the absolute sovereignty of the States. The operation of the machine was actual consolidation of the whole country under Federal laws. When the sovereignty of the States was practically annulled, the collision of the opposite interests and sections of this enormous empire began, and proceeded irresistibly to produce dissolution. Such, in brief, was the history of the Union; such would surely be the history of the Confederacy, if like causes were introduced to make like effects."

No further attack on the Judiciary Act was made in Congress until after the Civil War, when the Reconstruction legislation and the anticipated action of the Supreme

^{101a} See Why the Confederate States Had No Supreme Court, in Vol. IV (1900); see also *Richmond Enquirer*, Jan. 28, 1863; March 19, 1863. Pub. of the Southern Hist. Ass.,

Court with regard to it gave rise to much bitterness of feeling. January 21, 1867, Thomas Williams of Pennsylvania introduced in the House of Representatives a bill requiring concurrence of all the judges on any Constitutional case, the hearing to be had only before a full bench—a bill which, he said, “startled the profession and to some extent the country at large.”

In the same year, December 16, Senator Garrett Davis of Kentucky, introduced a resolution “that the Constitution should be so amended as to create a tribunal with jurisdiction to decide all questions of constitutional power that shall arise in the Government of the United States and all conflict of jurisdiction between it and the State Governments, the said tribunal to consist of one member from each State to be appointed by the State to hold office during good behavior, and a majority of the whole number of said tribunal to be necessary to make a decision. In his speech he savagely attacked Judge Swayne and Chief Justice Chase for their decisions upholding the “atrocious,” “monstrous” Civil Rights Act.¹⁰²

The next year, January 13, 1868, James F. Wilson of Iowa in the House reported a bill which actually passed by a vote of 110-39, providing that “no cause pending, which involves the action or effect of any law of the United States, shall be decided adversely to the validity of such law without the concurrence of two-thirds of all the members of the Court.”¹⁰³

Three years later (1871), Senator Davis of Kentucky again introduced a resolution for a Constitutional amendment to provide for a separate tribunal of one member from each State chosen by the States to decide on all constitutional questions.¹⁰⁴

¹⁰² See Congressional Globe 1867-68, pp. 196, 470, 471, 472, 492-4, 498; Dec. 16, 1867, January 13, 14, 1868.

Sec. 25, by Act of Feb. 5, 1867, sec. 2.

¹⁰³ But see amendment of Jud. Act,

¹⁰⁴ See Congressional Globe 1871, pp. 120, 832, March 16, April 20, 1871.

In 1872, Archibald T. McIntyre of Georgia introduced a bill to facilitate decisions of constitutional questions.¹⁰⁸

In 1882, a Mississippi congressman and senator introduced joint resolutions proposing an amendment to Article Three, Section Two of the Constitution, modifying the appellate jurisdiction of the Supreme Court. No action was taken by Congress.¹⁰⁹

Practically no further attempt to change the relation of the Supreme Court to the States has been made until the present proposition to alter the Judiciary Act in order to allow writs of error in cases where the validity of State statutes has been denied by the State court; and with the exceptions above narrated there has been entire acquiescence by the States and by the people in the jurisdiction granted to the Supreme Court by the United States Constitution.

And as Mr. Justice Lurton said, as late as 1900:¹⁰⁷

"When we consider that there have been proposed no less than 1736 amendments to the Constitution, of which only 16 have been adopted, and that only 6 of the whole number proposed to deprive the Supreme Court of its jurisdiction, we may assume that this jurisdiction has not been regarded as a source of particular danger."

BENTON, MANN.

CHARLES WARREN.

¹⁰⁸ See Congressional Globe, p. 393, January 16, 1872.

¹⁰⁹ See Congressional Record, 1882, pp. 1650, 3249, March 6, April 25, 1882.

¹⁰⁷ The Judicial Power in a Constitutional Government, by Judge H. H. Lurton, Ohio State Bar Ass., Vol. XXI., p. 158 (1900).

THE POWER OF CONGRESS TO LIMIT THE JURISDICTION OF FEDERAL COURTS: AN EXERCISE IN DIALECTIC

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INTRODUCTORY NOTE

The reports are full of what may be thought to be injudiciously unqualified statements of the power of Congress to regulate the jurisdiction of the federal courts.

Before the close of the eighteenth century, Justice Samuel Chase observed that "the political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to congress. If congress has given the power to this court, we possess it, not otherwise" ¹ Speaking in mid-nineteenth century of the inferior federal courts, Justice Grier said flatly, "Courts created by statute can have no jurisdiction but such as the statute confers." ² No longer than ten years ago Chief Justice Stone spoke, if anything, with added emphasis: "The Congressional power to ordain and establish inferior courts includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.' " ³ And in perhaps the most spectacular of historic

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¹ *Turner v. Bank of North America*, 4 Dall. 8, 10 n.1 (U.S. 1799). Even though diversity of citizenship existed between the plaintiff and the defendant, an action on a promissory note was dismissed for lack of jurisdiction, since it was not affirmatively shown that the requisite statutory diversity existed between the original promisee and the defendant.

² *Sheldon v. Sill*, 8 How. 441, 449 (U.S. 1850) (no statutory jurisdiction in foreclosure action when mortgagor and mortgagee were residents of same state, even though there was diversity between mortgagor and mortgagee's assignee).

³ *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943), upholding a denial of jurisdiction to federal district courts and state courts to enjoin enforcement of OPA regulations, a special statutory procedure having been provided for administrative protest and appeal to a specially constituted court of appeals. Chief Justice Stone's quotation is from *Cary v. Curtis*, 3 How. 236, 245 (U.S. 1845). See pp. 1367-69 *infra*.

examples a unanimous Supreme Court recognized the power of Congress to frustrate a determination of the constitutionality of the post-Civil War reconstruction legislation by withdrawing, during the very pendency of an appeal, its jurisdiction to review decisions of the federal circuit courts in habeas corpus. "[T]he power to make exceptions to the appellate jurisdiction of this court is given by express words," Chief Justice Salmon P. Chase said. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."⁴

Are these pronouncements to be taken at face value? How, if so, can they be reconciled with the basic presuppositions of a regime of law and of constitutional government? These are the central questions explored in the discussion which follows.

The discussion is taken from a forthcoming volume of teaching materials which Professor Herbert Wechsler of Columbia and I have edited,⁵ and it has profited greatly from his collaboration.

The purpose of the discussion is not to proffer final answers but to ventilate the questions and, in particular, to indicate the very distinct types of situations in which they may be presented. As will be observed, full advantage has been taken of the ambivalence of the dialogue form; and, beyond that, some matters have been left without benefit even of a unilateral expression of opinion.

I. LIMITATIONS AS TO WHICH COURT HAS JURISDICTION

Q. Does the Constitution give people any right to proceed or be proceeded against, in the first instance, in a federal rather than a state court?

A. It's hard to see how the answer can be anything but no, in view of cases like *Sheldon v. Sill*⁶ and *Lauf v. E. G. Shinner & Co.*,⁷ and in view of the language and history of the Constitution itself. Congress seems to have plenary power to limit federal

⁴ *Ex parte McCordle*, 7 Wall. 506, 514 (U.S. 1868).

⁵ HART AND WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM*, which will be published in September, 1953, by The Foundation Press, Inc., of Brooklyn, N. Y.

⁶ 8 How. 441 (U.S. 1850), see note 2 *supra*.

⁷ 303 U.S. 323 (1938) (enforcing provisions of Norris-LaGuardia Act denying jurisdiction to federal district courts to grant injunctions in labor disputes in absence of certain findings of fact).

jurisdiction when the consequence is merely to force proceedings to be brought, if at all, in a state court.⁸

Q. But suppose the state court disclaims any jurisdiction?

A. If federal rights are involved, perhaps the state courts are under a constitutional obligation to vindicate them.⁹ There are cases, like *Testa v. Katt*,¹⁰ and *General Oil Co. v. Crain*,¹¹ which seem to say so.

Q. But even assuming the obligation, and I gather it's something of an assumption, only the Supreme Court can enforce it if the state courts balk. The *McCardle*¹² case says that the appellate jurisdiction of the Supreme Court is entirely within Congressional control.

A. You read the *McCardle* case for all it might be worth rather than the least it has to be worth, don't you?

Q. No, I read it in terms of the language of the Constitution¹³ and the antecedent theory that the Court articulated in explaining its decision. This seems to me to lead inevitably to the same result, whatever jurisdiction is denied to the Court.

A. You would treat the Constitution, then, as authorizing exceptions which engulf the rule, even to the point of eliminating the appellate jurisdiction altogether? How preposterous!

Q. If you think an "exception" implies some residuum of jurisdiction, Congress could meet that test by excluding everything but patent cases. This is so absurd, and it is so impossible to lay down any measure of a necessary reservation, that it seems to me the language of the Constitution must be taken as vesting plenary control in Congress.

⁸ Note, however, that the result of this is to deprive diversity plaintiffs like Sill of any access at all to a federal court. Is this material? Would Congress have power to authorize Supreme Court review of state court decisions in diversity of citizenship cases? *Cf. Plaquemines Tropical Fruit Co. v. Henderson*, 170 U.S. 511 (1898).

⁹ Of course, if a state court does adjudicate a controversy, the Supremacy Clause compels it to observe federal law. The point in question is whether the state is bound to provide a forum.

¹⁰ 330 U.S. 386 (1947) (Supremacy Clause requires state courts to enforce treble damage provisions of federal price-control legislation even though action was regarded by state courts as penal).

¹¹ 209 U.S. 211 (1908) (state court must entertain a bill to enjoin state officials from enforcing an allegedly unconstitutional tax despite state statutes withdrawing jurisdiction from state courts in such cases).

¹² *Ex parte McCardle*, 7 Wall. 506 (U.S. 1868).

¹³ U.S. Const., Art. III, § 2: "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

A. It's not impossible for me to lay down a measure. The measure is simply that the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan. *McCardle*, you will remember, meets that test. The circuit courts of the United States were still open in *habeas corpus*, and the Supreme Court itself could still entertain petitions for the writ which were filed with it in the first instance.¹⁴

Q. The measure seems pretty indeterminate to me.

A. Ask yourself whether it is any more so than the tests which the Court has evolved to meet other hard situations. But whatever the difficulties of the test, they are less, are they not, than the difficulties of reading the Constitution as authorizing its own destruction?

Q. Has the Supreme Court ever done or said anything to suggest that it is prepared to adopt the view you are stating?

A. No, it has never had occasion to. Congress so far has never tried to destroy the Constitution.

Q. Passing to another question, does the Constitution give people any right to proceed or be proceeded against in one inferior federal constitutional court rather than another?

A. As to civil plaintiffs, no. Congress has plenary power to distribute jurisdiction among such inferior federal constitutional courts as it chooses to establish.

As to civil defendants, the answer almost certainly is also no. To be sure, doubts are occasionally suggested about the validity in all circumstances of nation-wide service of process, but they don't seem to me to have much substance.¹⁵

As to criminal defendants, of course, the answer is controlled by the express language of the Constitution — Article III, Section 2, Paragraph 3,¹⁶ and the Sixth Amendment.¹⁷

Q. Does the Constitution give people any right to proceed or

¹⁴ *Ex parte Yerger*, 8 Wall. 85 (U.S. 1869), a petition in the Supreme Court for *habeas corpus* and a common law writ of *certiorari*. Again, however, a decision on the constitutionality of the Reconstruction Acts was prevented — this time by releasing Yerger from the challenged military custody. See 2 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 496-97 (1937 ed.).

¹⁵ See *Robertson v. Railroad Labor Bd.*, 268 U.S. 619 (1925).

¹⁶ "The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

¹⁷ "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."

be proceeded against, in the first instance, in an inferior federal constitutional court rather than a federal legislative court?

A. As to criminal defendants charged with offenses committed in one of the states, surely. As to others, it's hard to say. The answer may well vary for civil plaintiffs and civil defendants. And it must vary, must it not, according to the nature of the right in question and the availability and scope of review in a constitutional court.¹⁸

II. LIMITATIONS OF JURISDICTION TO GIVE PARTICULAR KINDS OF REMEDIES

Q. The power of Congress to regulate jurisdiction gives it a pretty complete power over remedies, doesn't it? To deny a remedy all Congress needs to do is to deny jurisdiction to any court to give the remedy.

A. That question is highly multifarious. If what you are asking is whether the power to regulate jurisdiction isn't, in effect, a power to deny rights which otherwise couldn't be denied, why don't you come right out and ask it?

Before you do, however, I'll take advantage of the question to make a point that may help in the later discussion. The denial of *any* remedy is one thing — that raises the question we're postponing. But the denial of one remedy while another is left open, or the substitution of one for another, is very different. It must be plain that Congress necessarily has a wide choice in the selection of remedies, and that a complaint about action of this kind can rarely be of constitutional dimension.

Q. Why is that plain?

A. History has a lot to do with it. Take, for example, the tradition of our law that preventive relief is the exception rather than the rule. That naturally makes it hard to hold that anybody has a constitutional right to an injunction or a declaratory judgment.¹⁹

But the basic reason, I suppose, is the great variety of possible remedies and the even greater variety of reasons why in different situations a legislature can fairly prefer one to another. That

¹⁸ Cf. *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929). See Katz, *Federal Legislative Courts*, 43 HARV. L. REV. 894 (1930); Notes, 46 HARV. L. REV. 677 (1933); 34 COL. L. REV. 344, 746 (1934). See also note 26 *infra*.

¹⁹ For cases suggesting that due process requires an opportunity to apply to a court for an interlocutory stay of a state administrative order challenged on constitutional grounds, see *Pacific Tel. & Tel. Co. v. Kuykendall*, 265 U.S. 296, 304-05 (1924); *Porter v. Investors Syndicate*, 286 U.S. 461 (1932).

usually makes it hard to say, when one procedure has been provided, that it was unreasonable to make it exclusive. Witness, for example, the *Yakus*²⁰ case and, even more strikingly, the more familiar examples cited in the *Yakus* opinion.²¹

Q. Please spell that out a little bit.

A. Tax remedies furnish one of the best illustrations.

More than a hundred years ago in *Cary v. Curtis*²² the Supreme Court distressed Justice Story and many other people by holding that Congress had withdrawn the traditional right of action against a collector of customs for duties claimed to have been exacted illegally. Congress soon showed that it had never intended to do this, by restoring the right of action. But meanwhile the misunderstanding of the statute had produced a notable constitutional decision.

Story thought it unconstitutional to abolish the right of action against the collector. The majority opinion by Justice Daniel poses very nicely the apparent dilemma which is the main problem of this discussion. It states the contention that the construction adopted would attribute to Congress purposes which "would be repugnant to the Constitution, inasmuch as they would debar the citizen of his right to resort to the courts of justice."²³ In a bow to this position, it said:

The supremacy of the Constitution over all officers and authorities, both of the federal and state governments, and the sanctity of the rights guarantied by it, none will question. These are *concessa* on all sides.²⁴

²⁰ *Yakus v. United States*, 321 U.S. 414 (1944). The World War II price control legislation provided that the validity of OPA regulations could be tested only by an administrative proceeding subject to review by a specially constituted Emergency Court of Appeals and by the Supreme Court on certiorari. Such a proceeding had to be instituted within 60 days of issuance of the regulation or of the date when the regulation complained of had become unlawful. Because of the exclusive statutory procedure to which they had failed to resort, the petitioners in *Yakus* were not allowed to raise the defense of statutory invalidity in a criminal prosecution for wilful violation of OPA regulations. The Supreme Court affirmed their conviction, holding that it was not a denial of due process to place such a limitation on the enforcement court when an adequate procedure for the determination of invalidity had been provided elsewhere.

²¹ E.g., *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) (invalidity of tariff rate cannot be asserted in state court reparations proceeding without first resorting to ICC); *Anniston Mfg. Co. v. Davis*, 301 U.S. 337 (1937) (right to sue collector for recovery of taxes under unconstitutional statute may be abolished where remedy against United States is substituted). See 321 U.S. at 445-46 for further examples.

²² 3 How. 336 (U.S. 1845).

²³ *Id.* at 345.

²⁴ *Ibid.*

But then Justice Daniel stated the other horn of the dilemma as if it were an answer:

The objection above referred to admits of the most satisfactory refutation. This may be found in the following positions, familiar in this and in most other governments, viz: that the government, as a general rule, claims an exemption from being sued in its own courts. That although, as being charged with the administration of the laws, it will resort to those courts as means of securing this great end, it will not permit itself to be impleaded therein, save in instances forming conceded and express exceptions. Secondly, in the doctrine so often ruled in this court, that the judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. To deny this position would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited by its own discretion merely.²⁵

Q. I can't see how to reconcile those two horns. How did Justice Daniel do it?

A. He escaped by way of the power to select remedies. He said:

The claimant had his option to refuse payment; the detention of the goods for the adjustment of duties, being an incident of probable occurrence, to avoid this it could not be permitted to effect the abrogation of a public law, or a system of public policy essentially connected with the general action of the government. The claimant, moreover, was not without other modes of redress, had he chosen to adopt them. He might have asserted his right to the possession of the goods, or his exemption from the duties demanded, either by replevin, or in an action of detinue, or perhaps by an action of trover, upon his tendering the amount of duties admitted by him to be legally due. The legitimate inquiry before this court is not whether all right of action has been taken away from the party, and the court responds to no such inquiry.²⁶

²⁵ *Ibid.*

²⁶ *Id.* at 250. Neither did the Court respond to any such question in *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272 (U.S. 1856). It upheld a summary procedure, without benefit of the courts, for the collection by the United States of moneys claimed to be due from one of its customs collectors. Justice Curtis' opinion has a much-quoted statement carefully limiting the holding, and foreshadowing later developments (*Id.* at 284):

Q. Why bother with an old case that ducked the issue that way? What is today's law? Has a taxpayer got a constitutional right to litigate the legality of a tax or hasn't he?

A. Personally, I think he has. But I can't cite any really square decision for the very reason I'm trying to tell you. The multiplicity of remedies, and the fact that Congress has seldom if ever tried to take them all away, has prevented the issue from ever being squarely presented.

For example, history and the necessities of revenue alike make it clear that the Government must have constitutional power to make people pay their taxes first and litigate afterward. Summary distraint to compel payment is proper.⁸⁷ And injunctions against collection can be forbidden.⁸⁸ But these decisions all proceeded on the express assumption that the taxpayer had other remedies.

Correspondingly, a remedy after payment may be denied if the taxpayer had a remedy before, as *Cary v. Curtis* shows. Or the remedy may be conditioned upon following exactly a prescribed procedure.⁸⁹

Q. The taxpayer has to watch out, then, or he'll lose his rights.

A. He certainly does. As Justice Holmes said in the *Rock Island* case, "Men must turn square corners when they deal with the government."⁹⁰ That's true of constitutional rights generally. Witness *Yakus* again, and the cases on proper presentation of federal questions in state courts.⁹¹ There isn't often a constitutional right to a second bite at the apple.

Q. Why do you think there is a right even to one bite in tax cases?

To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.

⁸⁷ *Springer v. United States*, 101 U.S. 386 (1880); *Phillips v. Commissioner*, 183 U.S. 389 (1931).

⁸⁸ *Snyder v. Marks*, 109 U.S. 189 (1883).

⁸⁹ *Rock Island, Ark. & La. Ry. v. United States*, 354 U.S. 141 (1910).

⁹⁰ *Id.* at 143.

⁹¹ *E.g.*, *Mellon v. O'Neil*, 375 U.S. 313 (1937); *Herndon v. Georgia*, 295 U.S. 441 (1935); *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649 (1942). See STEIN AND GREENMAN, *SUPREME COURT PRACTICE* 75-87 (1950).

A. For reasons of principle, which I'll develop later. And on the basis of some authority which you'll find in a footnote.⁸²

Q. I can find that unconvincing without even looking at your footnote. Granting the right, you still have to reckon separately with the power of Congress to prevent its vindication by controlling jurisdiction. May I remind you of *Sheldon* and *McCardle*?

A. There you go oversimplifying again.

III. THE BEARING OF SOVEREIGN IMMUNITY

Q. Well, if it's too simple for you, let me complicate it a little bit. Justice Daniel mentioned sovereign immunity in *Cary v. Curtis*. That gives a double reason, doesn't it, why Congress has an absolute power over legal relations between the Government and private persons? If it doesn't want to defeat private rights by regulating the jurisdiction of the federal courts, it can do it by withholding the Government's consent to suit.

A. I can't deny that that does complicate things. But the power of withholding consent isn't as nearly absolute as it seems.

Q. What mitigates it?

A. You have to remember, in the first place, that the immunity is only to suits against the Government. This isn't the place to go into the question of what constitutes such a suit. My point now is that the possibility remains, as *Cary v. Curtis* indicates, of a personal action against an official who commits a wrong in the name of the Government. Wherever the applicable substantive law allows such a remedy, the Government may be forced to protect its officers by providing a remedy against itself. The validity of any protection it tries to give may depend on its providing such a remedy and, indeed, the validity of other parts of its program. Consider, for example, the possibility that summary collection of taxes might be invalid if the Government did not waive its immunity to a suit for refund.

⁸² Among federal tax decisions the authority consists of several cases which could readily have been disposed of on the ground that the taxpayer had no right to a judicial hearing if the Court had been of that opinion, but in which the Court was at pains to show that a right satisfying the requirements of due process had been accorded. See, in particular, *Graham & Foster v. Goodcell*, 282 U.S. 409 (1931); *Anniston Mfg. Co. v. Davis*, 301 U.S. 337 (1937).

And the Court has several times held that the Due Process Clause of the Fourteenth Amendment entitles the taxpayer to an opportunity to contest the legality of state taxes. E.g., *Central of Georgia Ry. v. Wright*, 307 U.S. 127 (1937); *Brinkerhoff-Paris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930).

Too, the Government may be under other kinds of practical pressure not to insist on its immunity. Take Government contracts, for example. The law gives no immunity against being branded as a defaulter. The business of the Government requires that people be willing to contract with it.⁸⁰

Finally, no democratic government can be immune to the claims of justice and legal right. The force of those claims of course varies in different situations. If private property is taken, for example, the claim for just compensation has the moral sanction of an express constitutional guarantee; and it is not surprising that there is a standing consent to that kind of suit.⁸¹ And where constitutional rights are at stake the courts are properly astute, in construing statutes, to avoid the conclusion that Congress intended to use the privilege of immunity, or of withdrawing jurisdiction, in order to defeat them.⁸²

IV. LIMITATIONS ON THE JURISDICTION OF ENFORCEMENT COURTS AND COURTS IN THE POSITION OF ENFORCEMENT COURTS: THE POSSIBILITY OF JUDICIAL CONTROL

Q. Let's stop beating around the bush and get to the central question. The bald truth is this, isn't it, that the power to regulate jurisdiction is actually a power to regulate rights — rights to judicial process, whatever those are, and substantive rights generally? Why, that *must* be so. What can a court do if Congress says it has no jurisdiction, or only a restricted jurisdiction? It's helpless — helpless even to consider the validity of the limitation, let alone to do anything about it if it's invalid.

A. Why, what monstrous illogic! To build up a mere power to regulate jurisdiction into a power to affect rights having nothing to do with jurisdiction! And into a power to do it in contradiction to all the other terms of the very document which confers the power to regulate jurisdiction!

⁸⁰ This pressure made itself felt even before the Civil War and resulted in a blanket consent to suit in the Court of Claims. See generally RICHARDSON, *HISTORY, JURISDICTION AND PRACTICE OF THE COURT OF CLAIMS* (2d ed. 1885).

⁸¹ 28 U.S.C. §§ 1346 (a)(2), 1491(1) (Supp. 1952).

⁸² E.g., *Lynch v. United States*, 292 U.S. 571 (1934); *De La Rama S.S. Co. v. United States*, 344 U.S. 386 (1953); cf. *Bruner v. United States*, 343 U.S. 112 (1952) (withdrawal of jurisdiction affecting only the number of tribunals authorized to hear a claim).

For an instance of construction of the scope of consent in light of constitutional considerations, see *Clark v. Uebersee Finanz-Korporation*, 332 U.S. 480, 487-88 (1947).

Q. Will you please explain what's wrong with the logic?

A. What's wrong, for one thing, is that it violates a necessary postulate of constitutional government — that a court must always be available to pass on claims of constitutional right to judicial process, and to provide such process if the claim is sustained.

Q. Whose Constitution are you talking about — Utopia's or ours?

A. Ours. It's a perfectly good Constitution if we know how to interpret it.

Q. Have you got the patience to spell out just what my fallacies are?

A. There are so many of them it will take a little time.

Let's start with the most obvious one. Your point, at best, can apply only to plaintiffs. Perhaps a plaintiff *does* have to take what Congress gives him or doesn't give him, although I have my doubts about it. But surely not a defendant. It's only a *limitation* on what a court can do once it has jurisdiction, not a denial of jurisdiction, that can hurt a defendant. And if the court thinks the limitation invalid, it's always in a position to say so, and either to ignore it or let the defendant go free. *Crowell v. Benson*³⁶ and the *Yakus*³⁷ case make that clear, don't they?

Q. You're saying, then, that the power to regulate jurisdiction is subject in part to the other provisions of the Constitution?

A. No. It's subject in whole not in part. My point is simply that the difficulty involved in asserting any judicial control in the face of a total denial of jurisdiction doesn't exist if Congress gives jurisdiction but puts strings on it.

I'm also pointing out more than that. When the *way* of exercising jurisdiction is in question, rather than its denial, the constitutional tests are different.

It's hard, for me at least, to read into Article III any guarantee to a civil litigant of a hearing in a federal constitutional court

³⁶ 285 U.S. 22 (1932). In accordance with the statutory procedure, Benson brought suit to enjoin enforcement of a compensation award under the Federal Longshoremen's and Harbor Workers' Compensation Act on the ground that the injured worker was not in his employ and the claim, therefore, was not within the jurisdiction of the commissioner making the award. After hearing evidence *de novo* on the issue, the district court restrained enforcement. The Supreme Court affirmed the judgment construing the statute as requiring trial *de novo* on "jurisdictional" and "constitutional" facts. The Court took the view that Congress could not make an agency's determination of such facts binding upon the courts and that such a limitation, therefore, was not to be implied.

³⁷ *Yakus v. United States*, 321 U.S. 414 (1944). See note 30 *supra*.

(outside the original jurisdiction of the Supreme Court) if Congress chooses to provide some alternative procedure. The alternative procedure may be unconstitutional. But, if so, it seems to me it must be because of some other constitutional provision, such as the Due Process Clause.

On the other hand, if Congress directs an Article III court to decide a case, I can easily read into Article III a limitation on the power of Congress to tell the court *how* to decide it. Rutledge makes that point clearly in the *Yakus* case,³⁸ as the Court itself made it clear long ago in *United States v. Klein*.³⁹ That's the reason, isn't it, why Hughes invokes Article III as well as the Fifth Amendment in *Crowell v. Benson*? As he says, the case was one "where the question concerns the proper exercise of the judicial power in enforcing constitutional limitations."⁴⁰

Q. But *Crowell v. Benson* wasn't an enforcement case. It was a suit by an employer to set aside an award in favor of an employee.

A. Under the Act the award was enforceable only by judicial process. Congress chose to give the employer a chance to challenge an award in advance of enforcement proceedings. The Court was certainly entitled to assume in those circumstances, wasn't it, that whatever would invalidate an award in enforcement proceedings would invalidate it also in an advance challenge?

Q. I guess so. But that brings a lot of cases involving plaintiff's rights within the sweep of your principle, doesn't it?

A. Yes, when the plaintiffs are prospective defendants. What you have to keep your eye on, when a plaintiff is attacking governmental action, is whether the action plays a part in establishing a duty which later may be judicially enforced against him. If so,

³⁸ *Id.* at 463-68.

³⁹ 13 Wall. 128 (U.S. 1872). *Klein* recovered judgment in the Court of Claims under the Civil War enemy property acts which provided for the recovery of captured property or its value by the former owners if they had not been disloyal or had received a pardon. While the case was pending on appeal to the Supreme Court, Congress enacted a statute providing that in any case in which it appeared that the claimant had received a pardon containing a recital of previous disloyalty, the recital should be conclusive evidence of disloyalty, and the Court of Claims or the Supreme Court should lose jurisdiction and should dismiss the claim forthwith. The Supreme Court held the act unconstitutional and declined to apply it in *Klein's* case. The Court recognized the power of Congress to regulate both its own jurisdiction and that of the Court of Claims, but held the statute an attempt to prescribe a rule of decision retroactively, and hence an invasion of the judicial function.

⁴⁰ 285 U.S. at 58.

the court has to decide as a matter of construction — including possible problems of separability — whether an objection to a limitation on jurisdiction can be raised only in enforcement proceedings or can be asserted in advance.

Because of the wide power of Congress in the selection of remedies, which I spoke of before, the question usually *is* one of construction. But the inference ordinarily should be in favor of making the statute workable and constitutional as a whole. Once that inference is drawn, the court in the advance proceeding is substantially in the position of an enforcement court.

Q. You mean that in an advance challenge the court, regardless of any restriction on its jurisdiction, should consider and decide any question which it thinks the plaintiff would have a right to have it decide if he were a defendant?

A. I think you're hitting it. If the court disposes of the case on the advance challenge, the decision will be *res judicata*. And so, if the court thinks the restriction invalid, it has only the two choices of disregarding it or refusing to proceed to a decision and thus forcing the government to bring an enforcement proceeding. Since the purpose of the advance challenge is to make an enforcement proceeding unnecessary, the court ought ordinarily, as a matter of statutory construction, to make the first choice and treat the plaintiff now as if he were a defendant.

Q. Well, I'll admit that all this makes *Sheldon* and *McCardle* a little less frightening. But only a little less so. I'm wondering what there is to prevent Congress from by-passing the courts altogether. If a court has no jurisdiction at all, it obviously can't seize on the excuse of merely invalidating a limitation on its jurisdiction.

But before I ask you about that, let's see what Congress would have to gain by it — or the defendants to lose. When you come right down to it, what *are* the rights of a defendant in an enforcement proceeding?

V. LIMITATIONS ON THE JURISDICTION OF ENFORCEMENT COURTS: THEIR VALIDITY

A. The *Yakus* case and *Crowell v. Benson* give you a good starting-point. Most people reading *Yakus* concentrate on what the Court said Congress *could* do, and reading *Crowell* concen-

trate on what it said Congress could *not* do. I hope you won't make those simple mistakes.

Q. You'll have to spell that out for me. Take *Crowell* first.

A. *Civil Defendants*

A. Well, the solid or apparently solid thing about *Crowell* is the holding that administrative findings of non-constitutional and non-jurisdictional facts may be made conclusive upon the courts, if not infected with any error of law, as a basis for judicial enforcement of a money liability of one private person to another.

Q. What's so surprising about that?

A. It's worth thinking about even as a matter of due process and Article III judicial power. But stop and think particularly about the Seventh Amendment.

Q. No right of jury trial in admiralty.

A. Good. But the Seventh Amendment hasn't been treated as standing in the way of the *Crowell* result even when the admiralty answer wasn't available. Administrative proceedings haven't been regarded as "suits at common law."⁴¹

Q. My, the Seventh Amendment might have been a major safeguard against bureaucracy with a little different interpretation, mightn't it?

A. Don't build it up too much. How many administrative arrangements can you think of that involve establishment of a money liability?

Q. I'm still interested in what *Crowell* said Congress could *not* do. Isn't that solid?

A. Not very. So far as the case insists on trial *de novo*, it seems clear it has no germinal significance.⁴² Do you think it should have?

Q. But *Crowell* also spoke of the right to have the independent judgment of a court on constitutional and jurisdictional facts. That's important, isn't it, even if the court is confined to the administrative record?

⁴¹ See, e.g., *Wickwire v. Reinecke*, 275 U.S. 101, 105-06 (1927); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49 (1937). The few cases are collected in DAVIS, *ADMINISTRATIVE LAW* 305-06 (1951).

⁴² See, e.g., *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 257-58 (1940); *Davis v. Department of Labor*, 317 U.S. 249, 256-57 (1942); *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469 (1947); *Alabama Public Service Comm'n v. Southern Ry.*, 341 U.S. 341 (1951). And see Schwartz, *Does the Ghost of Crowell v. Benson Still Walk?*, 98 U. or PA. L. REV. 163 (1949).

A. It's a right with very different implications. That was the right insisted on in the *Ben Avon* case⁴³ on review of a state court decision, where of course it had to be rested solely on due process.

The *Ben Avon* part of the *Crowell* holding was reaffirmed in 1936, although in somewhat less rigorous form, in *St. Joseph Stock Yards Co. v. United States*.⁴⁴ That was a case coming from a three-judge district court involving a rate order of the Secretary of Agriculture under the Packers and Stockyards Act. The judgment sustaining the order was affirmed. But Chief Justice Hughes, prompted by the lower court's expression of doubts, went out of his way to emphasize that an "independent judicial judgment on the facts" (which actually had been exercised) was constitutionally necessary. He added, however, that such a judgment "does not require or justify disregard of the weight which may properly attach to findings upon hearing and evidence."⁴⁵ Justice Brandeis, concurring in result with Justices Stone and Cardozo, thought that "no good reason exists for making special exception of issues of fact bearing upon a constitutional right."⁴⁶ He said:

The supremacy of law demands that there shall be an opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality. But supremacy of law does not demand that the correctness of every finding of fact to which the rule of law is to be applied shall be subject to review by a court. If it did, the power of courts to set aside findings of fact by an administrative tribunal would be broader than their power to set aside a jury's verdict. The Constitution contains no such command.⁴⁷

Q. Where does the *Ben Avon-Crowell-St. Joseph* rule stand now?

⁴³ *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920). The Ohio Supreme Court upheld a public utility rate established by the state utility commission, reversing the lower court on the ground that the state statute did not permit the court to make findings of fact on review and that the commission's valuation of the utility's property was not unreasonable as a matter of law. The Supreme Court reversed, holding that where confiscation of property is claimed due process requires an independent judicial judgment on the facts. (Brandeis, Holmes, and Clarke dissenting.)

⁴⁴ 298 U.S. 38 (1936).

⁴⁵ *Id.* at 53.

⁴⁶ *Id.* at 73.

⁴⁷ *Id.* at 84.

A. Most commentators question its present vitality, at least in the field of civil liability.⁴⁸ Certainly, the recent decisions on rate-making, to which the commentators point, reflect such altered views of the applicable constitutional restraints as to leave little room for the *Ben Avon* question to arise within its original field.⁴⁹ The same thing is true in other areas of administrative action. Putting aside questions of personal liberty where the governing criteria are likely to be more rigorous, constitutionality, as distinguished from statutory authority, will rarely turn upon the concrete factual situation sought to be reviewed.

Q. The *Crowell* case also has a dictum that questions of law, including the question of the existence of evidence to support the administrative decision, must be open to judicial consideration.⁵⁰ And you quoted Brandeis as saying *that* was necessary to the supremacy of law. Have those statements stood up?

A. If I can speak broadly and loosely, I'll say yes — they *have* stood up.

Shutting off the courts from questions of law determinative of enforceable duties was one of the things *Yakus* assumed that Congress could *not* do. To be sure, that was a criminal case; but there's no reason to suppose the Court would have made a different assumption if the sanction had been civil.

Q. How do you explain cases like *Gray v. Powell*,⁵¹ and *NLRB v. Hearst Publications, Inc.*?⁵² Or, for that matter, *O'Leary v. Brown-Pacific-Maxon, Inc.*?⁵³ Didn't these cases allow the agencies to make final determinations of questions of law?

⁴⁸ See, e.g., DAVIS, ADMINISTRATIVE LAW 918-22 (1951); Benjamin, *Judicial Review of Administrative Adjudication: Some Recent Decisions of the New York Court of Appeals*, 48 COL. L. REV. 1, 27-32 (1948).

⁴⁹ See *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 600 (1942); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); *New York v. United States*, 331 U.S. 284 (1947).

However, the New York Court of Appeals has held itself bound by the *Ben Avon* principle until it is in terms repudiated by the Supreme Court. *Staten Island Edison Corp. v. Maltbie*, 296 N.Y. 374, 73 N.E.2d 705 (1947). And Massachusetts recently defined in *Ben Avon* terms the scope of review required by its own constitution. *Lowell Gas Co. v. Department of Public Utilities*, 324 Mass. 80, 84 N.E.2d 811 (1949).

⁵⁰ 285 U.S. at 46, 49-50.

⁵¹ 314 U.S. 402 (1942) (upheld administrative determination of the meaning of "producer" in the Bituminous Coal Act).

⁵² 322 U.S. 111 (1944) (upheld administrative determination of the meaning of "employees" in the Wagner Act).

⁵³ 340 U.S. 504 (1951) (upheld administrative determination of the meaning of "arising out of and in the course of employment" in the Longshoremen's Act).

A. That depends on how you define "law." I think Professor Davis is right in saying that the term "law" in the first sentence I quoted from Justice Brandeis has to be read "as excluding the body of rules and principles that grow out of the exercise of administrative discretion" — at least while the rules are in process of crystallizing.⁶⁴

In recent years we've recognized increasingly a permissible range of administrative discretion in the shaping of judicially enforceable duties. How wide that discretion should be, and what are the appropriate ways to control it, are crucial questions in administrative law.⁶⁵ But so long as the courts sit to answer the questions, the spirit of Brandeis' statement is maintained. And, since discretion by hypothesis is not law, the letter of it is not in question.

Q. But it's notorious that there are all kinds of administrative decisions that are not reviewable at all. Professor Davis devotes a whole fat chapter to "Nonreviewable Action" of administrative agencies.⁶⁶

A. Administrative law is a relatively new subject. Naturally there have been a number of ill-considered decisions. But if you look closely at Professor Davis' cases you'll find that almost all of them are distinguishable. Many of them don't involve judicially enforceable duties of the complaining party at all. Others involve political questions, or administrative questions in the old-fashioned sense.⁶⁷ Still others turn on this point of administrative discretion we were just talking about. The remainder were not themselves enforcement cases, and the opinions simply didn't face up to the question whether the validity of the restriction on jurisdiction should be judged as it would be in an enforcement proceeding.

Name me a single Supreme Court case that has squarely held

⁶⁴ See DAVIS, ADMINISTRATIVE LAW 33-34 (1951). Note that § 10 of the Administrative Procedure Act does not provide for judicial review when "agency action is by law committed to agency discretion." However, § 10(e) provides for the setting aside of agency action which constitutes an abuse of discretion. 60 STAT. 243, 5 U.S.C. § 1009(e) (1946).

⁶⁵ Similar yet distinct questions are involved in the problem of the appropriate scope of administrative discretion in devising remedies. See, e.g., *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611 (1946); *FTC v. Ruberoid Co.*, 343 U.S. 470 (1952).

⁶⁶ DAVIS, ADMINISTRATIVE LAW 812-67 (1951).

⁶⁷ See, e.g., *Federal Radio Comm'n v. General Electric Co.*, 281 U.S. 464 (1930); *Federal Radio Comm'n v. Nelson Bros. Co.*, 289 U.S. 266 (1933); *FPC v. Idaho Power Co.*, 344 U.S. 17 (1952).

that, in a civil enforcement proceeding, questions of law can be validly withdrawn from the consideration of the enforcement court where no adequate opportunity to have them determined by a court has been previously accorded.⁵⁸ When you do, I'm going back to re-think *Marbury v. Madison*.⁵⁹

Q. You put a lot of weight on the point of whether an enforceable legal duty is involved, don't you?

A. Yes.⁶⁰

B. Criminal Defendants

Q. You haven't mentioned criminal defendants so far. I suppose that all you've said, and more, applies to them. They have a right to trial by jury that isn't limited to offenses that were crimes at common law — and a lot of other specific guarantees, too.

A. Well, the same basic point certainly ought to apply. I don't believe that courts can be given criminal jurisdiction, and at the same time be told to exercise it in violation of the Constitution. *Yakus*, at least, went on that basis. It dealt directly with the scope of constitutional rights, with no nonsense about any question being foreclosed by the power to regulate jurisdiction.

⁵⁸ If a prior opportunity for review by a legislative court, such as the Tax Court, be regarded as adequate, the procedure for renegotiation of war contracts involves no such problem. Otherwise, it may.

The renegotiation provisions often operate *in invitum*, without notice when the contract was made. In *Lichter v. United States*, 334 U.S. 742 (1948), the Court held that a federal district court could not redetermine excessive profits in an enforcement proceeding brought by the United States, since the exclusive remedy was a petition for redetermination in the Tax Court. This left open the question whether the Tax Court's decision is reviewable either in a court of appeals or in an enforcement proceeding in the district court after the contractor has exhausted his prior remedies. Some of the issues in such cases, it should be noted, turn upon the exercise of discretion; but others involve clear questions of law.

One court of appeals has read the statutes as foreclosing the usual review of Tax Court decisions. *French v. War Contracts Price Adjustment Board*, 182 F.2d 560 (9th Cir. 1950). Another has found power to review a narrow group of constitutional and jurisdictional questions. See, e.g., *Maguire Industries, Inc. v. Secretary of War*, 185 F.2d 434 (D.C. Cir. 1950). The enforcement question seems not to have been presented. See generally Braucher, *The Renegotiation Act of 1951*, 66 HARV. L. REV. 270, 305-12 (1952).

⁵⁹ 1 Cranch 137 (U.S. 1803).

⁶⁰ Cf. § 10, Administrative Procedure Act, 60 STAT. 243, 5 U.S.C. § 1009 (1946):

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion —

(b) . . . Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Whether the courts define the rights too narrowly or too broadly, they are there to declare them — and whenever appropriate to overrule and re-declare.

There is significance, moreover, in the conformities to the traditional pattern of a criminal trial which *Yakus* assumed to be necessary as well as in the departures which it sanctioned. The departures were the withdrawal from the court or jury of certain questions of legislative fact and from the court of certain questions of law. But these departures were sanctioned only because an alternative procedure had been provided which, in the exigencies of the national situation, the Court found to be adequate. The alternative procedure for the decision of the questions of law was in a court; and everybody assumed it had to be.

Q. Does *Yakus* mark the maximum inroad on the rights of a criminal defendant to judicial process?

A. No, unfortunately it doesn't. We have to take account of two World War II selective service cases, *Falbo v. United States*,⁶¹ and *Estep v. United States*. "By the terms of" the selective service legislation, as Justice Douglas put it in *Estep*, "Congress enlisted the aid of the federal courts only for enforcement purposes."⁶² And so the question was sharply presented on what terms that could be done.

The Court held in *Falbo*, with only Justice Murphy dissenting, that a registrant who was being prosecuted for failure to report for induction (or for work of national importance) could not defend on the ground that he had been wrongly classified and was entitled to a statutory exemption.

Q. Doesn't that pretty well destroy your notion that there has to be some kind of reasonable means for getting a judicial determination of questions of law affecting liability for criminal punishment? All Congress has to do is to authorize an administrative agency to issue an individualized order, make the violation of the order a crime in itself, and at the same time immunize the order from judicial review. On the question of the violation of the order, all the defendant's rights are preserved in the criminal trial, except that they don't mean anything.

A. Whoa! *Falbo* doesn't go that far. In *Estep*, after the fighting was over, the case was explained — and perhaps it had actually been decided — on the basis that the petitioner in failing

⁶¹ 320 U.S. 549 (1944).

⁶² 327 U.S. 114, 119 (1946).

to report for induction had failed to exhaust his administrative remedies. Considering the emergency, the requirement that claims be first presented at the induction center was pretty clearly a reasonable procedure.

Q. How about *Estep*?

A. The petitioner there went to the end of the administrative road, and was indicted for refusing to submit to induction. The Court held that he was entitled to make the defense that the local board had "acted beyond its jurisdiction." Justice Douglas, speaking for himself and Justices Reed and Black, said:

The provision making the decisions of the local boards "final" means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant.⁶³

Justices Murphy and Rutledge concurred specially on the ground that the Court's construction was required by the Constitution. Justice Frankfurter thought the construction wrong but

⁶³ *Id.* at 122-23. Justice Douglas had a footnote here saying, "That is the scope of judicial inquiry in deportation cases where Congress has made the orders of deportation 'final.'" Query. See *Lloyd Sabauo Societa v. Elting*, 287 U.S. 329, 335-36 (1932); *Kessler v. Strecker*, 307 U.S. 22, 34 (1939); *Bridges v. Wixon*, 326 U.S. 135 (1945). But cf. *Heikkila v. Barber*, 345 U.S. 229 (1953).

The narrow scope of review which Justice Douglas describes was all that was given in *Cox v. United States*, 332 U.S. 442 (1947), another selective service case.

In *United States v. Spector*, 343 U.S. 169 (1952), the Court upheld the conviction of an alien for wilfully failing to make timely application for travel documents necessary for his departure after a deportation order was issued. Justice Jackson dissented on the ground that the statute was unconstitutional, since it made the validity of the deportation order conclusive on the enforcement court. The majority refused to consider this objection on the ground that it had not been argued.

In *Heikkila v. Barber*, the Court held that an alien who was at large after an order of deportation, and hence could not bring habeas corpus, was foreclosed also from getting a review of the order under § 10 of the Administrative Procedure Act, 60 STAT. 243, 5 U.S.C. § 1009 (1946). Does this indicate that such an alien who failed to seek travel papers would be automatically a felon, regardless of the validity of the order of deportation? In such a case, at least, would not the criminal court, on proper objection, be bound to examine the order?

To illustrate the importance of a prior administrative remedy, compare *United States v. Ruzicka*, 329 U.S. 287 (1946), with *Stark v. Wickard*, 321 U.S. 288 (1944). See also *Ewing v. Myttinger & Casselberry*, 339 U.S. 594 (1950).

concurred on the ground that there were other errors in the trial. Justice Burton and Chief Justice Stone dissented.

Q. Well, the holding in the end wasn't such a departure after all, was it?

A. Stop and think before you say that.

Except for two Justices who are now dead, the whole Court dealt with the question as if it were merely one of statutory construction. Three Justices of the Supreme Court of the United States were willing to assume that Congress has power under Article I of the Constitution to direct courts created under Article III to employ the judicial power conferred by Article III to convict a man of a crime and send him to jail without his ever having had a chance to make his defenses.⁶⁴ No decision in 164 years of constitutional history, so far as I know, had ever before sanctioned such a thing. Certainly no such decision was cited. For these three didn't even see it as a problem. There is ground to doubt whether the first three in the majority did either.

Bear in mind that the three dissenters from the Court's construction expressly recognized that the order of induction might have been erroneous in law. They said that the remedy for that was habeas corpus after induction. They seemed to say that the existence of the remedy of habeas corpus saved the constitutionality of the prior procedure. That turns an ultimate safeguard of law into an excuse for its violation. And it strikes close to the heart

⁶⁴ Would the force of the objection to a refusal to permit a criminal defendant to show that an order of induction was erroneous in law be destroyed if it were concluded that Congress might have made such an order a matter purely of the board's discretion? Is the power to do that material if the Congress never exercised it?

Because Congress might have excluded the courts altogether from the process of raising an army in crisis, would it follow that it also has the alternative of using them for the limited purpose of punishing as a civil crime a violation of a purely discretionary determination?

In criminal prosecutions of draft evaders during World War I, the question of the finality of the draft board's classifications apparently did not arise. See *Bell, Selective Service and the Courts*, 28 A.B.A.J. 164, 167 (1942). However, the courts were in general agreement that habeas corpus would be granted after induction where the classification was arbitrary or not based on substantial evidence. *E.g., Arbitman v. Woodside*, 258 Fed. 441 (4th Cir. 1919). See also cases collected in *Bullock, Judicial Review of Selective Service Board Classifications by Habeas Corpus*, 10 GEO. WASH. L. REV. 827, 829 n.7 (1942). There was some suggestion that a draftee could only obtain judicial review after induction. See *United States ex rel. Roman v. Rauch*, 253 Fed. 814 (S.D.N.Y. 1918). But see *Angelus v. Sullivan*, 246 Fed. 54 (2d Cir. 1917) (injunction against issuance of induction order denied because common law certiorari was available).

of one of the main theses of this discussion — that so long at least as Congress feels impelled to invoke the assistance of courts, the supremacy of law in their decisions is assured.

VI. DENIAL OF JURISDICTION: WITHHOLDING FROM PLAINTIFFS AFFIRMATIVE GOVERNMENTAL AID

Q. So much for defendants and prospective defendants. How about other kinds of plaintiffs? Have they any rights?

A. Before we can even start dealing with that question, we'll have to break it down into parts. An initial division which I find useful is between plaintiffs who are simply trying to get the Government's help, and those who are trying to protect themselves against extra-judicial governmental coercion — and whose claims thus reach much more closely to the foundations of liberty. Let's take the first group first, breaking it into two sub-groups.

A. Plaintiffs Wanting to Enforce Other Private Persons' Duties

Q. Do men have a constitutional right to judicial assistance against their fellow men?

A. Very possibly, at least when rights of action have already accrued. The portal-to-portal cases illustrate one type of problem of this kind. You will remember that when Congress acted to deprive both state and federal courts of jurisdiction to entertain the bonanza claims under the Fair Labor Standards Act to which previous Supreme Court decisions⁶⁵ had unexpectedly given rise, it was careful at the same time to outlaw the substantive liability.⁶⁶

Q. Why was that necessary when no court was left with jurisdiction to enforce the liability?

A. A few district courts looked at it that way, but the courts of appeals were mostly perspicacious enough to see that a total denial of any remedy, in either the state or federal courts, was not a mere regulation of jurisdiction. They applied the Act only after they had satisfied themselves that the liability had been validly extinguished.⁶⁷

⁶⁵ *Tennessee Coal Co. v. Muscoda Local*, 321 U.S. 590 (1944); *Jewell Ridge Corp. v. Local No. 6167*, 325 U.S. 161 (1945); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

⁶⁶ 61 STAT. 84 (1947), 29 U.S.C. §§ 251 *et seq.* (Supp. 1952).

⁶⁷ *Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d Cir. 1948), followed in *Addison v. Huron Stevedoring Corp.*, 2d Cir., March 20, 1953. In *Seese v. Bethlehem Steel Co.*, 168 F.2d 58 (4th Cir. 1948), Chief Judge Parker approached the decision of the question by sustaining the section destroying the claim to back

Q. Then this is a clear case of plaintiffs who *do* have a constitutional right of access to a federal court with jurisdiction to pass on the merits of their claims, isn't it?

A. Not so fast. We can't be sure of that. The Supreme Court never granted certiorari; and perhaps the courts of appeals' decisions are to be explained on grounds of statutory construction, or more accurately of separability. Perhaps the courts were simply unwilling to believe that Congress would have wanted the withdrawal of jurisdiction to be effective if the substantive action were invalid.

Q. You indicated that there was another type of case in this group.

A. Yes. Congress hasn't often tried to take away preexisting rights of action for judicial relief between private persons. The question is more likely to arise when a private plaintiff complains of the refusal of an administrative agency to make an order, favorable to him, against another private person.

A good illustration of this latter type is the situation in *Crowell v. Benson*⁶⁸ itself. Suppose the plaintiff complaining of the administrative decision in that case had been an employee denied an award instead of an employer called upon to pay one. Do you think the Court would have written the same opinion?

Q. Why not?

A. The employer in the actual case was being made to do something to his disadvantage. The employee in the supposed case simply failed to gain a hoped-for advantage. Do the two have an equal warrant to appeal to the courts? The employee, after all, couldn't even prove the soundness of his claim to the agency created for his special protection.

Haven't you noticed how frequently the protected groups in an administrative program pay for their protection by a sacrifice of procedural and litigating rights? The agency becomes their champion and they stand or fall by it. Does this phenomenon reflect a disregard or a recognition of the equities of the situation?⁶⁹

pay and then adding: "Whether the denial of jurisdiction would be valid if the provision striking down the claims were invalid is a question which does not arise." *Id.* at 65. The cases are collected in *Thomas v. Carnegie-Illinois Steel Corp.*, 174 F.2d 711 (3d Cir. 1949).

⁶⁸ See note 36 *supra*.

⁶⁹ See, e.g., *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 161 (1940). But cf. *Parker v. Fleming*, 319 U.S. 531 (1947). See Jaffe, *The Individual Right to Initiate Administrative Process*, 25 IOWA L. REV. 485 (1940); DAVIS, ADMINISTRATIVE LAW 460-64, 676-717 (1951).

Q. I can see the force of that point if the employee were getting something he never had before — like a consumer under the Federal Food, Drug, and Cosmetic Act. But the compensation system was imposed on longshoremen in lieu, at least in part, of prior rights of action at law and in admiralty.

A. Yes, that does seem to make a difference.

I wonder what you would think of *Switchmen's Union v. National Mediation Board*.¹⁰ There the union brought suit under the general federal question jurisdiction to set aside a Board order designating a rival union as the authorized collective bargaining representative. The union said the order was based on a misconstruction of the statutory provisions concerning the appropriate bargaining unit. But the Court collected from the silence of the statute an intention of Congress to preclude judicial review, and held that the alleged error of law could not be examined.

Q. The order, I suppose, resulted in an enforceable duty of the employer to bargain with the designated union?

A. Yes.

Q. Then if the employer had been denied review, the case would have met the challenge with which you ended the last section?

A. That's right. And Justice Douglas' opinion would apply to the employer just as readily as to the union. But you'd never gather from what he said a whisper of a suggestion that any special problem was involved.

Q. I gather that the unsuccessful union did not come under any enforceable duty *not* to bargain?

A. That's right. All it lost was the liberty to bargain with an employer free from an enforceable duty not to bargain with it.

Q. Then the case is a little like your supposititious inversion of *Crowell v. Benson*. But here the union's interest actually seems more important than the employer's. Don't you think the denial of review is pretty significant?

A. Not very. Opinions that don't face up to their problems aren't likely to have much growing power.

Q. Well, you've got me all up in the air now. What's the answer?

A. I don't think anybody, including the Supreme Court, has thought through to one. For present purposes we don't need to exhaust the question of just what constitutional rights of access to courts there are in this kind of situation. Our main interest is

¹⁰ 310 U.S. 297 (1943).

in the question of the extent to which the power to control jurisdiction is a power to impair these rights, whatever they may be. On this question I think you'll find that the answer here falls in with that in the remaining groups of problems.

B. Plaintiffs Complaining About Decisions In Connection With Non-Coercive Governmental Programs

Q. What's the next group of problems?

A. It's really a miscellany rather than a group. It's all the cases I can't stop to talk about now if I'm going to avoid occupying the field of administrative law entirely. Broadly, it's the cases of plaintiffs complaining about governmental decisions which do not involve the direct coercion of private persons.

More specifically, the group includes problems with respect to plaintiffs who are *neither* (a) trying to avoid becoming defendants, *nor* (b) complaining about a governmental decision concerning a judicially enforceable duty of another private person, *nor* (c) complaining about extra-judicial governmental coercion of themselves. For example, a plaintiff seeking review of a government contracting officer's decision which he had agreed in the contract should be final.⁷¹ Or a plaintiff seeking some statutory benefit from the government.

It's perfectly obvious that final authority to determine even questions of law can be given to executive or administrative officials in many situations not having the direct impact on private persons of a governmentally created and judicially enforceable duty, or of an immediate deprivation of liberty or property by extra-judicial action. These cases, by and large, are those falling in the third of Justice Curtis' three classes in *Murray's Lessee*.⁷² Some such situations may rise to the dignity of a constitutional problem. But whatever the constitutional rights to judicial process of these plaintiffs may be, the power of Congress to impair them seems to involve no distinctive problems. The problems appear to be the same as those discussed in the next section.

VII. DENIAL OF JURISDICTION: PLAINTIFFS COMPLAINING OF EXTRA-JUDICIAL GOVERNMENTAL COERCION

Q. All right, then, now comes the sixty-four dollar question we've been avoiding. What happens if the Government is hurting

⁷¹ *United States v. Moorman*, 338 U.S. 457 (1950).

⁷² 18 How. 272 (U.S. 1856); see note 26 *supra*.

people and not simply refusing to help them? Suppose Congress authorizes a program of direct action by Government officials against private persons or private property. Suppose, further, that it not only dispenses with judicial enforcement but either limits the jurisdiction of the federal courts to inquire into what the officials do or denies it altogether.

A. Relief Under General Jurisdiction

A. You sound as if you thought you finally had me in a corner. But after what we've been through the answer to this one is easy, isn't it — so long as there is any applicable grant of general jurisdiction?

Obviously, the answer is that the validity of the jurisdictional limitation depends on the validity of the program itself, or the particular part of it in question. If the court finds that what is being done is invalid, its duty is simply to declare the jurisdictional limitation invalid also, and then proceed under the general grant of jurisdiction.

Q. That can't be as easy as you make it sound. Is that what the federal courts actually do?

A. That's what they've often done.

Take the clearest case — an attempt by Congress to authorize the administrative imposition of infamous punishment. That, substantially, is *Wong Wing v. United States*,⁷³ one of the bulwarks of the Constitution. There Congress had directed that any Chinese person adjudged in a summary proceeding by any judge or United States commissioner to be in the country unlawfully should first be imprisoned at hard labor for not more than a year and then deported. In the exercise of its general jurisdiction in habeas corpus, the Court ordered the prisoners discharged from such imprisonment — without prejudice of course to their detention according to law for deportation.

In *Lipke v. Lederer*,⁷⁴ the Court found that a payment required by the tax laws was actually a penalty enforceable only by the processes of the criminal law. It exercised general federal question jurisdiction to enjoin summary collection, in spite of the statute prohibiting injunctions against federal taxes.

Q. In those cases the whole extra-judicial procedure was found unconstitutional. That's an unusual situation. What if the party

⁷³ 163 U.S. 228 (1896).

⁷⁴ 259 U.S. 557 (1922).

simply says that the executive officers are proceeding erroneously in his particular case?

A. If he has a constitutional right to have that question examined in court, and the court has general jurisdiction, it can disregard any special jurisdictional limitation and go ahead and examine it.

That's what the Court did, for example, in *Ng Fung Ho v. White*.⁷⁶ That case involved an administrative order to deport an asserted alien who claimed to be a citizen. On habeas corpus the Court held that the Due Process Clause entitled the claimant to a trial *de novo* and an independent judicial judgment on the issue of citizenship; and it directed the district court to give it to him. *Crowell*, you remember, relied on *Ng Fung Ho*.

Q. Is *Ng Fung Ho* any more solid now than *Crowell*?

A. On the trial *de novo* point, maybe not, if Congress tried expressly to override it. Possibly not even on the other point. In recent years *Ng Fung Ho* has been cited for the proposition that judicial review may be a constitutional requirement, without suggesting that its scope includes an independent judgment on the facts.⁷⁶ But I'd be surprised if the deportee claiming citizenship were ever denied, on the issue of citizenship, a review at least as broad as that called for, say, by Hughes' formulation in *St. Joseph*.⁷⁷

Q. What about a claim of citizenship by an applicant for admission to the country?

⁷⁶ 259 U.S. 276 (1922).

⁷⁶ See *Estep v. United States*, 327 U.S. 114, 120 (1946); Frankfurter, J., dissenting in *Stark v. Wickard*, 321 U.S. 288, 312 (1944).

⁷⁷ But cf. Emergency Detention Act of 1950, § 111(c), 64 STAT. 1028, 50 U.S.C. § 821(c) (Supp. 1952): "The findings of the Board as to the facts, if supported by reliable, substantial, and probative evidence, shall be conclusive." See Note, *The Internal Security Act of 1950*, 51 COL. L. REV. 606, 646 et seq. (1951).

For another problem akin to the alien problems about to be discussed, but touching the rights of citizens, consider passports. For years a passport was a mere facility and there was substance in the notion that its issuance rested in administrative discretion. But now going abroad without a passport may be a crime, and, apart from that, you can't ordinarily get on board a foreign-bound boat or plane without one. See the pioneering decision in *Bauer v. Acheson*, 106 F. Supp. 445 (D.D.C. 1952), holding that the revocation of the plaintiff's passport by the Secretary of State without notice and hearing was "without authority of law." See also Comment, *Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review*, 61 YALE L.J. 171 (1952); Note, *Passports and Freedom of Travel: The Conflict of a Right and a Privilege*, 41 GEO. L.J. 63 (1952).

A. That's an interesting present problem. If *United States v. Ju Toy*⁷⁸ is still law, the applicant for admission has no right to a *de novo* review of his claim of citizenship.⁷⁹ But lots of people have doubted whether *Ju Toy* could stand after *Ng Fung Ho*.

The Ninth Circuit, in particular, doubts it, at least as to prior residents, and accords them a *de novo* inquiry into citizenship in habeas corpus.⁸⁰ In 1940 Congress seemed to recognize the essential justice of this position when it provided a special statutory procedure for a judicial determination of citizenship.⁸¹ The Second Circuit thought that this made it unnecessary to reexamine *Ju Toy*.⁸² But the Immigration and Nationality Act of 1952 abolished the statutory procedure.⁸³ And so, the question whether the Ninth Circuit is right about the scope of review in habeas corpus has taken on new importance, and is likely to come to a head soon.

Q. But even admitted aliens have access to the courts on habeas corpus on the question of their right to enter or remain in the country, don't they?

A. Yes, although the scope of review, of course, falls short of trial *de novo*. Indeed, judicial review in exclusion and deportation cases is one of the most impressive examples of the general point I am making, and currently provides a testing crucible of basic principle.

The structure of review has been developed by the courts in the face of a statutory plan of administrative control which looked neither to their help nor interference. For years the statutes have provided that orders of the Secretary of Labor (now of the Attorney General) in these matters shall be "final."

Q. How then can aliens have any rights to assert in habeas corpus? I thought they came and stayed only at the pleasure of Congress.

A. The Supreme Court seemed to think so, too, at first. In its

⁷⁸ 198 U.S. 253 (1905).

⁷⁹ But cf. *Chin Yow v. United States*, 208 U.S. 8 (1908), per Holmes, J., in which the Court, after deciding that an applicant for admission claiming citizenship had been unfairly deprived by the administrative officers of access to evidence to prove his case to them, corrected the wrong by giving him a chance to prove the case to a court.

⁸⁰ *Carmichael v. Delaney*, 170 F.2d 239 (9th Cir. 1948).

⁸¹ Nationality Act of 1940, § 503, 54 STAT. 1171, 8 U.S.C. § 903 (1946).

⁸² *United States ex rel. Chu Leung v. Shaughnessy*, 176 F.2d 249 (2d Cir. 1949).

⁸³ See § 360(a), 66 STAT. 273, 8 U.S.C.A. § 1503(a) (Supp. 1952). The problem is discussed in *Developments in the Law — Immigration and Nationality*, 66 HARV. L. REV. 643, 673-74, 744-45 (1953).

earliest decisions the Court started with the premise of plenary legislative power and on that basis seemed to be prepared to take the word "final" in the statutes literally and to decline any review whatever, even in deportation cases.⁸⁴

Before long, however, it began to see that the premise needed to be qualified — that a power to lay down general rules, even if it were plenary, did not necessarily include a power to be arbitrary or to authorize administrative officials to be arbitrary. It saw that, on the contrary, the very existence of a jurisdiction in habeas corpus, coupled with the constitutional guarantee of due process, implied a regime of law. It saw that in such a regime the courts had a responsibility to see that statutory authority was not transgressed, that a reasonable procedure was used in exercising the authority, and — seemingly also — that human beings were not unreasonably subjected, even by direction of Congress, to an uncontrolled official discretion.⁸⁵

⁸⁴ The Chinese Exclusion Case, 130 U.S. 381 (1889) (admission); *Nishimura Eku v. United States*, 142 U.S. 651 (1892) (admission); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (deportation); *Lem Moon Sing v. United States*, 158 U.S. 538 (1895) (admission); *Li Sing v. United States*, 180 U.S. 486 (1901) (deportation); *Fok Yung Yo v. United States*, 185 U.S. 296 (1902) (admission); *Lee Lung v. Patterson*, 186 U.S. 168 (1902) (admission).

⁸⁵ The turning point was the Japanese Immigrant Case (*Yamataya v. Fisher*), 189 U.S. 86 (1903), involving an immigrant taken into custody for deportation four days after her landing. After referring to earlier cases cited in note 84, *supra*, the Court said:

But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends. . . . No such arbitrary power can exist where the principles involved in due process of law are recognized.

This is the reasonable construction of the acts of Congress here in question, and they need not be otherwise interpreted. . . . An act of Congress must be taken to be constitutional unless the contrary plainly and palpably appears. *Id.* at 100-01.

Compare Justice Holmes' formulation in *Chin Yow*, an admission case, *supra* note 79: "The decision of the Department is final, but that is on the presupposition that the decision was after a hearing in good faith, however summary in form." 208 U.S. at 12.

For other deportation cases, see *Low Wah Suey v. Backus*, 225 U.S. 460, 468 (1912); *Zakonaite v. Wolf*, 226 U.S. 272, 274-75 (1912); *United States ex rel Bilokumsky v. Tod*, 263 U.S. 149, 156-57 (1923); *Bridges v. Wixon*, 326 U.S. 135, 156 (1945). See also *United States ex rel. Iorio v. Day*, 34 F.2d 920 (2d Cir. 1929), and *Whitfield v. Hanges*, 222 Fed. 745 (8th Cir. 1915), both cited with approval in *Lloyd Sabaudo Societa v. Elting*, 287 U.S. 329, 334-36 (1932).

On admissions, see especially Justice Stone's summary of the law in the *Lloyd Sabaudo* case, *supra*. See also *Kwock Jan Fat v. White*, 253 U.S. 454, 457-58

Under the benign influence of these ideas, the law grew and flourished, like Egypt under the rule of Joseph. Thousands of cases were decided whose presence in the courts cannot be explained on any other basis.⁸⁶ But what the status of many of these cases is now is not altogether clear.

Q. Why?

A. There arose up new justices in Washington which knew not Joseph. Citing only the harsh precepts of the very earliest decisions, they began to decide cases accordingly, as if nothing had happened in the years between.⁸⁷

In the *Knauff* case, Justice Minton said that, "Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."⁸⁸ Since Congress has never expressly authorized any court to review an exclusion order, this statement either ignores or renders obsolete every habeas corpus case in the books involving an exclusion proceeding.

(1920), where the Court in setting aside an order excluding a person claiming to be a citizen said:

It is fully settled that the decision by the Secretary of Labor, of such a question as we have here, is final, and conclusive upon the courts, unless it be shown that the proceedings were "manifestly unfair," were "such as to prevent a fair investigation," or show "manifest abuse" of the discretion committed to the executive officers by the statute, *Low Wah Suey v. Backus*, . . . or that "their authority was not fairly exercised, that is, consistently with the fundamental principles of justice embraced within the conception of due process of law." *Tang Tun v. Edsell*, 223 U.S. 673, 681, 682. The decision must be after a hearing in good faith, however summary, *Chin Yow v. United States* . . . and it must find adequate support in the evidence. *Zakonaite v. Wolf* . . .

See generally DAVIS, *ADMINISTRATIVE LAW* 827-29 (1951); *Developments in the Law—Immigration and Nationality*, 66 HARV. L. REV. 643, 671-76, 681-82, 692-95 (1953), particularly the excellent discussion at pp. 671-76.

⁸⁶ See the hundreds of pages of decisions on the writ of habeas corpus in both admission and deportation cases listed under the heading *Aliens* in 3 FED. DIO. 137-457 (1940).

⁸⁷ See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (Interpreting the War Brides Act as permitting the wife of an American soldier to be excluded without a hearing for security reasons); *Shaughnessy v. United States ex rel. Mezel*, 345 U.S. 206 (1953).

For the uncontrolled power to deport an alien enemy, even after the cessation of actual hostilities, see the five-to-four decision in *Ludecke v. Watkins*, 335 U.S. 160 (1948). The frequently doctrinaire approach of the present Court to the general problem is sharply exposed in *Harislaides v. Shaughnessy*, 342 U.S. 580 (1952) (suggesting that the power of Congress to specify grounds for deportation is without limit).

⁸⁸ *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950).

On the procedural side, Justice Minton went so far as to say that, "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned,"⁸⁹ a patently preposterous proposition.

Justice Clark repeated and applied both statements in the *Mezei* case.⁹⁰

Q. Then we're back where we started half a century ago?

A. Oh no. The aberrations have been largely confined to admission cases. In deportations, for the most part, the Court has adhered to the sound and humane philosophy of the middle period. In some respects it has even extended its applications.⁹¹

What is happening is what so often happens when there has been a development in the law of which the judges are incompletely aware. Some decisions follow the earlier precedents and some the later, until the conflict of principle becomes intolerable, and it gets ironed out.

Q. Do you mean to say that you don't think there are any material differences between the case of an alien trying to get into the country and the case of one whom the Government is trying to put out?

A. No. Of course there are differences in these alien cases — not only those simple ones but many others.⁹² But such differ-

⁸⁹ 338 U.S. at 544.

⁹⁰ *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).

⁹¹ In *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), the Court decided that "for purposes of his constitutional right to due process," the position of an alien seaman previously admitted for permanent residence and applying for readmission after a four months voyage on an American vessel was to be "assimilate[d] . . . to that of an alien continuously residing and physically present in the United States." With his position thus assimilated, the Court held that the Constitution forbade it to construe the regulations permitting exclusion without a hearing for security reasons, under which *Knauff* and *Mezei* had been barred, as applying to him.

In *Wong Yang Sung v. McGrath*, 339 U.S. 33, 48-51 (1950), the Court held that a hearing was "required by statute" within the meaning of § 5 of the Administrative Procedure Act, on the ground that unless the statute were construed to require such a hearing "there would be no constitutional authority for deportation." The actual case was that of a seaman who had overstayed his shore leave. The Court referred to earlier cases as holding, "under compulsion of the Constitution," that a hearing is necessary "at least for aliens who had not entered clandestinely and who had been here some time even if illegally." *Cf. Heikkila v. Barber*, discussed in note 93 *infra*.

⁹² For example, if the alien is applying for admission, the force of his claim may vary according to whether he is coming for the first time or seeking to resume a permanent residence previously authorized. If he is coming for the first time, it may make a difference whether he is a stowaway or in possession of a duly

ences are material only in determining the content of due process in the particular situation. What process is due always depends upon the circumstances, and the Due Process Clause is always flexible enough to take the circumstances into account.

The distinctions the Court has been drawing recently, however, are of a different order. They are distinctions between when the Constitution applies and when it does not apply at all. Any such distinction as that produces a conflict of basic principle, and is inadmissible.

Q. What basic principle?

A. The great and generating principle of this whole body of law — that the Constitution always applies when a court is sitting with jurisdiction in habeas corpus. For then the court has always to inquire, not only whether the statutes have been observed, but whether the petitioner before it has been "deprived of life, liberty, or property, without due process of law," or injured in any other way in violation of the fundamental law.

That is the premise of the deportation cases,⁹³ and it applies in

authorized visa. If he has a visa, it may make a difference whether it is one for permanent residence or only for a temporary visit. If he is seeking to resume a previously authorized residence, it may make a difference whether he carries a reentry permit, border crossing card, or other document purporting to facilitate reentry.

Similarly, if the alien is resisting expulsion, the force of his claim may vary according to whether he entered legally or illegally. If he entered legally, it may make a difference whether he was duly admitted for permanent residence or came in only as a seaman, student, or other temporary visitor for business or pleasure.

⁹³ See, in addition to the cases cited in notes 85 and 91 *supra*, *Heikkila v. Barber*, 345 U.S. 229 (1953). Speaking for the Court, Justice Clark there held squarely that judicial review in deportation cases is "required by the Constitution." He said that "regardless of whether or not the scope of inquiry on habeas corpus has been expanded, the function of the courts has always been limited to the enforcement of due process requirements." *Id.* at 236.

It is to be observed that since the courts in habeas corpus have always enforced statutory requirements, too, Justice Clark must here be understood as saying that the Constitution gives the alien a right, among others, to have the statutes observed. The statement seems to apply equally to admission cases.

The Court gave this sweeping declaration of the constitutional rights of aliens an ironical twist by turning it in the particular case against the alien. It said that since review in habeas corpus was required by the Constitution rather than by the statute, (the statute making deportation orders in terms "final"), the case was one in which the "statutes preclude judicial review" within the meaning of § 10 of the Administrative Procedure Act. Hence a prospective deportee could not get review of an order for his deportation under that section, and since he had been set at large pending efforts to effectuate his removal he was for the moment without a remedy.

Was it reasonable to read the statute as if Congress had said, "We wish to

exactly the same way in admission cases. The harsh early decisions announcing a contrary premise applied such a contrary premise without distinction in both deportations and admissions. Indeed, Justice Minton cited early admission and deportation precedents indiscriminately in *Knauff*, without noticing that the principle which had compelled repudiation of the deportation precedents required repudiation also of the others.⁹⁴

That principle forbids a constitutional court with jurisdiction in habeas corpus from ever accepting as an adequate return to the writ the mere statement that what has been done is authorized by act of Congress. The inquiry remains, if *Marbury v. Madison* still stands, whether the act of Congress is consistent with the fundamental law. Only upon such a principle could the Court reject, as it surely would, a return to the writ which informed it that the applicant for admission lay stretched upon a rack with pins driven in behind his finger nails pursuant to authority duly conferred by statute in order to secure the information necessary to determine his admissibility. The same principle which would justify rejection of this return imposes responsibility to inquire into the adequacy of other returns.

Granting that the requirements of due process must vary with the circumstances, and allowing them all the flexibility that can conceivably be claimed, it still remains true that the Court is obliged, by the presuppositions of its whole jurisdiction in this area, to decide whether what has been done is consistent with due process — and not simply pass back the buck to an assertedly all-powerful and unimpeachable Congress.

Q. Would it have made any difference in *Knauff* and *Mezei* if the Court had said that the aliens were entitled to due process

except from this broad grant of judicial review all cases in which a statute precludes judicial review, even where the statute does so unconstitutionally, and even though the courts for half a century have been according judicial review under the statute, saying as they did so that they were construing the statute to authorize such review in order to save its constitutionality?"

⁹⁴ Justice Minton cited *Nishimura Ekiu* and *Fong Yue Ting*, *supra* note 84, and *Ludecke v. Watkins*, *supra* note 87, three times each. At the end of one string of these citations, he included an unexplained "*Cf. Yamataya v. Fisher*," *supra* note 85. He cited no other alien cases.

As will be seen from the cases in note 85, the earlier premise, in substance, had already been repudiated in admission as well as deportation cases. Justice Clark's statement in *Heikkila*, *supra* note 93, that the function of courts in habeas corpus cases "has always been limited to the enforcement of due process requirements" makes this unmistakable.

and had got it, instead of saying that they weren't entitled to it at all?

A. At least the opinions in that case might have been intellectually respectable. Whether the results would have been different depends upon subtler considerations. Usually, however, it *does* make a difference whether a judge treats a question as not properly before him at all, or as involving a matter for decision.

Take *Knauff*, for example. Remember that the War Brides Act was highly ambiguous on the point in issue of whether exclusion without a hearing was authorized. If one approaches such a question on the assumption that it is constitutionally neutral, as Justice Minton declared it to be, it is at least possible to resolve the doubt as he resolved it. But if one sees constitutional overtones, the most elementary principles of interpretation call for the opposite conclusion. Note how crucially important constitutional assumptions have been in the interpretation of statutes throughout this whole area.

Again, take the facts of *Mecsi*, in comparison with its *dicta*. The *dicta* say, in effect, that a Mexican wetback who sneaks successfully across the Rio Grande is entitled to the full panoply of due process in his deportation.⁹⁵ But the holding says that a duly admitted immigrant of twenty-five years' standing who has married an American wife and sired American children, who goes abroad as the law allows to visit a dying parent, and who then returns with passport and visa duly issued by an American consul, is entitled to nothing — and, indeed, may be detained on an island in New York harbor for the rest of his life if no other country can be found to take him.

I cannot believe that judges adequately aware of the foundations of principle in this field would permit themselves to trivialize the great guarantees of due process and the freedom writ by such distinctions. And I cannot believe that judges taking responsibility for an affirmative declaration that due process has been accorded would permit themselves to arrive at such brutal conclusions.

Q. But that is what the Court has held. And so I guess that's that.

⁹⁵ "It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." 345 U.S. at 212. Compare the facts of *The Japanese Immigrant Case*, note 85 *supra*, Justice Jackson's statement in *Wong Yang Sung v. McGrath*, note 91 *supra*, and the Court's holding in *Kwong Hai Chew v. Colding*, note 91 *supra*.

A. No, it isn't.

The deepest assumptions of the legal order require that the decisions of the highest court in the land be accepted as settling the rights and wrongs of the particular matter immediately in controversy. But the judges who sit for the time being on the court have no authority to remake by fiat alone the fabric of principle by which future cases are to be decided. They are only the custodians of the law and not the owners of it. The law belongs to the people of the country, and to the hundreds of thousands of lawyers and judges who through the years have struggled, in their behalf, to make it coherent and intelligible and responsive to the people's sense of justice.

And so, when justices of the Supreme Court sit down and write opinions in behalf of the Court which ignore the painful forward steps of a whole half century of adjudication, making no effort to relate what then is being done to what the Court has done before, they write without authority for the future. The appeal to principle is still open and, so long as courts of the United States sit with general jurisdiction in habeas corpus, that means an appeal to them and their successors.

B. In Default of Grants of General Jurisdiction

Q. Well, maybe so and maybe not so. In any event, what I thought was the sixty-four dollar question turned out to be only the thirty-two dollar one. You've brought in general grants of jurisdiction, and everything you've just been saying depends on them. What if those grants didn't exist?

A. But they *do* exist. And although they don't quite cover the waterfront, they take care of most of the basic situations. On the crucial matter of personal liberty, there is the habeas corpus statute we've just been talking about.⁹⁶ There are Sections 1346 and 1491 of the Judicial Code to assure just compensation for the taking of private property.⁹⁷ And, passing other special provisions, there is Section 1331 for denials of constitutional rights generally.⁹⁸ The principal hole is the jurisdictional amount requirement there, which, I admit, may be a big one.

Q. But suppose those statutes were repealed. Why wouldn't

⁹⁶ 28 U.S.C. § 2241 (Supp. 1952).

⁹⁷ 28 U.S.C. §§ 1346, 1491 (Supp. 1952).

⁹⁸ 28 U.S.C. § 1331 (Supp. 1952).

the executive department then be free to go ahead and violate fundamental rights at will?

A. That's a pretty unlikely situation, isn't it? You're supposing that two of the three branches of the federal government are going to gang up on the third. Congress would need the executive arm to seize persons and property, if it were going to act on an important scale. And the executive arm could be checked by the courts unless Congress had repealed the general grants of jurisdiction. If both of them did get together, it wouldn't be long before the voters had something to say, would it?

Besides, what would be the practical incentive to act that way in any very great number of situations? Remember the *Federalist* papers. Were the framers wholly mistaken in thinking that, as a matter of the hard facts of power, a government needs courts to vindicate its decisions? Is there some new science of government that tells how to do it in some other way?

Q. Granting all that, you can do a lot of things without courts, as the alien laws show. The problem can easily arise by deliberate action directed to an unpopular group, or even by inadvertence. Suppose Congress says flatly that no court shall have jurisdiction in such and such a situation, even in habeas corpus?

A. The habeas corpus part of it would be in direct violation of the Constitution. Article I, Section 9, Clause 2.

True, the Constitution does not explain what happens if the constitutional command is disobeyed. In *Ex parte Bollman*, Chief Justice Marshall said unequivocally that "the power to award the writ by any of the courts of the United States must be given by written law."⁹⁹ And in considering Section 14 of the Judiciary Act of 1789 as a source of jurisdiction he observed:

It may be worthy of remark, that this act was passed by the first congress of the United States, sitting under a constitution that had declared "that the privilege of the writ of habeas corpus should not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it." Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should

⁹⁹ 4 Cranch 75, 93 (U.S. 1807).

be enacted. Under the impression of this obligation, they gave to all the courts the power of awarding writs of habeas corpus.¹⁰⁰

However, where statutory jurisdiction to issue the writ obtains, but the privilege of it has been suspended in particular circumstances, the Court has declared itself ready to consider the validity of the suspension and, if it is found invalid, of the detention.¹⁰¹ In such an event the courts at least may speak, though they may still be helpless to enforce their orders if they are defied.¹⁰²

Q. Habeas corpus has a special constitutional position. But suppose Congress is in dead earnest about withdrawing general jurisdiction in a special class of cases arising under the Constitution. Do you mean that it could only accomplish that by repealing Section 1331 *in toto*, on the theory that a mere amendment might be declared unconstitutional and the prior Section 1331 then left free to operate? Or that it couldn't accomplish it even by a total repealer, since the repealer could be declared unconstitutional?

A. Well, now, I'll have to stall a little. Habeas corpus aside, I'd hesitate to say that Congress couldn't effect an unconstitutional withdrawal of jurisdiction — that is, a withdrawal to effec-

¹⁰⁰ *Id.* at 94.

¹⁰¹ *Ex parte Milligan*, 4 Wall. 2 (U.S. 1866).

¹⁰² *Cf. Taney, C.J., in Ex parte Merryman*, 17 Fed. Cas. 153, No. 9487 (C.C.D. Md. 1861):

I have exercised all the power which the constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome. It is possible that the officer who has incurred this grave responsibility may have misunderstood his instructions, and exceeded the authority intended to be given him; I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the circuit court of the United States for the district of Maryland, and direct the clerk to transmit a copy, under seal, to the President of the United States. It will then remain for that high officer in fulfillment of his constitutional obligation to "take care that the laws be faithfully executed," to determine what measures he will take to cause the civil process of the United States to be respected and enforced.

See ROSSITER, *THE SUPREME COURT AND THE COMMANDER-IN-CHIEF* 18 *et seq.* (1951).

The disgraceful effort of the Commanding General in Hawaii to prevent the District Court from entertaining a petition designed to test the validity of the purported suspension of the writ and the regime of martial law is recounted in McCulloch, *Now It Can Be Told: Judge Metzger and the Military*, 35 A.B.A.J. 365 (1949). See also Fairman, *The Supreme Court on Military Jurisdiction: Martial Rule in Hawaii and the Yamashita Case*, 59 HARV. L. REV. 833 (1946); Armstrong, *Martial Law in Hawaii*, 29 A.B.A.J. 698 (1943); Anthony, *Hawaiian Martial Law in the Supreme Court*, 57 YALE L.J. 27 (1948); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). But *cf. King, The Legality of Martial Law in Hawaii*, 30 CALIF. L. REV. 599 (1942); Houston, *Martial Law in Hawaii, A Defense of the War-Time Military Governor*, 36 A.B.A.J. 825 (1950).

tuate unconstitutional purposes — if it really wanted to. But the Court should use every possible resource of construction to avoid the conclusion that it did want to.

Q. That's the second or third time you've said something like that. What basis for it have you?

A. Sound principle. Our whole constitutional history shows that Congress generally doesn't intend to violate constitutional rights, and a court ought not readily to assume any sudden departure.

But there's a deeper reason which follows from what we were saying a moment ago. In the end we have to depend on Congress for the effective functioning of our judicial system, and perhaps for any functioning. The primary check on Congress is the political check — the votes of the people. If Congress wants to frustrate the judicial check, our constitutional tradition requires that it be made to say so unmistakably, so that the people will understand and the political check can operate.

Q. But you still haven't answered the question of what happens if Congress *does* withdraw jurisdiction unmistakably or if, by inadvertence or whatever, there just isn't any grant of jurisdiction.

A. One current situation may present that question. The present habeas corpus statute authorizes courts and judges to issue the writ only "within their respective jurisdictions." *Ahrens v. Clark*¹⁰⁰ held that the quoted language precluded the district court for the District of Columbia from inquiry into restraint in a New York district. This was held to be so even though the defendant Attorney General had issued the orders involved and had supervision of the custodians. And the defect was held to be one of jurisdiction which could not be waived. The Court reserved the question of possible application of this decision to persons held abroad and so not under restraint in any judicial district.

Q. You mean that such persons might have no access to the writ at all?

A. Exactly. But the Court of Appeals of the District of Columbia considered any such conclusion inadmissible in the *Eisen-trager* case, and held that the action should be entertained regardless. It said, without limitation to the habeas corpus problem, that the provisions of Article III "were compulsory upon Congress to

¹⁰⁰ 335 U.S. 188 (1948).

confer the whole of the federal judicial power upon some federal court."¹⁰⁴

Q. I should think the government would have taken that case up.

A. It did. But the victory it won was equivocal. The petitioners for the writ were German nationals, confined in Germany upon conviction of war crimes by a United States military commission in China. The Supreme Court held that, as enemy aliens, they had failed to state a case. But whether this was for the reason that their confinement was legal or, though illegal, irremediable, the opinion leaves obscure.¹⁰⁵ Thus the position of a citizen im-

¹⁰⁴ *Eisentrager v. Forrester*, 174 F.2d 961 (D.C. Cir. 1949). Judge Prettyman wrote:

We think that if a person has a right to a writ of habeas corpus he cannot be deprived of the privilege by an omission in a federal jurisdictional statute. This conclusion follows from these premises. *First.* The right to habeas corpus is an inherent common law right. *Second.* The Federal Government cannot suspend the privilege, except when, in cases of rebellion or invasion, the public safety may so require. . . . *Third.* Congress could not effectuate by omission that which it could not accomplish by affirmative action. So, if the existing jurisdictional act be construed to deny the writ to a person entitled to it as a substantive right, the act would be unconstitutional. It should be construed, if possible, to avoid that result.

It may be reasoned that "courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction," and that, therefore, a federal court has no jurisdiction outside that which is conferred by congressional enactment, a written law. It might be, theoretically at least, that in ordaining and establishing and conferring jurisdiction upon the inferior courts, Congress might omit mention of some case or cases arising under the Constitution or laws of the United States. In such event, the argument from the above-stated premise might be that the contestants in that controversy were deprived of a forum for the adjudication of their dispute. We doubt that the affirmative conclusion to that proposition would be valid if the case concerned the authority of officials of the United States to act. It is established that a state court cannot inquire, upon petition for habeas corpus, into the validity of the confinement of a person held under the authority of the United States. Therefore, unless the federal jurisdictional statute be construed as co-extensive with governmental action by United States officials, such action outside the specifications of the statute would be wholly immune from judicial power; in other words, outside the necessity for compliance with the constitution. To state the proposition would seem to refute it.

Moreover, the constitutional grant of judicial power to the Federal Government extends "to all Cases, in Law and Equity, arising under" the Constitution and laws of the United States and under the treaties made under its authority. And the Constitution further provides that the judicial power of the United States "shall be vested" in the Supreme Court and in such inferior courts as Congress may establish. It was held early in our history that these provisions were compulsory upon Congress to confer the whole of the federal judicial power upon some federal court [citing *Martin v. Hunter's Lessee*]. The Supreme Court has denied that it has jurisdiction to issue a writ upon petition of a person confined outside the United States. It follows that if the case presented by these appellants arises under the Constitution, laws or treaties of the United States, as it clearly does, jurisdiction to entertain it is in some district court by compulsion of the Constitution itself. *Id.* at 965-66.

¹⁰⁵ *Johnson v. Eisentrager*, 339 U.S. 763 (1950). *Cf.* *Ludecke v. Watkins*, 335 U.S. 160 (1948).

prisoned abroad who states a genuine challenge to the legality, or even the constitutionality, of his detention remains undecided.¹⁰⁶

VIII. CONCLUSION

Q. At least the Court in *Eisentrager* didn't squarely accuse Congress of intending to leave constitutional rights without a remedy, where Congress hadn't said that. But it ducked the ultimate question, just as you've done so far.

A. I've given all the important answers to that question, haven't I? I would have thought the rest was clear. Why, it's been clear ever since September 17, 1787.

Q. Not to me.

A. The state courts. In the scheme of the Constitution, they are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones. If they were to fail, and if Congress had taken away the Supreme Court's appellate jurisdiction and been upheld in doing so,¹⁰⁷ then we really would be sunk.

Q. But Congress can regulate the jurisdiction of state courts, too, in federal matters.

A. Congress can't do it unconstitutionally. The state courts always have a general jurisdiction to fall back on. And the Supremacy Clause binds them to exercise that jurisdiction in accordance with the Constitution.

¹⁰⁶ See Wolfson, *Americans Abroad and Habeas Corpus: The Trap Begins to Close*, 10 FED. B.J. 69 (1948); Perlman, *Habeas Corpus and Extraterritoriality: A Fundamental Question of Constitutional Law*, 36 A.B.A.J. 187 (1950); Note, *Habeas Corpus Protection Against Illegal Extraterritorial Detention*, 51 COL. L. REV. 368 (1951).

¹⁰⁷ The vulnerability of the Supreme Court's appellate jurisdiction to control by Congress has led recently to serious proposal of amendment of the Constitution. Initiated by the Association of the Bar of the City of New York, supported by former Justice Roberts and, after some conflict of views, by the American Bar Association, the suggestion is that Article III, Section 2, be amended to provide in substance that the Supreme Court shall have appellate jurisdiction in all cases arising under the Constitution of the United States, both as to law and fact, with such exceptions and under such regulations as the Court shall make. See 34 A.B.A.J. 1072-73 (1948); Roberts, *Now is the Time: Fortifying the Supreme Court's Independence*, 35 A.B.A.J. 1 (1944); 75 A.B.A. REP. 116 (1950); Tweed, *Provisions of the Constitution Concerning the Supreme Court of the United States*, 31 B.U.L. REV. 1 (1951). On the opposite problem, see Fite and Rubinstein, *Curbing the Supreme Court—State Experiences and Federal Proposals*, 35 MICH. L. REV. 762 (1937).

How much danger is there that any sustained attack upon judicial review will take the form of a contraction of the Supreme Court's appellate jurisdiction, leaving "inferior" federal and/or state courts to speak the final words?

Q. But the Supreme Court could reverse their decisions.

A. Not lawfully, if the decisions were in accordance with the Constitution. Congress can't shut the Supreme Court off from the merits and give it jurisdiction simply to reverse. Not, anyway, if I'm right that the implications of *Estep* were an aberration, and that jurisdiction always is jurisdiction only to decide constitutionally.

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PROVISIONS OF THE CONSTITUTION CONCERNING THE SUPREME COURT OF THE UNITED STATES***HARRISON TWEED******INTRODUCTION**

Notwithstanding the title, this is not an attempt to tell the story of the drafting of the Constitution or even of those parts of it which concern the judiciary. My purpose is much narrower. It is to discuss the power of the Supreme Court of the United States to set aside legislation on the ground that it violates a provision of the Constitution. Most people, including many lawyers, would think that there is not much to discuss and that the Constitution clearly gives the Supreme Court absolute jurisdiction to invalidate an act of Congress or of a state legislature as unconstitutional. There are comparatively few who recognize that under the express words of the Constitution and a flat decision of the Supreme Court¹ Congress can largely, if not entirely, deprive the Court of this jurisdiction. The reason for the lack of general recognition of this constitutional right is that Congress has only once directly exercised that power.

An article which appeared in October, 1946, in the Record, published by The Association of the Bar of the City of New York, entitled "In Time of Peace Prepare for War," suggested certain amendments to the Constitution to strengthen the Supreme Court and to protect its position against attack by Congress. It recommended that a time when there is no political or other controversy on the point is the appropriate moment for intelligent and non-partisan action. These amendments have, in substance, been approved by The Association of the Bar of

*The Gasper G. Bacon lectures, delivered at Boston University on November 13, 14 and 15, 1950.

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¹*Ex parte McCordle*, 7 Wall. 506 (1868).

the City of New York, the New York State Bar Association and the American Bar Association.

The most fundamental of these amendments fixes beyond change by Congress or otherwise, save by further constitutional amendment, the power of the Supreme Court, acting by a majority, to declare void legislation which in the judgment of the Court is in conflict with the Constitution. It is to this proposed amendment that attention will, for the most part, be directed.

Another suggested amendment fixes the number of the Court at nine, thus eliminating the risk that Congress on its own initiative or under the leadership of the executive might increase the number for purposes of creating a majority in sympathy with congressional policies. This, as things now stand, Congress has the right to do—to any figure it may fancy.

The other proposed amendments are designed to assure efficiency, morale and independence. One calls for compulsory retirement at the age of seventy-five and the other disqualifies any member of the Court as a candidate for President or Vice President until five years after retirement or resignation from the bench.

The arguments for and against these proposals will be stated in the third part of this article. The first and second parts will deal with the drafting of the Constitutional provisions and their interpretation and the attitude of Congress and the country towards the Court from time to time. Some of the historical discussion will seem elementary to lawyers but may not be familiar to others.

I.

THE DRAFTING OF THE CONSTITUTIONAL PROVISIONS AND THEIR INTERPRETATION

It is probably permissible to refresh memories of the setting in which the Constitution was framed. Everybody knows about the Boston Massacre, the Tea Party and the disorders in New York which followed the harshness of Parliament and led to even greater harshness. In September, 1774, the First Continental Congress assembled in Philadelphia, where only Georgia was unrepresented. A decision was immediately reached to stop all imports and, within a year, all exports. There was also a resolution by which the Continental Congress approved the opposition of Massachusetts to the recent acts of Parliament

and declared that if force should be used by Great Britain "all America ought to support" resistance. In 1775 Parliament declared Massachusetts in rebellion and offered the Crown the resources of the Empire to suppress the revolt. Paul Revere rode on the night of April 19, 1775, and the next day the Battle of Concord was fought.

Thomas Paine's pamphlets, arguing that independence was essential, aroused the spirit of the people and informed them of the principles involved. Chief among them was the doctrine of a higher or natural law, as expounded in England at the time of Magna Carta, which justified resistance to the British in any form or manner.

At the meeting of Congress in June, 1776, Richard Henry Lee of Virginia moved a resolution for independence which John Adams seconded. A committee of five, with Thomas Jefferson as draftsman, prepared a formal declaration of independence which was adopted on July 2 and proclaimed on July 4. It was more than a defiant declaration. It expressed the philosophical basis upon which the country was prepared to stand and go forward. Because some have forgotten and because those who remember will welcome repetition, I quote the following:

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form as to them shall seem most likely to effect their Safety and Happiness."

The surrender of Cornwallis at Yorktown in 1781 practically ended the war, although no treaty of peace was signed until 1783. Following the peace the several states, each in its own way and against varying degrees of opposition, proceeded to provide local government and to regulate ownership of land, taxation and education. There was, however, a general sense of frustration on account of the lack of a national government. The Articles of Confederation of March, 1781, were feeble and inadequate. There was no national executive and there were no national courts. The only legislature was the Continental Congress,

consisting of one house in which each state had a single vote. As has been written :

"The American people still had to show that they possessed a genuine capacity for self-government—for making a success of their republic. They still had to show that they could solve the problem of imperial organization. They had not yet proved it. Their 'league of friendship' seemed to be turning into a league of dissension. Their Congress was sinking into utter contempt. The quarrels among the states were growing positively dangerous."²

There was good fortune in two features of the situation. One was that the Articles of Confederation were thoroughly defective and clearly inadequate. No mere tinkering with them could suffice. The other was that a serious commercial depression began in 1786. Only a real crisis could have made a powerful central government acceptable to those who believed so strongly in local government and the importance of the states. The desperateness of the situation cannot be exaggerated.

It was largely the audacity and eloquence of Alexander Hamilton which in 1786 led to a call upon the states to appoint commissioners to meet in Philadelphia to take action "to render the Constitution of the Federal government adequate to the exigencies of the Union." After appropriate protestation, Congress supported the plan and the legislatures of all the states, except Rhode Island, elected delegates to the Convention. It is interesting that although a state could send as many delegates as it liked, each state had only one vote. And it was fortunate that economy restricted the number so that only fifty-five men in all attended. At the close only thirty-nine were present. No full report of the debates was preserved, but the journals kept by members—and particularly by Madison—show the high order of the discussion.

Almost everyone is familiar with the names of the more active members of the Convention—Madison, Hamilton, Washington, Franklin, Jay and Morris. It is not so often remembered that Jefferson was abroad, that Patrick Henry refused election and that the radicals Tom Paine, Sam Adams and Christopher Gadsden had not been selected by their respective states. On the whole, the members of the Convention were of the well-to-do, if not the aristocratic, part of the population. But there were among them those who held more democratic ideas. Perhaps the unusual, if not unique, feature of the Convention

²NEVINS & COMMAGER 116.

was the extent to which the points of view and the debates were inspired by a knowledge of political philosophy and an insistence upon sound principles of government.

It was fundamental throughout the deliberations of the Convention that the government to be established was to be one limited by a written constitution. No one had any such reverence for the government of the mother country as to incline him towards an unwritten constitution as a framework of government. And it was to be an essential part of the new government that it should be a representative republic rather than a people's direct democracy. If there are to be regrets that the precise plans of the Founding Fathers have not been followed through the years, one of them must be that the theory that men are to be elected to legislative office on the basis of ability to handle problems according to their own wise judgment has been discarded, so that today legislators are elected chiefly because the platform of their party pleases the people and they will comply with it in order to assure re-election.

The gravest problem which faced the Convention was the achievement of a national government which would have the necessary power and yet be acceptable to the advocates of states' rights. An example of the sound and philosophic judgment of the Convention is disclosed in the initial determination that the powers of the national government must be expressly stated because the states were to lose the powers the new government was to have. The rest of the usual powers of government were to remain with the states and did not require enumeration. It was also early agreed that there should be three distinct branches of government, pursuant to the conception that each would restrain and counterbalance the others and that none could dominate.³

³The arrangement has been summed up in NEVINS & COMMAGER:

"Each of the three branches was independent and co-ordinate, and yet each was checked by the others. Congressional enactments did not become law until approved by the President; the President in turn had to submit many of his appointments and all of his treaties to the Senate and might be impeached and removed by Congress. The judiciary was to hear all cases arising under the laws and the Constitution and, therefore, had a right to interpret both the fundamental law and the statute law. But the judiciary were appointed by the President and confirmed by the Senate, while they, too, might be impeached by Congress. Since the Senators were elected by the state legislatures for six-year terms, since the President was chosen by an electoral college, and since the judges were appointed, no part of the government was exposed to direct public pressure except the lower house of Congress. Moreover, officers of government were chosen for such

In achieving a national government, the decision to set up a legislature of two branches was essential and went far to reconcile the differences which otherwise would have arisen between large and small states. Of much more—indeed primary—importance was the fundamental decision which has been called the kingpin of the Constitution, that the Federal government should not attempt to operate through the state governments but should operate directly on the individual citizens themselves. Without this there would have been no nation at all. This was accomplished by that brief paragraph in Article VI, stating:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

There remained the question whether nine of the thirteen states would ratify. Before the end of 1787 Delaware, Pennsylvania and New Jersey had done so. But there was still grave doubt whether Massachusetts, New York and Virginia would follow. The ninth state, New Hampshire, ratified on June 21, 1788.

Enough—probably too much—of background. It is extraordinary how little discussion there was about the Supreme Court either in the Constitutional Convention or in the ratifying conventions. Such as there was concerned mostly the original jurisdiction of the Court. As time has passed, the importance of that jurisdiction of the Court has become less and less and for us it is entirely irrelevant.

Article III of the Constitution deals with the judiciary. It contains less than 400 words as compared with 3,000 in the preceding articles covering the legislative and the executive. Section 1 of Article III reads:

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

a wide variety of terms, ranging from life to two years, that a complete change in personnel could not be effected except by revolution." p. 30.

The first paragraph in Section 2 reads as follows:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State; between Citizens of different States, —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

The second paragraph says that "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction." It goes on to say, and these are the important words:

"In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

The only other words in the original Constitution which even indirectly affect the power of the Supreme Court are those in Section 4 of Article II, which read:

"The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

Looking at the words of the Constitution and asking the question whether they give the Supreme Court power to invalidate acts of Congress as unconstitutional, two things are clear.

First, the provisions do not expressly—but may, impliedly—give that power.

Second, if they do give that power it is nevertheless subject to "such exceptions, and under such regulations as the Congress shall make."

Clearly, there is no express statement giving the Court appellate jurisdiction on all questions concerning constitutionality of legislation and thus giving the power to declare acts of Congress void. But it is generally admitted that this jurisdiction and power are to be implied.

Otherwise Congress would have acquired the same arbitrary power that Parliament had, and the consistency of its legislation with the provisions of the Constitution would have been purely a matter of the conscience and common sense of Congress. Very clearly, the Constitutional Convention did not intend any such situation as that.

The drafters of the Constitution were as anxious to prevent tyranny through a legislative body as through a monarch. Many of them had pondered Rousseau's question, "But if great princes are rare, how much more so are great legislators?" They had read Locke and Montesquieu and learned that a legislature designed to limit the power of a sovereign executive must itself be kept within bounds. Even Jefferson, sailing for Europe shortly before the Constitutional Convention, wrote: "One hundred and seventy-three despots would surely be as oppressive as one. . . . An elective despotism was not the government we fought for." He knew that the anti-British feeling in this country was directed as much at Parliament as at the King and that the people wished to do away with arbitrary power in anybody's hands.

The question of judicial versus legislative supremacy had been recognized and vehemently debated in the separate states before the Constitutional Convention. The strongest support for what has been called the unique doctrine of judicial supremacy was found in the American tradition of a written Constitution defining the powers of the different instrumentalities of government. The Mayflower Compact which was made on the landing of the Pilgrims in 1620 is sometimes called the first constitution in America, although the nature of that instrument hardly warrants the statement. A few years later, in 1639, Connecticut adopted as its political plan the so-called Fundamental Orders of Connecticut. These and other similar documents furnished the basis for a tradition that the framework of government should be in a written instrument. It was a logical next step that the instruments should contain a statement of the relative powers of the different instrumentalities of government. Another step was necessary to designate the instrumentality of government which should have the right to interpret the extent of the respective powers of the departments as stated in the written instrument.

Obviously, most of those who attended the Constitutional Convention recognized the existence and importance of the problem whether the ultimate power of interpretation should rest in Congress as the legislative

body or be put in the hands of the judiciary with the right to decide whether or not Congress or the executive had transgressed the limit of their powers as defined by the Constitution. Although it is the general and better opinion that the Convention intended that the Supreme Court should have the power to interpret the Constitution,⁴ there are those who disagree.⁵

There is the intermediate position that the Founding Fathers intentionally left the question open. Thus, William Draper Lewis, in "Interpreting the Constitution," says that "Many reasons have been advanced for this omission, but no valid excuse. The matter was vital and they neglected it." He adds:

"There is one explanation of this failure by the Convention to act that I submit with diffidence. It is that there existed among the leaders the fear that, should the matter be seriously argued in the Convention with an insistence on a definitive decision, the Constitution's adoption by the Convention or its adoption by the people of the several States would be jeopardized because it would create a long wrangle over who should be the final interpreter, the Congress, the Supreme Court, or some body especially created for that purpose. Perhaps also there was the belief that if nothing were said the Supreme Court or the Congress would become the ultimate arbitrator, either of these solutions being satisfactory to the more federal-minded members. If there is anything in the fear which I have postulated, we can excuse their 'sin of omission' and turn to events which have embodied in our unwritten Constitution the rule that the authoritative interpreter of the written Constitution is the Supreme Court." (p. 12)

We shall never know exactly what the Founding Fathers had in their heads or exactly what they intended by what they put on paper. The same thing is true to a lesser extent as to the people of the states who elected the members of the state conventions which ratified the Constitution. But, as to the latter, it would seem that they must have been aware not only of the problem but also of the answer in favor of judicial supremacy given by some of those most active in the Constitutional Convention. The *Federalist*, written and distributed anony-

⁴SAMUEL MORISON, *THE GROWTH OF THE AMERICAN REPUBLIC*, Vol. I, p. 80; CHARLES A. BEARD, *THE SUPREME COURT AND THE CONSTITUTION*; A. C. McLAUGHLIN, *THE COURTS, THE CONSTITUTION AND THE PARTIES*; EDWIN S. CORWIN, *THE DOCTRINE OF JUDICIAL REVIEW*.

⁵ROBERT K. CARR, *DEMOCRACY AND SUPREME COURT: THE SUPREME COURT AND JUDICIAL REVIEW*; HORACE A. DAVIS, *THE JUDICIAL VETO* p. 121.

mously, but actually the work of Jay, Madison and Hamilton, contains a definite statement that the Constitution established judicial supremacy. And the *Federalist* was read by most of those whose votes or voices would count.

Partly for its pertinence in that connection, and partly for the clearness of its reasoning, I will quote from No. 78 of the *Federalist*, which was written by Alexander Hamilton:

"Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the ground on which it rests cannot be unacceptable.

"There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid."

Hamilton goes on to state his premise that it is not to be supposed "that the Constitution could intend to enable the representatives of the people to substitute their will for that of their constituents," but rather it is to be supposed that the courts were designed so as to keep the legislature "within the limits assigned to their authority." He adds:

"Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental."

Going back to the provision in the Constitution making the appellate jurisdiction of the Supreme Court subject to "such exceptions, and under such regulations as the Congress shall make": It is extraordinary

how little attention has been paid to these words either before or when they were written into the Constitution or at any time since then. There have been suggestions that they were intended to give Congress a regulatory rather than a restrictive power. But there seems to be nothing in the records of the Convention or in the *Federalist* to fully sustain the suggestion. It is true that Hamilton suggested in one of the *Federalist* papers that they were inserted because of the fear that under the power to review judgments of state courts, "both as to law and fact," the Supreme Court might encroach upon the treasured right to trial by jury. But towards the end of No. 81 he indicated that the provision was inserted as a sort of compromise in order to assure approval of the Article concerning the judiciary. He said:

"To avoid all inconveniences, it will be safest to declare generally, that the Supreme Court shall possess appellate jurisdiction both as to law and *fact*, and that jurisdiction shall be subject to such *exceptions* and regulations as the national legislature may prescribe. This will enable the government to modify it in such a manner as will best serve the ends of public justice and security.

"This view of the matter, at any rate, puts it out of all doubt that the supposed abolition of the trial by jury, by the operation of this provision, is fallacious and untrue."

In any event, we must take the Supreme Court at its word and concur in its decision in *Ex parte McCordle*,⁶ that under this clause Congress may take away from the Court jurisdiction to hear and decide an appeal involving the constitutionality of an act of Congress. This certainly means that Congress may include in a statute a provision that the Supreme Court shall not have appellate jurisdiction to consider its validity under the Constitution. If that be so, the further question whether Congress may legislate a blanket elimination of the appellate jurisdiction of the Court on the question of the constitutionality of acts of Congress is practically unimportant. And it is not relevant to consider here the possibilities of other and even more radical action which Congress might take under this clause of the Constitution.

In 1800 the two political parties were the Federalists—of whom the leader, intellectually at least, was Alexander Hamilton—and the Republicans—sometimes called the anti-Federalists, led by Thomas Jefferson. The Presidential term of John Adams, a Federalist, expired on

⁶*Supra*, n. 1.

March 4, 1801, and he was to be succeeded by Jefferson. The Chief Justice—Ellsworth—a Federalist sympathizer, resigned before the end of Adams' presidency. The first selection for a successor was former Chief Justice Jay. He declined the appointment. This was typical of the lack of respect for the position. Both Patrick Henry and William Cushing had previously refused to serve. The lack of standing of the Court is evidenced by the fact that when the national capitol was built quarters for the Court were overlooked and it was relegated to a small room in the basement. John Marshall, who was then serving as Secretary of State, was the next selection. He took his seat on February 4, 1801.

The new Jeffersonian administration was not loath to quarrel with the judiciary. The Judiciary Act of 1789, and particularly the twenty-fifth section of it, was designed to give the Federal judiciary a standing and jurisdiction distasteful to the Jeffersonians. And the conduct of the judges had rendered them vulnerable. For one thing, Chief Justice Jay had proclaimed the doctrine of common law crime, meaning crime as defined by the common law of England but not specified in any statute in this country. The doctrine became more and more unpopular until finally rejected by the Supreme Court in 1812. Furthermore, the judges had shown extreme severity in the enforcement of the Sedition Act, and had used distinctly unjudicial language in alluding to the political beliefs of the Republicans. Justice Samuel Chase of the Supreme Court, later to be tried on impeachment charges, was perhaps the chief offender when sitting as a trial judge on circuit. The anti-Federalists were loud in their recriminations. Beveridge says in his life of Marshall:

"But for these things, *Marbury v. Madison* might never have been written; the Supreme Court might have remained nothing more than the comparatively powerless institution that ultimate appellate judicial establishments are in other countries; and the career of John Marshall might have been no more notable and distinguished than that of the many ghostly figures in the shadowy procession of our judicial history. But the Republican condemnations of the severe punishment that the Federalists inflicted upon anybody who criticized the Government raised fundamental issues and created conditions that forced action on those issues."

The Republican assault upon the judiciary in Congress began in

¹Vol. III, p. 49.

January, 1802. The Judiciary Act of 1801, adopted under Federalist control, was an excellent bit of legislation, particularly when contrasted with the Act of 1789. It provided that the judges of the Supreme Court should be relieved from circuit duty and it created sixteen circuits throughout the country, each with a circuit judge to sit with the district judge in the way that justices of the Supreme Court had formerly done. Naturally, Adams made the most of his opportunity and appointed staunch Federalist partisans to the new judicial posts. Jefferson and the Republican Congress resolved to repeal the legislation. In doing so they attacked the Federal judiciary and the entire doctrine of judicial supremacy. In the course of the debates in Congress the democratic argument in favor of the ultimate power of the legislature was emphasized and the theories advanced by Hamilton in the Federalist papers and elsewhere were scathingly attacked. In other words, the repeal of the Judiciary Act of 1801 was nothing more nor less than a challenge to the supremacy of the national judiciary. If the challenge were allowed to pass it would amount to an acquiescence in the supremacy of Congress and that acquiescence would soon obtain the force of law and in time make a reversal practically impossible. Furthermore, some of those on the Supreme Court bench were growing old and new appointments by Jefferson would alter the Federalist character of the Court.

There had been pending in the Supreme Court, since December, 1801, a case entitled *Marbury v. Madison*.¹ But in connection with the repeal of the Judiciary Act of 1801 the Republicans in Congress had abolished the new June and December Terms of the Supreme Court created by the Act of 1801 and restored the old February Term but not the old August Term. This meant an adjournment of the Court for fourteen months from December, 1801 to February, 1803. If the Congress could do this, what limit was there to what it might do?

Such was the situation when *Marbury v. Madison* was argued in February, 1803. The facts were simple: In February, 1801, an act had been passed providing for the appointment by the President of justices of the peace for the counties of Washington and Alexandria. President Adams nominated forty-two such justices of the peace on March 2, 1801, and they were promptly confirmed by the Senate. The commissions were signed by the President and sealed by Secretary of

¹1 Cranch 137, 2 L. Ed. 60 (1803).

State John Marshall on March 2. But some of them were not delivered to the appointees before midnight and when Jefferson had been inaugurated he directed Madison as the new Secretary of State to withhold these commissions. One of the commissions withheld was addressed to William Marbury. Technically, the proceeding Marbury commenced was to show cause why a writ of mandamus should not issue to direct the delivery of Marbury's commission by the Secretary of State.

What was almost universally expected was that the Court would either dismiss the application, thus admitting its lack of power over the executive, or assert that power and demand that Madison deliver the commission. Probably most observers thought that the Chief Justice would adopt the second alternative. It is worth commenting that in that event Madison would almost certainly have ignored the writ and declined to observe the mandate of the Court. In such a situation the judiciary would have been at a distinct disadvantage. On the other hand, the acceptance of the first alternative and the dismissal of the case would have been an admission that the judiciary could not enforce the law as against the executive department. From that it would have been generally accepted that the judiciary lacked power to invalidate acts of Congress.

Marshall saw a third alternative and followed it. The statutory basis for the issuance of a writ of mandamus by the Supreme Court was the so-called Ellsworth Judiciary Act of 1789. If this act were held unconstitutional a conflict with the executive would be avoided and at the same time the power of the Court to declare an act of Congress void as in conflict with the Constitution would be proclaimed. Under the leadership of John Marshall, that is exactly what the Supreme Court unanimously decided to do.

It is not appropriate to consider the exact legal basis for the decision that the Judiciary Act of 1789 was unconstitutional. The reasoning was technical and to the effect that when the Constitution gave the Supreme Court original jurisdiction in specified cases it thereby denied such original jurisdiction in all other cases; therefore Congress could not grant jurisdiction to issue writs of mandamus.

It was necessary, of course, that the opinion state the basis of the power of the Supreme Court to declare the Act of Congress void. This Chief Justice Marshall did at length. There was nothing novel in

what he said, and to a large extent his reasoning followed that set forth a dozen years before by Alexander Hamilton in the *Federalist* papers.

Marbury v. Madison has not won and held its place in history because of the facts involved or the impact of the decision on those facts. Indeed, the office of justice of the peace to which Marbury had been appointed was of slight importance, and at the time of the decision Marbury's appointive term was about half over. Neither is it a landmark because of the quality of the opinion rendered by the Court, for the fact is that it does not rank with Marshall's great opinions. One of its historic attributes is that so far as what is decided is concerned it was not a case thrust upon the court but one which Marshall seized as presenting the opportunity for the decision which he believed essential at the moment. It is interesting also because it was conceived and produced largely through the moral courage and intellectual strength of one man alone, John Marshall. Finally, of course, the case for the first time proclaimed the constitutional principle that the Supreme Court may hold an act of Congress void because in its judgment it conflicts with the provisions of the Constitution. It is, however, worth while to give this one quotation:

"The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

"If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

"Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void."⁹

The decision has been called many things. It has been extolled as saving the country from what might have been a demagogic future ending in disruption and ruin. It has been called a shameless usurpation of power in violation of the Constitution and every sound principle of

⁹*Id.* at 177.

democratic government. In the preface to *Lions Under the Throne* Charles P. Curtis says:

"Marshall had taken a court of law and made it into an organ of government. We adopted what he did with many misgivings, but with growing pride, and we have been struggling with its difficulties ever since."

Why was the decision so thoroughly accepted by the executive and legislative departments and the people of the country? In the first place, of course, there was the fact that the decision favored the administration. It was difficult for either President Jefferson or the leaders of the majority party in Congress to complain about logic or principles which sustained a decision in their favor. Furthermore, the very next week the Court announced its decision in *Stuart v. Laird*,¹⁰ to the effect that the act of Congress which repealed the Federalist Judiciary Act of 1801 was constitutional. Since the anti-Federalists were the beneficiaries of that decision, it lay not in their mouths to question the power of the Court to bring it about. But there was more to it than that, as Mr. Justice Burton has pointed out in a recent address which he entitled "The Cornerstone of Constitutional Law: The Extraordinary Case of *Marbury v. Madison*":

"The Court displayed such a fairness between the parties that it strengthened public confidence in itself. Evidently, the Court supplied precisely what the conditions required. The need was for a convincing lecture on constitutional law upholding the essential power of the Court, while saving the face of the Chief Executive."¹¹

Curtis puts it this way:

"When a great people finds that there are certain things they want done, and no one specially appointed to the work, a job to be done and no one named to do it, they look around. . . .

"The clue to the Court's power lies partly in the need that the job be done, and partly in the way the Court has done the job."¹²

It is anti-climactic, but probably appropriate, to mention that within two years of the decision in *Marbury v. Madison* impeachment proceedings were brought against Justice Samuel Chase. There is no doubt that his conduct had been unjudicial but, as the acquittal indi-

¹⁰1 Cranch 299 (1803).

¹¹36 A. B. A. J. 805, October, 1950.

¹²LIONS UNDER THE THRONE, 46.

cates, he had not been guilty of any "high crimes or misdemeanors." The historic importance of this event lies in the fact that impeachment had been regarded by Alexander Hamilton and some of the others who favored judicial supremacy as a means of restraining the Court. It failed in 1805 and has never been attempted since. Nevertheless, this one attempt did put the fear of Congress into Marshall's heart, for he was far from certain that Chase would be acquitted and he knew that otherwise his own impeachment would follow. There is evidence of this aplenty in what Marshall wrote to Story:

"I think the modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than [would] a removal of the Judge who has rendered them unknowing of his fault."¹³

D. W. Brogan, an Englishman, sums up the historical events referred to:¹⁴

"When all allowances are made, the spectacle of the American people living its political life according to canons laid down in the late eighteenth century to secure the political ideals and the economic rights of the American bourgeoisie, almost beggars credulity. The ingenious gentlemen who framed and put into operation the American constitution, performed a feat of extraordinary difficulty. In the first ebb of, a revolution they hastily proceeded to put a hook into the nose of Leviathan and induced him to make a covenant with his new masters, a covenant that the monster has kept till he has forgotten his old liberty and the strength that could break his chain."

II.

ATTITUDE TOWARDS THE COURT FROM TIME TO TIME

The course of the judiciary did not constantly run smooth even after Jefferson left the White House. Indeed, the waters roughened as soon as Andrew Jackson moved in. The wind that stirred them came mostly from the proponents of states rights. It was an attack upon the powers exercised by the Federal government and sustained by the judiciary against the asserted rights of the states. That really is no part of our

¹³III Beveridge 177.

¹⁴GOVERNMENT OF THE PEOPLE, A STUDY IN THE AMERICAN POLITICAL SYSTEM 36.

problem, because it is undeniable that there can be no Federal government worthy of the name unless the Supreme Court has power to declare an act of a state legislature unconstitutional.

Examples of the controversy in the Jackson era are the statutory attempt of Georgia to require a license from all Cherokee Indians within the jurisdiction, which was held unconstitutional on the ground that the Federal government had exclusive jurisdiction over the Indians. Another case arose in Massachusetts and concerned the right of a state to compete with a private toll bridge which it had previously chartered. States righters believed that this was no affair of a Federal court.

Jackson and the Court did not agree concerning the United States Bank. The Supreme Court had previously held the charter of the bank valid. When a new act rechartering the bank was passed Jackson refused his signature because he believed the act unconstitutional. In his veto message he said:

"It is as much the duty of the House of Representatives, of the Senate and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval, as it is of the Supreme Judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion Congress has over the judges; and on that point the President is independent of each."

This, however, was more the statement of a principle than of a line of action, for Jackson never asserted the right to refuse in his executive capacity to comply with any decision of the Supreme Court. The probabilities are that the statement frequently attributed to Jackson, "Well, John Marshall has made his decision, now let him enforce it," was never made by him. At any rate, when South Carolina passed a so-called Nullification Ordinance, providing that no appeal should be taken or allowed to the Supreme Court in any case involving the validity of the ordinance or of any act of Congress which had been passed upon by the Carolina courts, Jackson promptly took the position that this was the equivalent of rebellion. His attitude did much to turn the tide of sentiment. How strongly that tide had been running is clear from a letter Marshall wrote in which he said "the case of the South seems to me to be desperate. Their opinions are incompatible with a united government even among ourselves. The Union has been prolonged thus far by miracles. I fear they cannot continue."

During the period of nearly twenty years between 1832 and 1850 the Court was subjected to almost no criticism by Congress, the states or the people. Until the middle of the century it was gradually but steadily winning prestige. But it was predestined that a political issue, which cut as deeply as the slavery question, would demand that the Court take a position and stand exposed to whatever might be the result of the taking of that position.

It was in *Dred Scott v. Sandford*,¹⁵ that the Court took its position. It is unnecessary and would be inappropriate to set forth the facts in detail or to go deeply into the reasoning of Chief Justice Taney's opinion. The facts were complicated and the opinion not only contained statements which might well have been omitted but were contemporaneously interpreted as meaning many things that the Court did not intend. The essence of the decision was that the Act of Congress, generally known as the Missouri Compromise, prohibiting slavery north of 36 degrees 30 minutes North Latitude, was void as in excess of the constitutional power of Congress.

The Court could have avoided this question by simply affirming the decision below for which there was the authority of one of its own recent decisions. Indeed, it is probable that a majority of the Court had first reached agreement to so decide the case. Unfortunately, some at least of the justices were all too conscious of the political importance which the decision would have and hoped that it might foreclose further controversy. It postponed the writing of the opinion until after the presidential election of 1856.

Buchanan's election encouraged those justices who sympathized with the South to adjudicate the invalidity of the Missouri Compromise. The reasoning necessary to declare it void was difficult, but Chief Justice Taney did not hesitate. It is charitable to believe that the Court proceeded as it did in the belief that the decision would operate as a settlement of the differences between the North and South. In this the Court was utterly wrong—so wrong that often it has been claimed that the decision was the immediate cause of the Civil War. That is probably an exaggeration. But what is clearly true and is for our purposes more important is that a result of the decision was a loss of respect for the Court for having so obviously abandoned legal judgment for political preference.¹⁶

¹⁵19 How. 393 (1856).

¹⁶Charles Warren, in *The Supreme Court in United States History*, Vol. III,

It was the *Dred Scott* decision which impelled Lincoln in his first inaugural to say that while he recognized that "constitutional questions are to be decided by the Supreme Court" and must be binding upon the parties to the suit and are also entitled to "very high respect and consideration in all parallel cases by all other departments of government,"

"At the same time, the candid citizen must confess that if the policy of government, upon vital questions affecting the whole people, is to be irrevocably fixed by the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal."

At any rate, war came and the country ignored the decision and largely forgot about the Supreme Court. The *Merryman*¹⁷ case might be mentioned for its dramatic quality. It arose in May, 1861, after President Lincoln had asserted the right to suspend the writ of habeas corpus at his discretion. He had done this in the case of a citizen not in the military forces arrested and kept in confinement by the army authorities. A writ of habeas corpus was issued requiring the commanding officer to produce the prisoner before a civilian court. The marshal reported that he had been refused admission to the fort where the prisoner was confined. The case came before Chief Justice Taney, sitting on circuit. Mr. Justice Jackson has described the situation:¹⁸

"Shorn of power, but not of courage, Taney . . . in full expectation that he, too, would be imprisoned, thundered forth the fundamental and eternal principles of civilian freedom from military usurpation. But with a confession of helplessness and despair, he closed an opinion which must rank as one of the most admirable and pathetic documents in American judicial annals: 'In such a case, my duty was too plain to be mistaken. I have exercised all the power which the constitution and laws confer upon me, but

p. 316, has commented, "While, with the lapse of time, the opinion expressed by many earlier historians and statesmen that the *Dred Scott* decision was the most potent factor in bringing on the Civil War has been rejected, and the inevitability of that conflict has been realized, the really serious effect of this fatal decision by the Court was that which was foretold by a writer in the *North American Review* as early as October 1857: 'The country will feel the consequences of the decision more deeply and more permanently, in the loss of confidence in the sound judicial integrity and strictly legal character of their tribunals, than in anything beside; and this, perhaps, may well be accounted the greatest political calamity which this country, under our form of government, could sustain.'"

¹⁷*Ex parte Merryman*, Fed. Cas. No. 9487 (1861).

¹⁸THE STRUGGLE FOR JUDICIAL SUPREMACY 326.

that power has been resisted by a force too strong for me to overcome.'"

When the war was over and the problem of the treatment of the South arose, there came the most bitter and determined effort on the part of Congress to suppress the judiciary that has yet developed. Primarily the controversy was over the so-called Reconstruction Acts passed in 1867. In substance, they established military rule over the South. They had been vetoed by President Johnson and then enacted over his veto. They were, of course, distinctly distasteful to the South and thoroughly relished by the North.

There had been preliminary skirmishes in connection with the Court decisions that the military tribunals set up by Lincoln were unconstitutional in areas where civil courts were still open. The majority of the Justices seemed prepared to go even further than this and in substance to prevent the establishment of any military tribunals anywhere in the South. Finally, a Mississippi editor, McCardle, who had been held for trial before a military commission, petitioned for a writ of habeas corpus under an Act of February 5, 1867. This act amended the Judiciary Act of 1789 and provided that justices and judges of the Federal courts should have power to grant writs of habeas corpus where any person had been restrained in violation of the Constitution or any treaty or law of the United States. It further expressly provided that from any final decision appeal might be taken to the Circuit Court for the appropriate district and from the judgment of the Circuit Court to the Supreme Court. The Circuit Court denied the writ sought by McCardle and an appeal was taken to the Supreme Court. The Court took jurisdiction. This was the case of *Ex parte McCardle*.¹⁰

Clearly, if there ever was a political issue, this question of the proper treatment of the South after the war was one. Just as clearly, the question of the power of the Federal government to set up military tribunals in the separate states was one calling for interpretation of the provisions of the Constitution. It was generally expected that the Court would hold the Reconstruction Acts unconstitutional. The radical Republicans in Congress moved fast. They repassed over the President's veto an Act of March 27, 1868, which provided that "so much of the act approved February 5, 1867, . . . as authorized an appeal from the judgment of the Circuit Court to the Supreme Court of the United

¹⁰6 Wall. 318 (1867) ; 7 Wall. 506 (1868).

States, or the exercise of any such jurisdiction by said Supreme Court, on appeals which have been, or may hereafter be taken, be, and the same is hereby repealed." This, of course, covered the appeal to the Supreme Court already taken by McCardle.

Feeling in the country ran high. The action of Congress was claimed by some to be equivalent to doing away with the Supreme Court. Bitter resentment was felt by those who sympathized with the Court or its assumed attitude towards reconstruction. On the other hand, those who demanded severe treatment for the South were determined to have their way, Supreme Court or no Supreme Court.

Chief Justice Chase delivered the opinion of the Court. He faced the unpleasant necessity frankly and unflinchingly. He admitted that the question was one of jurisdiction. He pointed out that the appellate jurisdiction of the Court was conferred by the Constitution, but only "with such exceptions and under such regulations as Congress shall make." He added:

"The provision of the act of 1867 affirming the appellate jurisdiction of this court in cases of *habeas corpus* is expressly repealed. It is hardly possible to make a plainer instance of positive exception.

"We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words. . . .

"It is quite clear, therefore, that this court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer."

When another editor imprisoned under military authority appealed for a writ of habeas corpus under the original Judiciary Act of 1789 the Court again took jurisdiction.²⁰ But again Congress acted and a bill was introduced prohibiting the Supreme Court from considering any case which involved the validity of the Reconstruction Acts. That was followed by another, prohibiting the judicial review of any act of Congress. It is fortunate that while these bills were pending a compromise outside of court was affected whereby Yerger, on being turned over to the civil authorities, withdrew his petition. Otherwise there

²⁰*Ex parte Yerger*, 8 Wall. 85 (1868).

might well have been a life and death battle between Congress and the Court.

The current of events, and particularly the failure of the Republicans to convict President Johnson in the impeachment trial and the death of their leader, Thaddeus Stevens, led to an abatement in the severity of the enforcement of the Reconstruction Acts. And very soon the interest of almost all groups in the country turned to economic matters. Thus, the struggle between Congress and the Court ended as had the struggle between Jefferson and Marshall, without any change in the statutory or constitutional position of the Court.

During the last twenty-five years of the nineteenth century the Court continued to gain in prestige from the low point of the Civil War and Reconstruction periods. Generally speaking, its chief activity was in the protection of property rights from infringement by state and national legislation, but that did not antagonize Congress or the country. The turn of the century saw the apex of the doctrine of *laissez faire* in judicial decision, and it seemed that the power of the legislatures to regulate industry or interfere with industrial capitalism was permanently restricted. Then Theodore Roosevelt became President in 1901. His so-called trust busting campaign won a somewhat Pyrrhic victory in the *Northern Securities* case in 1904²¹ and while the government prosecutions in the *Standard Oil*²² and *American Tobacco*²³ cases were successful, the opinions were to the effect that the Sherman Act must be interpreted according to the "rule of reason." In the field of labor legislation the Court remained conservative, if not obstructive.

During the period from 1910 to 1920 legislation resulting from the liberal attitude of Presidents Roosevelt and Wilson and the general stirring of progressivism in the country came before the Court. For a while under the leadership of Chief Justice White there was hope for liberality in the decisions of the Court. Then came the famous Child Labor case, *Hammer v. Dagenhart*.²⁴ The Act was held invalid on the ground that Congress had exceeded its power to regulate commerce in using it for the entirely different and ulterior purpose of eliminating

²¹*Northern Securities Co. v. U. S.*, 193 U. S. 197, 24 S. Ct. 436, 48 L. Ed. 679 (1904).

²²*Standard Oil Co. v. U. S.*, 221 U. S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911).

²³*U. S. v. American Tobacco Co.*, 221 U. S. 106, 31 S. Ct. 632, 55 L. Ed. 663 (1911).

²⁴217 U. S. 251, 38 S. Ct. 529, 62 L. Ed. 1101 (1918).

child labor. This was a five-to-four decision, the dissenters being Holmes, McKenna, Brandeis and Clarke.

The decade from 1920 to 1930 requires no comment. This was the era of Harding and Coolidge. Not many constitutional questions were presented to the Court. It was a time of Republicanism and conservatism and there was no ground for controversy between Congress and the Court. But the wind was making up again.

Franklin Roosevelt took the presidential oath on March 4, 1933. The general state of the country at that moment is well known. The depression which began with the stock market crash of October, 1929, had dragged through more than three years of difficulty, if not despair. Nothing resembling an up-turn was visible on the horizon. Millions of men and women were out of work, debtors were in a desperate situation and the business and financial world seemed powerless to deal with the situation. Something was demanded of the administration by citizens in all walks of life and in every income group. The so-called New Deal responded promptly and the "100 days" following the inauguration were the most active period in American legislative history.

It was not until 1934 that the attitude of the Supreme Court towards this legislation was revealed in an opinion by Chief Justice Hughes in which the Minnesota State Mortgage Moratorium Law was sustained.²⁵ He spoke for only himself and Justices Holmes, Brandeis, Cardozo and Roberts. Justices Sutherland, Van Devanter, McReynolds and Butler joined in a dissent. They denied the power of the state to give relief to debtors in the way in which the law had attempted to do it.

In 1934 the opinion of Mr. Justice Roberts²⁶ sustaining the New York price-fixing legislation known as the Milk Control Law indicated liberality, but the same four justices dissented. As the months went by it became clear that these four dissenters would continue to be opposed to the sort of legislation which the New Deal had enacted and was determined to continue to enact. On the other hand, it seemed probable that so long as the legislation kept within bounds Justices Holmes, Brandeis, Cardozo and Stone would be disposed to sustain it. There was uncertainty as to what position the Chief Justice and Justice

²⁵Home Building & Loan Ass'n v. Blaisdell, 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 940, 88 A. L. R. 1481 (1934).

²⁶Nebbia v. N. Y., 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A. L. R. 1469 (1934).

Roberts would take in a borderline case. To be sustained, legislation would need the support of both of them.

In 1935 the attempt to prohibit certain interstate shipments of oil was held unconstitutional on the ground that it involved an uncontrolled delegation of authority to the President.²⁷ There followed the so-called Gold Cases, which were argued in January, 1935. In substance, the decision which came down in March sustained the devaluation of 40.94% but there were four dissents and the majority stood on the narrow ground that the holders of government bonds had not been able to prove any damages.

In May the National Industrial Recovery Act was declared unconstitutional by a unanimous Court. In January, 1936, the Agricultural Adjustment Act was held unconstitutional in *U. S. v. Butler*.²⁸ The *Carter Coal Company* case²⁹ upset the Bituminous Coal Conservation Act of 1935 despite the long-felt need for some regulation and the careful study which had been given in framing the act. In this case Justice Roberts voted with McReynolds, Butler, Sutherland and Van Devanter, whereas the Chief Justice was with the liberals. Throughout 1936 there were no signs of relaxation in the conservative attitude of the Court, and in the field of state legislation it struck down the New York Minimum Wage Law in *Morchard v. Tipaldo*.³⁰ on the ground that it interfered with the freedom of contract.

President Roosevelt was reelected in November, 1936, with 515 out of a possible 523 electoral votes. That certainly furnished some basis for his statement that he had a "mandate from the country." On February 5, 1937, he sent to Congress a message "Transmitting a Recommendation to Reorganize the Judicial Branch of the Federal Government." With this letter went one from Attorney General Homer Cummings to the President dated February 2, and a draft of a proposed bill. I shall not attempt an analysis of any of these documents. Suffice it to say that they purported to seek three substantial changes and to justify them almost entirely on the need for more judges and better administration, in order to prevent delays and to secure efficiency in the administration of justice. The three objectives were, first, the

²⁷*Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 S. Ct. 241, 79 L. Ed. 446 (1935).

²⁸297 U. S. 1, 56 S. Ct. 312, 80 L. Ed. 477, 102 A. L. R. 914 (1936).

²⁹298 U. S. 238, 56 S. Ct. 918, 80 L. Ed. 1347 (1936).

³⁰298 U. S. 587 (1936).

appointment of an additional judge in any Federal court when a sitting judge who had held his commission for ten years attained the age of seventy and neither resigned nor retired within six months thereafter. The theory here, so far as the Supreme Court was concerned, was not to positively and immediately increase the number of justices but to persuade one or more of the six who were over seventy to resign or retire. Thus, it was provided that the appointment of a new judge or judges would permanently increase the number of the Court—but with an outside limit of fifteen members.

The second objective was the assignment of judges to courts other than those in which they held their commissions so as to prevent the bogging down of calendars. The third objective was to give the Supreme Court power to appoint a Proctor with the duty of keeping in touch with the docket situation, recommending the assignment of judges and generally expediting the disposition of cases in the Federal courts. These objectives were heartily approved by the Bar and have been largely attained to the great benefit of the administration of justice.

Let one of those who supported the plan and now sits on the Court, Justice Jackson, describe it:

"The President's message was so generalized in order to relate to all courts that it failed to focus attention on the real judicial offending. The fighting issues, ready-made for the President, were not seized. There was not a word about the usurpation, the unwarranted interferences with lawful governmental activities, and the tortured construction of the Constitution, all of which could be proved against the Court from the words of some of its most respected members. It lacked the simplicity and clarity which was the President's genius and, to men not learned in the procedures of the Court, much of it seemed technical and confusing."³¹

It is no exaggeration to say that all hell broke loose throughout the country and particularly among the members of the bar. The press almost unanimously attacked the plan on every ground. Practically speaking, no one favored it except ardent New Dealers, and many of them—laymen and lawyers alike—were either non-committal, lukewarm or against the plan. It was almost universally taken to be a plan to pack the Court, dishonestly camouflaged as one to strengthen the judiciary.

It was not until March 9 that the President spoke to the country and

³¹THE STRUGGLE FOR JUDICIAL SUPREMACY 189.

frankly and flatly expressed his dissatisfaction with the decisions of the Court and his demand for a majority who would approve the New Deal legislation. The testimony before the Judiciary Committee by Attorney General Homer S. Cummings, Assistant Attorney Robert H. Jackson and others was equally direct. Chief Justice Hughes reluctantly joined the fight in a letter dated March 21, 1937, to Senator Burton K. Wheeler. The first sentence in it read: "The Supreme Court is fully abreast of its work." It went on to say that an increase in the number of justices "would not promote the efficiency of the Court" and then to demonstrate it. The Chief Justice stated that the views expressed were concurred in by Justice Brandeis and Justice Van Devanter. This letter sealed the fate of the plan.

The report of the Senate Judiciary Committee may be mentioned here, although it was not handed down until June 7. Considering the party alignment of those who signed the report, it is an amazing document. It contains a statement that the measure should be rejected because it "does not accomplish any of the objectives for which it was originally offered." There were five other reasons, which need not be gone into. Throughout, the report waxed rhetorical and ended:

"It is a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America."

To go back to March 29, 1937: On that day the Chief Justice rendered an opinion for a majority of the Court upholding the constitutionality of the Minimum Wage Act of the State of Washington,³² which was substantially identical with the New York act declared unconstitutional in 1936.³³ The opinion expressly overruled *Adkins v. Children's Hospital*.³⁴ Justice Roberts voted with the Chief Justice and Justices Holmes, Brandeis and Cardozo to make a majority. Two weeks later came a series of decisions sustaining the National Labor Relations Act³⁵ and retreating from the attitude which the majority of the Court had taken a year before.

³²*West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703, 108 A. L. R. 1330 (1937).

³³*Supra*, note 29.

³⁴261 U. S. 525, 43 S. Ct. 394, 67 L. Ed. 785 (1923).

³⁵*N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893, 108 A. L. R. 1352 (1937); *N. L. R. B. v. Freuhauf Trailer Co.*, 301 U. S. 49, 57 S. Ct. 642, 81 L. Ed. 918, 108 A. L. R. 1352 (1937); *N. L. R. B. v. Friedman-Harry Marks Clothing Co.*, 301 U. S. 58, 57 S. Ct. 645, 81 L. Ed. 921, 108 A. L. R. 1352 (1937); *Washington, Virginia & M. Coach Co. v. N. L. R. B.*, 301 U. S. 142, 57 S. Ct. 648, 81 L. Ed. 962 (1937).

In June, 1937, Justice Van Devanter announced his retirement. On the same day the Court held constitutional the National Firearms Act,⁸⁶ a national police regulation which might have been questioned in the immediate past, the amended Railway Labor Act⁸⁷ and the revised Prazier-Lemke Act⁸⁸ for the relief of farm debtors. We need go no further in the field of judicial happenings.

In the political arena there was much of interest to the politician but little that need concern the constitutional lawyer or the statesman. President Roosevelt refused to admit defeat when it was obvious that his court plan would not pass or to accept victory when it was equally obvious that without legislation the Court would no longer obstruct the congressional course. It may be commented, however, that the probabilities are very great that if originally the President had come out with a flat demand to Congress for an increase in the number of justices from nine to eleven Congress would have complied with that demand. Indeed, it is authentically stated that a plan had finally been agreed upon, that Senator Robinson would introduce a bill providing simply for such an increase in the Court and that almost certainly Congress—knowing that its beloved Joe Robinson would be appointed to one of the vacancies—would have passed the bill. But the Senator died forty-eight hours before the bill was to be introduced and there was no one else who could pick up the torch.

The New Deal period furnished an example of another way in which Congress may interfere with the appellate jurisdiction of the Supreme Court. This is by the creation of a special court to deal with and have exclusive jurisdiction over certain sorts of cases. The Emergency Price Control Act of 1942 set up a procedure for protest by any person affected and, on denial of the protest, for taking the case to the specially-created Emergency Court having jurisdiction to restrain the enforcement of regulations or price orders under the Act. It withdrew that jurisdiction from every other court, state or Federal, but allowed a review of the decision of the Emergency Court by the Supreme Court. The point here is not that appellate jurisdiction was interfered with but that Congress was constituting a special court to administer justice under the Act instead of leaving that to the regularly constituted courts.

⁸⁶*Sonzinsky v. United States*, 300 U. S. 506, 57 S. Ct. 554, 81 L. Ed. 772 (1937).

⁸⁷*Eastes v. Union Terminal Co.*, 89 F. 2d 768 (5th Cir. 1937).

⁸⁸*Wright v. Vinton Branch of Mountain Trust Bank*, 300 U. S. 440, 57 S. Ct. 556, 81 L. Ed. 736, 112 A. L. R. 1455 (1937).

I have been referring to the occasions on which there was controversy between the Supreme Court and the legislative or executive departments. I have not mentioned the times during which there has been harmony and the Court has been serving its purpose to the satisfaction of all. And I may add that there have been times when the action of the Court in invalidating an act of Congress as unconstitutional has been almost as thankfully received by Congress as by the rest of the country. For no one can doubt that on occasion Congress has enacted legislation by a slim majority or under some special pressure which it did not particularly wish to see on the statute books. On the other hand, there have been occasions when the knowledge that the Court would not sustain legislation has been enough to persuade Congress not to enact it. Finally, the existence of the Court and its power over acts of Congress have often given courage to a President who believed that a bill should be vetoed as unconstitutional.

As Charles Evans Hughes wrote in 1927.³⁰

"Much of the criticism of the Court deals with what is occasional rather than typical. . . .

"In our system, the individual finds security in his rights because he is entitled to the protection of tribunals that represent the capacity of the community for impartial judgment as free as possible from the passion of the moment and the demands of interests or prejudice. The ends of social justice are achieved through a process by which every step is examined in the light of the principles which are our inheritance as a free people. The spirit of the words of the Supreme Court permeates every legislative assembly and every important discussion of reforms by legislative action."

Criticism or support of the Court has not come systematically either from liberals or conservatives. Long before he was appointed to the Supreme Court Benjamin Cardozo wrote:

"The restraining power of the judiciary does not manifest its chief worth in the few cases in which the legislature has gone beyond the lines that mark the limits of discretion. Rather shall we find its chief worth in making vocal and audible the ideals that might otherwise be silenced, in giving them continuity of life and expression, in guiding and directing choice within the limits where choice ranges. This function should preserve to the courts the power that now belongs to them, if only the power is exercised

³⁰THE SUPREME COURT OF THE UNITED STATES 236.

with insight into social values, and with suppleness of adaptation to changing social needs."⁴⁰

Similarly, Felix Frankfurter, when a Professor in the Harvard Law School, summarized his opinion of the Court by saying:

"The Supreme Court is indispensable to the effective workings of our federal government. If it did not exist, we should have to create it. I know of no other peaceful method for making the adjustments necessary to a society like ours—for maintaining the equilibrium between state and federal power, for settling the eternal conflicts between liberty and authority—than through a court of great traditions free from the tensions and temptations of party strife, detached from the fleeting interests of the moment. But because, inextricably, the Supreme Court is also an organ of statesmanship and the most powerful organ, it must have a seasoned understanding of affairs, the imagination to see the organic relations of society, above all, the humility not to set up its own judgment against the conscientious efforts of those whose primary duty it is to govern. . . ."⁴¹

Taking the detached view, it may be said that although the Court has not functioned perfectly in our scheme of government, our scheme of government could not function at all without it.

III.

PRESENTLY PROPOSED CONSTITUTIONAL AMENDMENTS CONCERNING THE COURT

Certain amendments to the Constitution have been proposed for passage at this time upon the theory, first, that they are needed to protect the position of the Supreme Court as against Congress, and, second, that a moment such as this, when there is no particular controversy about the relative rights of the legislative and the judicial departments, is the proper time for such action. These proposed amendments have been considered and approved by the American Bar Association, the New York State Bar Association and The Association of the Bar of the City of New York. They have not so far been considered by any other organizations. It is not claimed by anyone that these amendments or the purposes sought to be accomplished are novel or original. On the contrary, it is recognized that from time to time similar suggestions have been made to strengthen the position

⁴⁰THE NATURE OF JUDICIAL PROCESS, 92.

⁴¹LAW AND POLITICS, 52.

of the Court. And, of course, many suggestions have been made at various time to restrict the power of the Court in one way or another.

It is important to have in mind the machinery for the amendment of the Constitution. Article V of the Constitution provides that it may be amended in four different ways, each of which involves proposal and ratification. Under two of the methods the proposal is by a two-thirds vote of the members present in both houses of Congress, and under the other two, the proposal is by a national convention called by Congress upon request of the legislatures of two-thirds of the states. There are two alternative methods of ratification--by the legislatures of three-fourths of the states or by conventions called for the purpose in three-fourths of the states.

The national convention method has never been used and there may be some question as to whether the states can compel a reluctant Congress to call such a convention. Thus, every proposal for a constitutional amendment has been presented to Congress. So far as ratification is concerned, all except one proposed amendment have been submitted to the state legislatures. The exception was the amendment repealing prohibition, which was submitted to conventions in the separate states.

During the first hundred years of the Constitution about two thousand amendments were suggested in Congress, and during the fifty years from 1890 to 1940 about the same number. Of the total number less than half received any consideration beyond reference to a committee. Only a small percentage of them were seriously discussed in Congress. Only twenty-seven were submitted by Congress to the states for ratification, of which there were ratified the ten original amendments proposed by Congress in 1789, the three Civil War amendments—Thirteenth, Fourteenth and Fifteenth—and eight others. These eight amendments, their dates of proposal by Congress and the approximate period required for ratification were:

Eleventh Amendment, eliminating jurisdiction of the Federal courts in suits against a state, 1794, one year.

Twelfth Amendment, changing system of electoral votes, 1803, six months.

Sixteenth Amendment, authorizing income taxation, 1909, three years, six months.

Seventeenth Amendment, popular election of Senators, 1912, one year.

Eighteenth Amendment, prohibition, 1917, two years.

Nineteenth Amendment, woman suffrage, 1919, one year.

Twentieth Amendment, "Lame Duck," 1932, one year.

Twenty-first Amendment, repeal of prohibition, 1933, nine months.

This is an average of about sixteen months for ratification.

Of the amendments presently proposed, other than the one expressly giving the Court appellate jurisdiction in cases involving the constitutionality of acts of Congress, one calls for retirement of justices at the age of seventy-five. There is, of course, plenty of room for differences of opinion, first as to whether there should be any compulsory retirement age and, second, what it ought to be. Charles Evans Hughes favored compulsory retirement at seventy-five.⁴² So does Justice Roberts, who wrote⁴³ that the proposed amendment

"will forestall the basis of the last attack on the Court, the extreme age of the justices, and the fact that superannuated old gentlemen hung on there long after their usefulness had ceased. More than that, it tends to provide for each administration an opportunity to add new personnel to the Court, which, I think, is a good thing."

Along the same line, Charles Fairman said:⁴⁴

"It would be fraught with the greatest danger to have the courts of justice new-minted to bear the image of each succeeding administration. It is quite a different matter to adopt such means as will assure some continuity to the process of renewal."

During the last ten years of the eighteenth century the average age of the justices was fifty-three and increased gradually but continuously until during the first seven years of the 1930s it was sixty-nine.

Another amendment is suggested to assure that the justices shall be entirely independent and that there may be no basis for attributing political aspirations to any member of the Court. This would disqualify a justice for a period of five years after retirement or resignation from being a candidate for President or Vice President. Justice Owen Roberts, who sat on the court for fifteen years, has spoken forcefully in favor of this suggestion:⁴⁵

"Just by so much as the Supreme Court is set apart, just be-

⁴²*Id. supra* note 39.

⁴³A. B. A. J. Jan. 1949.

⁴⁴FAIRMAN, LIFE OF JUSTICE MILLER 400. See also Fairman, 51 HARV. L. REV. 387.

⁴⁵*Supra*, note 43.

cause of the great powers the Supreme Court exercises in our constitutional system, there ought not to be any ambition in any man who sits in that Court to go beyond where he is."

It is no secret that Charles Evans Hughes wholeheartedly agreed with him.

The only other collateral proposal is the amendment which fixes the number of justices at nine. This, of course, is essential if the Court is to be protected from legislative control through court-packing. Furthermore, nine is pretty universally agreed upon as the best number. Chief Justice Hughes emphasized this in his historic letter to Senator Wheeler in connection with the court packing plan of 1937.

Returning to the main theme—an amendment is suggested that in all cases arising under the Constitution the Supreme Court shall have appellate jurisdiction. This would not eliminate the power which the Court now has and should retain to refuse to take jurisdiction in its discretion. Otherwise the Court would be swamped with cases. The amendment would do away with the power which Congress now has to make "exceptions and regulations" limiting the appellate jurisdiction of the Court either by prohibiting appeals to the Court, or by giving final jurisdiction to a specially constituted court, in a particular case or class of cases or in all cases. I present impartially, as behooves one speaking to students in an academic forum, the arguments for and against this proposed amendment. I shall do this by stating first the arguments which have been made against the amendment and then those made in support of it.

First, however, it is necessary to make clear what the issue is *not*. It is not seriously suggested that the Supreme Court be abolished or that its appellate jurisdiction be restricted more than it now is; most of the critics of the Court concede that the restraint which Congress can now assert through exceptions and regulations is a sufficient check on the Court. On the other hand, it is not suggested that the power of the Court be entirely unrestrained; even its most ardent supporters agree that it must be subject to the restraint imposed by the power of the people to amend the Constitution.

I say that it is not suggested that the Supreme Court be abolished or even that its appellate jurisdiction be restricted more than it now is because even in those times when the Court was being most bitterly attacked and the other departments of government were trying desper-

ately to circumvent or override it, there were very few who advocated anything as radical as that. Indeed, that would be revolutionary for it would destroy our governmental framework and abandon the philosophy of the Constitution calling for three balanced departments of government. The conception that the Supreme Court shall have the power to protect the people against violations of the Constitution is so deeply rooted in our tradition and our thought that there would be no support for a suggestion that it be discarded or emasculated.

The proof of this is to be found in the fate of the attempts by legislation or constitutional amendment to permanently and, as a matter of principle, restrict the appellate power of the Court. Any interference with the position of the Court has occurred or been threatened only under the stress of political emergency. And there is the further proof in logic. If the Court is to have no control over Congress, then Congress may violate the Constitution, not by the mere margin of a difference of opinion or under pressure of an emergency which justifies liberality, but to the extent of some radical and unwarranted departure, such as the abolition of trial by jury, or the establishment of compulsory worship, or the denial of the right to vote except to those who own a thousand dollars worth of property. To take its appellate jurisdiction away from the Court would be to destroy the Court, and if the Court should be destroyed the Constitution and the whole framework of our government would go down with it.

On the other hand, almost no one advocates that the Court be absolutely supreme. The Constitution expressly provides that it may be amended by the people so that changing conditions can be met in an orderly fashion. It has never been seriously suggested that the powers of the Supreme Court should be immune to restriction by that process. On the contrary, the supporters of the suggested amendments recognize and welcome the fact that if these amendments are adopted they themselves will be subject to subsequent repeal or amendment.

Such a limitation on the power of the Court is necessary. Otherwise its power, not as a court but as an instrument of government, is such as to destroy the balance and, under certain sets of circumstances, to create the risk that nine men may defeat the will of one hundred and fifty million. It is obvious that these nine men must act with restraint. They are judges and at least philosophically what they exercise is their judgment on the given state of facts which the particular case

presents. But practically their decisions involve the interpretation of words used in a Constitution written many years ago and will not only affect the parties to the case but, if a Federal statute is involved, will adjudicate whether it is or is not a valid law. If they could act without any restraint at all then they could rewrite or erase the Constitution according to taste.

A counterbalance to the necessary restraint is the leeway which the Court has in interpreting the Constitution. It can and should take into account the particular economic and political circumstances and the state of the country, and even of the world, in which the question of interpretation is submitted to it. The principle of the presumption of constitutionality gives it plenty of leeway if it needs it and will take it. Alexander Hamilton went no further in the *Federalist* than to say that it was in "clear cases" that the Court should exercise its power to declare a statute unconstitutional. And there is the rule laid down by Chancellor Waties of the Supreme Court of South Carolina in 1812:⁴⁶

"The validity of the law ought not to be questioned unless it is so obviously repugnant to the Constitution that when pointed out by the judges all men of sense and reflection in the community may perceive the repugnancy."

So we come back to the statement of the issue. It is not whether we want to keep the Court or do away with it—adhere to our Constitution or delete the judiciary from the trio of departments which it set up. The issue presented by the suggested amendments is, in substance, whether the appellate jurisdiction of the Supreme Court to hold void acts of congress as in violation of the Constitution is to remain subject to exceptions and regulations in the discretion of Congress or is to be subject only to the will of the people as expressed in the ratification of a constitutional amendment limiting or eliminating that power.

Looked at more narrowly, the question is whether the restraint upon the Supreme Court which is necessary to prevent its power of holding legislation unconstitutional from being absolute, may be asserted by Congress through the ordinary legislative process or only by the people through the process of amending the Constitution. The choice, in other words, is between two alternative forms of restraint. There will now be impartially stated first the arguments which have been advanced in favor of the present restraint by Congress and, second, the arguments

⁴⁶Desaussure's Equity Reports 466, 477.

which have been advanced in favor of the proposed amendments putting the restraint in the hands of the people.

Arguments in Favor of the Present Restraint by Congress

1. It is argued that we ignoramuses of 1950 should not alter what the wise men of 1787 created. The wisdom of the Founding Fathers is pretty well recognized and certainly there is no particular group or body of men which today commands anything like the same respect. Therefore, it is not only irreverent but risky for us to do otherwise than accept what has come down to us.

2. The fact is that for over 160 years the provisions of the Constitution and the acts of Congress regulating the federal judiciary have made their contribution to the most successful experiment in democratic government that the world has ever seen. Why make a change? The difficulties which have arisen have been transitory and today the relations between the legislative and judicial departments are as good, if not better, than they ever have been. Only one act of Congress has been declared unconstitutional in the last thirteen years.

On the economic side, the country is prosperous, judged by many, if not all, standards, and if it were not for the necessary burden of taxation, which the world situation has made necessary, there would be unprecedented well-being. Why alter the governmental framework and the respective powers of the different departments in any way?

3. The present situation is claimed to be a happy compromise between clear supremacy in Congress or in the Court. It is admitted that Congress should not have unbridled power and be permitted to legislate at its will, regardless of the Constitution. The congressional conscience is not a sufficient restraint to protect the country against departures from constitutional principles. But it is also admitted that the Supreme Court should not have a dictatorial veto over congressional legislation even though it be admitted that that veto would not ordinarily be exercised only as a matter of judgment in interpreting the provisions of the Constitution and not as a matter of political or economic preference.

As things have stood at least since the *McCordle* decision in 1868, Congress has the power to cut off the appellate jurisdiction of the Supreme Court by the enactment of a statute. The respect of the country for the Supreme Court is such that it would be a rare case in which Congress would attempt to take power away from the Court. Thus,

it is argued, there is just the proper degree of restraint upon the Court. The Court is looked to as having the responsibility and the authority to declare void congressional legislation which, in its judgment, violates the provisions of the Constitution. If the Court abuses this authority in the opinion of Congress to an extent which justifies Congress in standing out against the Court, it can do so without delay.

It is argued that the alternative restraint which a resort to amendment of the Constitution would impose is too loose a rein. I will let Charles P. Curtis, a close student of the subject, state the argument as he has stated it to me:

"I start with the proposition that the power of the Court rests on nothing but its prestige, or, from our point of view, our respect for it, which are the bases of obedience to its decisions. We are equally anxious for the Court to make decisions and to have them obeyed. The best way to obtain both is to have the Court not only wise, but also wary and circumspect. We are only too well aware of the danger the Justices run of going arrogant on us. Indeed, it is the judicial occupational disease. That spells some such disaster as the *Dred Scott* case or the *Legal Tender* cases or the series of anti-New Deal decisions. Then we have to cover up for them and save their faces as best we can. For disaster detracts from their prestige and if they lose prestige they lose the power we want them to have.

"The best way, the most efficacious way, to keep the Court out of trouble is to give Congress the power to prevent a decision by taking away the Court's jurisdiction. In a constitutional case, Congress should be able to stop the Court from making a decision which Congress foresees the country will not agree with enough to obey. For when Congress is willing to stake its prestige against the Court's—which is as hazardous a thing for Congress to do as it is for the Court—when it dares to go to that extreme, the Court had better be prevented than later disobeyed.

"Coming down to the hard facts, what we are talking about is the most delicately difficult of all governmental problems, that is, how to divide power between two equal agencies when there are no words, no phrases, no formula by which we can divide their powers. The Constitution makes no attempt to say which shall be the master on a showdown. Wisely, I think, for I don't believe there is any way of saying it. For the Congress and the President have all the force, if they dare to use it, and the Court has all our, but nothing but our, respect, if it does not abuse it. We want to make mighty certain that it won't. And the best way is for the Court to operate under the constant apprehension that Congress

can take away its jurisdiction. Let the Court live dangerously, so that it may act wisely. The best way to see to it that the Court will guess right is to make it risky to guess wrong."

4. The people of the country today, more perhaps than at any time in the past, demand the right to govern or at least to think that they are governing. They insist that their elected representatives in Congress shall not be frustrated by a court—even the Supreme Court. It is right that the people should have what they want, subject to the restrictions of the Constitution. They are unwilling to admit that the Constitution is, as Charles Evans Hughes said, "what the judges say it is." They—or at least many of them—believe that it should be what their responsible representatives in Congress claim it is in a critical situation where they are willing to pit their judgment against the judgment of the Court.

Arguments in Favor of the Proposed Amendments

1. With all due respect to those who drafted the Constitution, and with all humility, those who have studied the subject today do not feel bound by the past. The handicap of 160 years outweighs the alleged intellectual superiority of those who lived at that time. The question is for decision today, operative for the future. It cannot be gainsaid that things have changed in the last century and a half and that no one foresaw with any accuracy the events which have occurred or the situation existing today or, least of all, the future as it will unfold tomorrow. If the conduct of human affairs is to be improved, it must be through change and that change must be made upon the basis of experience.

Furthermore, it is fair to say that the Founding Fathers did not intend that the power given to Congress to make exceptions and regulations should be used so broadly as to deprive the Court of appellate jurisdiction on the very questions and at the very times when the existence of that jurisdiction would be vital. The probabilities are that the provision was inserted more to get votes for the adoption of the Constitution than because the draftsmen wanted it there. There is no merit in the suggestion that we of today should leave the Constitution as it was written 160 years ago. On the contrary, it is our duty to make the changes which the past and the best prophecy of the future indicate are needed. As will be pointed out later, the failure to amend the Constitution more frequently than has been the case may

very well have been a mistake. And this is said in full appreciation of the impropriety of amendments other than those which go to fundamental matters appropriate for inclusion in such a Constitution as ours.

2. The comparative success of our form of government and the absolute success of our economic system may be admitted without conceding that that prohibits any change in the relative rights of the legislative and judicial branches of the government. Such a concession could be necessary only if the old order had worked perfectly and there had never been occasions on which it was threatened with serious trouble in the joints.

The fact is, of course, that history shows some narrow escapes from permanent dislocation. Without going into the earlier occasions on which controversy between Congress and the Court, and perhaps uncertainty as to their respective powers under the Constitution, brought unfortunate consequences, it can certainly be said that in 1937 the margin of escape from serious consequences was very slim. That is not premised upon faith in the infallibility of the Court but rather upon belief in the orderly processes of constitutional government. If Franklin Roosevelt had succeeded in packing the Court, the vice would not have been a Court of eleven justices or even the addition of two justices practically pledged to a point of view. The real evil would have been the accomplishment of a purpose by a means which was not governmentally dignified and should not have been constitutionally permissible.

If Congress and the country had let the President have his way, it would have constituted a precedent for the decision of constitutional questions by the executive in alliance with Congress rather than by the judiciary. There would, of course, have been other unfortunate consequences if the Court had been packed in 1937. One would have been to take away from the Court its independence of judgment in passing upon acts of Congress. It is a complete perversion of justice to permit the bodies which have enacted legislation to compel the judiciary to accept it as within the provisions of the Constitution. And there is no doubt that the threat of packing the Court is a form of compulsion, not only because it can be carried out effectually but also because it lowers the prestige of the Court and its ability to perform its constitutional function.

No, the past must not be permitted to perpetuate itself on the basis of tradition and sentiment alone. Furthermore, when we are asked to

stake the future upon an alleged satisfactory experience in the past, it must be taken into consideration that the margin of safety has been very slim on several occasions and that the law of chances does not favor indefinite good luck.

3. As has been said, the real issue between those who oppose and those who favor the suggested amendments is what form of restraint shall be imposed upon the power of the Supreme Court to declare acts of Congress void because in conflict with the Constitution. Those who oppose the amendments say that the present restraint vested in Congress by the constitutional provision authorizing it to make exceptions and regulations concerning the appellate jurisdiction of the Court is entirely appropriate, adequate and satisfactory. The supporters of the proposed amendments deny this and believe that as a matter of orderly governmental procedure Congress should have no such power and that the appellate jurisdiction of the Supreme Court should be made clear and unalterable save by the people through the process of constitutional amendment.

The supporters of the proposed amendment concerning the appellate jurisdiction of the Court argue that the present situation violates the whole philosophy of our governmental framework and is utterly inconsistent with the American doctrine of judicial supremacy. They say that so long as Congress can, through the ordinary process of legislation, take away the appellate jurisdiction of the Court, Congress is constitutionally supreme and the Court is constitutionally helpless. They recognize and value the prestige of the Court and the traditional respect and reverence for it. They appreciate that only in some extraordinary situation when the Court has frustrated not only the desires of the executive and the legislative departments, but of the people as a whole, would Congress dare to take appellate jurisdiction away from the Court in order to accomplish its purposes. At the same time they believe that, assuming the existence of such an extraordinary situation, the orderly and proper procedure is not by act of Congress but by the action of the people. They make the point that it is in just that sort of extraordinary situation that there is the greatest need of judicial restraint.

The extraordinary situation in which there is such bitter controversy between Congress and the Court that the former resorts to its constitutional power to limit the appellate jurisdiction of the Court must,

of course, be one in which there is great pressure upon Congress to proceed in the manner deemed by the Court to violate the Constitution. The whole theory of judicial restraint is that it will operate for the welfare of the country in just that sort of a crisis. If Congress has the power to make the judiciary inoperative, the entire purpose of judicial restraint is defeated. It is only by constitutional amendment that the real desire of the people can be ascertained and expressed. Congress is, of course, a representative body but it is disqualified by its interest in its own legislation from impartially judging what the country wants. Furthermore, its members were not selected with the idea that they would speak for their constituents upon a question of the constitutional powers of the respective departments of government.

The present situation imposes a restraint upon the Court which may be exercised by Congress and the President or by Congress alone if it can override a veto. Since the time at which Congress will be tempted to restrain the Court will be one of controversy and political pressure, it will not act deliberately and with the desire to do the sound and far-sighted thing but only with the desire to accomplish the particular purpose to which it is committed and which has been frustrated by the Court. Remembering that the issue in controversy will be one that cuts deep into governmental philosophy or economic welfare, it seems clear that it is wrong that it should be decided in such an atmosphere and in such haste. Furthermore, the exercise of the congressional restraint is utterly inconsistent with the proper administration of justice. The essential of a court is that its members shall be independent and uncommitted. The existence of a restraining power in Congress not only deprives the members of the Supreme Court of independence but when exercised substitutes for a properly established court one which is servile to a congressional purpose. Whether Congress exercises its power by increasing the number of the justices or depriving the Court of jurisdiction and giving it to a special court, the result is the selection of judges in such a way as to assure that they will support the purposes of the appointing power. That cannot be right as a matter of true justice or sound government.

To test the merit of the proposed alternative restraint, we must visualize a situation in which the Constitution has been amended so as to give the Supreme Court appellate jurisdiction to hold acts of Congress void without any right in Congress to increase the number of

justices or to take any part of that jurisdiction away from the Court. If thereafter a situation arises such, for instance, as that which arose in 1936, and Congress is convinced that the Supreme Court is outlawing legislation essential to the welfare of the country there is at hand a remedy entirely consistent with our philosophy of government and our conception of the proper administration of justice. That remedy is, of course, the amendment of the Constitution.

It is important to consider the possible forms which amendments might take. At one extreme would be an amendment taking appellate jurisdiction away from the Supreme Court in the entire field of legislation. A less drastic amendment would be one taking away the appellate jurisdiction in some special field of legislation. Perhaps the easiest way to visualize possible forms of amendment is to consider what sort of constitutional amendments would have been appropriate to meet the desires of the Roosevelt administration in 1936. And parenthetically it may be said that the basis of a great deal of the opposition to the Court plan was that its purposes could have been accomplished, and should have been sought, by amendment of the Constitution and not by act of Congress alone.

Some of the New Deal legislation was held void on the ground that it did not come within the commerce clause of the Constitution. It would have been difficult, perhaps, but by no means impossible, to draft an amendment to the Constitution which would have broadened the power of Congress in that field so as to clearly validate the desired legislation if that were the will of the people. Similarly, if the devaluation of the dollar seemed essential, it could have been accomplished under an amendment to the Constitution giving broad powers over the currency to Congress. Neither of these amendments would have violated the principle that the Constitution should contain only matters concerning governmental powers and should not include anything in the nature of legislation on specific matters. Some of the New Deal legislation might have needed an amendment in more general terms permitting, for example, legislation necessary to the public welfare in an emergency. But the submission of such an amendment to the people would have been entirely orderly and appropriate.

4. The argument that the present situation is desirable because it gives Congress a prompt and effective power in the determination of constitutional problems rather than leaving it all to the Supreme Court

falls flat. The great danger in the world today is the seizure of power by government. And that is a danger nonetheless if the power be seized by a so-called representative body rather than a dictator. The one bulwark against the seizure of power is the judiciary—supported by the respect of the people. The first act of every tyrant or tyranny seeker is to take over the courts. The abolition of the administration of justice will be no less disastrous because it comes gradually. What is needed for its protection is a respect for the orderly processes of government even if they may seem to move slowly. The point has never been better expressed than by Elihu Root at the time when the recall of judges and judicial decisions was suggested by Theodore Roosevelt. He said:

"If the people of our country yield to the impatience which would destroy the system that alone makes effective these great impersonal rules and preserves our constitutional government, rather than endure the temporary inconvenience of pursuing regulated methods of changing the law, we shall not be reforming, we shall not be making progress, but shall be exhibiting . . . the lack of that self-control which enables great bodies of men to abide the slow process of orderly government rather than to break down the barriers of order when they have struck the impulse of the moment."

In answer to those who advocate an immediate constitutional amendment fixing the position of the Court as the final interpreter of the Constitution, subject only to the right of the people to reverse their interpretation by a constitutional amendment broadening the Constitution to permit the legislation held void or taking away the jurisdiction of the Court, it is said that this would be an inadequate restraint upon the power of the Court because of the difficulty and delay involved in amending the Constitution. This was the answer given to those who asserted that the remedy in the controversy of 1936 was to amend the Constitution. It was not persuasive then and it is not persuasive now.

The facts with respect to amendments to the Constitution proposed in the last forty years are that it required an average of sixteen months to obtain ratification of the last five amendments. And as to none of them was there any emergency calling for speed unless, perhaps, in the case of the repeal of prohibition, which from the original proposal in Congress to final ratification took only nine months. It would seem

clear that to deal with a serious question of what is permissible under the Constitution a year and a quarter of deliberation is none too much. Fate has a way of dealing with what seem to be uncompromisable controversies if given a little time. It did so in 1937 and it would be well to give it an opportunity to do so in connection with such controversies as may arise in the future.

If it be true, as has often been said, that the Founding Fathers erred in making the amendment of the Constitution too difficult, perhaps this is the moment to correct the error and establish some other system which will better meet the requirements of the future. Certainly it is unsound to say that a change in the Constitution shall not be made because if it proves unsatisfactory it will be too difficult to make a further amendment altering or repealing it. That is an argument which might have been made against every amendment of the Constitution.

Carrying this line of thought one step further raises the question whether we have not been relying too much upon the interpretation of the Constitution by the Supreme Court and too little upon the possibility of wise changes by amendment through the action of the people. The Constitution never attempted to do more than create a framework of government. It did not try to cover details or special situations except in a general way. That, of course, has created a need for a great deal of interpretation as conditions changed and unforeseen situations presented themselves. It has also created opportunity for greatly stretching or unduly contracting some of the language of the Constitution. Sometimes the Supreme Court has seemed to interpret too narrowly; sometimes it has seemed to stretch sentences or clauses to the straining point. It may well be that a more sympathetic and realistic attitude towards the usefulness of the amending process would be salutary.

The end of this statement of the arguments on behalf of the proposed amendment is the proper place to quote what Justice Roberts said on the floor of the House of Delegates of the American Bar Association in September, 1950:

"I sat very close to a great crisis in the Court's history, the crisis that arose when the Executive, under existing powers, attempted by legislation, to fill that Court with substitutes and additions in order to accomplish a result which it was doubtful could be accomplished under the Constitution any other way. It is true that under the leadership of a great Chief Justice who was perforce compelled to come out into the open and defend the tribunal

on which he sat (a very unfortunate situation, in my judgment, but one which seemed urgent under the stress of a threat that was real to the Court's integrity and to its existence) it was overcome by a narrow majority, as you know against political pressure in a time of great crisis.

"The world does not look too happy a place today. There are going to be extreme measures advocated here, there and everywhere. If it is right that Congress ought not to be allowed, by indirection, to pass upon the constitutionality of its own legislation in a time of great political pressure and crisis, then it is none too soon, Members of the House of Delegates, to say, laying our hands upon our hearts, that it is the considered judgment of the lawyers of the country that safety for the country lies in the right of the greatest tribunal that we have created, the one in which we must have confidence or we have no confidence in any of our institutions, to say, 'This legislation transgresses the fundamental principles of law.'"

CONCLUSION

I have tried to state impartially the arguments pro and con the suggested amendments of the Constitution. I am not attempting to persuade or even express an opinion one way or the other. I would not regard that as proper in a lecture in the free intellectual air of a university. But it is proper for me to state my belief that these amendments should be submitted promptly to Congress and the people for their action, favorable or unfavorable. The underlying question must and will sometime be submitted to the country.

In his short and stimulating "Democracy and the Supreme Court," Robert K. Carr says, by way of conclusion:

"Either the role played by the Supreme Court in our American political system is a desirable and acceptable one, or it is not. Whichever is true, no half measure would seem wise, and the outcome should not be left to the hand of fate. For too much is at stake. If history proves nothing else, it shows that the fate of a society, or a nation, hangs constantly in the balance. And that society or that nation that consistently evades the realities of the day, ignores its troublesome problems, and seeks to find calm and peace in half-measures and no measures at all, is indeed tempting the anger of the gods."

Mr. Justice Roberts entitled his article supporting the proposed amendments "Now is the Time."

There is no immediate controversy between Congress and the Court.

The President and the majority in both houses of Congress belong to the same political party. Every member of the Court was appointed by the President or his predecessor. I quote from the article which I mentioned in the introduction as the inspiration of my interest in the subject—"In Time of Peace Prepare for War" by Edwin A. Falk:

"The time is not inopportune to seek popular approval and to avoid passionate opposition by political factions interested in curbing the judiciary.

"The so-called conservatives can be counted upon for support because they are the ones who man the ramparts whenever danger threatens the constitutional system; and, it should be added, even upon occasions when their anxieties conjure up dangers that exist only in their imaginations. By evincing a continued readiness to protect the Supreme Court even as presently constituted, those who in 1937 professed concern about enduring principles rather than the immediate program, will have an opportunity to prove their good faith and intellectual honesty.

"On the other hand, a plan to stiffen the Supreme Court's armor should enlist equal support from the factions that delivered the 1937 assault. They were guided on that occasion partly by expediency or fancied expediency and, to the extent that similar considerations influence them now, they presumably would be eager to forestall a possible counterattack against the new bench whose current decisions are making drastic changes in fundamental American law along the lines favored by these groups."

What is at stake is a highly prized possession—a written Constitution with a Congress working under it as conscientiously as it will and a Court sitting alongside it to assure that it acts as conscientiously as it should. I do not prophesy whether we are more apt to lose that heritage by keeping the Constitution as it is or by amending it as has been suggested. I am no prophet and no statesman. To me the situation calls for an answer by the statesmen—now—at a moment when statesmen can be statesmen rather than at a time of party strife when statesmen cease to be statesmen and become mere partisan politicians.

(33 American Bar Association Journal, 1, (1949))

NOW IS THE TIME: FORTIFYING THE SUPREME COURT'S INDEPENDENCE

By Owen J. Roberts, Former Associate Justice of the Supreme Court of the United States¹

Speaking at a luncheon of the Association of the Bar of the City of New York on December 11, former Justice Roberts discussed and advocated the various constitutional amendments relating to the Supreme Court of the United States that have been proposed to and considered by the House of Delegates. Readers should refer to 84 A. B. A. J. 1072-1073, November 1948, where the substance and text of the proposed amendments that Justice Roberts discusses are given.

I feel entirely free to talk on this subject now because I have no longer any connection with any of the courts of the United States. I elected to resign the commission that I held and I am, like you, a common citizen and able, thank God, to express my view on public questions without feeling that I may, in some way, breach the proprieties. I cannot, of course, divorce myself from my experiences as a Justice of the Supreme Court and I cannot divorce myself from the opinions that I formed then with respect to policies.

It is because I have been with that body and it is because I have a deep affection for the Court and a deep desire that it be protected and that it carry its place in our tri-une form of government, the proper place, that I felt I ought to say what I could to back the movement that has now gone so far and become a matter of such wide discussion amongst our profession and good citizens of the United States. It has now reached the point that the American Bar Association after inconclusive action at two meetings has recommitment the matter to the appropriate committees with the expectation that they will report to the house of delegates at its next meeting.

The proposals are for certain amendments to the Constitution of the United States or, alternatively as to some of them, for legislation by Congress.

The first proposal is that the Constitution should be amended to provide that the Supreme Court shall be composed of the Chief Justice of the United States and eight Associate Justices. It was a matter of remark by James Bryce that the personnel of the Supreme Court had changed so often in the history of the country. He did not quite understand it, that the number had run all the way from 6 to 9, up and back again. Of course, we understand there is nothing in the world to prevent the Court from being 20 if Congress should so legislate.

You will remember the great letter that Chief Justice Hughes wrote to the Congress in 1937, when the plan to increase the personnel of the Court was under consideration. He said justly then, as I think, that a court of nine is as large a court as is manageable. The Court could do its work, except for writing of the opinions, a good deal better if it were 5 rather than 9. Every man who is added to the Court adds another voice in council, and the most difficult work of the Court, as you may well have imagined, is that that is done around the council table; and if you make the Court a convention instead of a small body of experts, you will simply confuse council. It will confuse council within the Court, and will cloud the work of the Court and deteriorate and degenerate it. I have not any doubt about that.

LIGHTEN COURT'S LOAD BY INCREASING DISCRETIONARY JURISDICTION

The remedy for the weight of work that is placed on the Court is to increase the discretionary jurisdiction and not to increase the personnel of the Court. I can well understand how the Founding Fathers left the number at large because there were many problems that they could not envisage when they drafted the Constitution, and one of its great virtues is that it is drawn with a wide sweep and with a broad brush, and that details are left to be filled in afterward. And that is one objection that will be made to these amendments of which I will speak in a minute.

The second proposal is an amendment to the Constitution that the Chief Justice of the United States and each Associate Justice of the Supreme Court shall retire

¹Owen J. Roberts, at 73, is one of our Nation's two living former members of the Supreme Court of the United States. A member of our association since 1909, he has had a long and useful career in American jurisprudence. He recently became dean of the University of Pennsylvania Law School.

when he shall attain the age of 75 years. I think little need be said about it. I believe it is a wise provision. First of all, it will forestall the basis of the last attack on the Court, the extreme age of the Justices, and the fact that superannuated old gentlemen hung on there long after their usefulness had ceased. More than that, it tends to provide for each administration an opportunity to add new personnel to the Court, which, I think, is a good thing. I think it is a bad thing for an administration to run as long as President Roosevelt's did without a single opportunity to name a Justice to the Court.

PROPOSAL TO FORESTALL POLITICAL AMBITIONS

The third proposal has to do with the appellate jurisdiction of the Court, and I want to pass that for a moment, because that is the crux of what I have to say here today, and that is the logjam we were up against at the annual meeting in Seattle. So I pass the third proposal for the moment and come to the fourth. The substance of it is that no person who hereafter shall become Chief Justice or an Associate Justice of the Supreme Court shall be eligible to the office of President or Vice President.

Just by so much as the Supreme Court is set apart, just because of the great powers the Supreme Court exercises in our constitutional system, there ought not to be any ambition in any man who sits in that Court to go beyond where he is. I would go farther than that. As a matter of personal belief, I do not think an Associate Justice ought to be eligible to be Chief Justice, and I do not think that any member of the Court ought to be eligible to hold any political office, but perhaps the present proposal goes far enough. It says that no Justice shall be eligible to be President or Vice President.

It is a fact, as I think you know, that every Justice who has ever sat on that Court who was bitten by political ambition and has actively promoted his own candidacy for office has hurt his own career as a Judge and has hurt the Court. Instances run pretty far back in the history of the Court.

When a man goes on the Court he ought not to have to depend upon the strength and robustness of his own character to resist the temptation to shade a sentence in an opinion or to shade a view in order to put an umbrella up in case it should rain. He ought to be free to say his say, knowing as the Founding Fathers meant he should know, that nothing could reach him and that his conscience was as free as could be.

The other limitations that the Constitution put, the good behavior clause, and the fact that a Judge's compensation cannot be reduced during his term of office, were intended to guarantee him utter independence. He ought not to have to make a vow to himself that ambition shall not color his opinions. It should be impossible for that to happen.

PROPOSAL THAT JUSTICES HOLD NO OTHER PUBLIC OFFICE

Another proposal is that the Chief Justice or any Associate Justice or any judge of any other court of the United States shall not, during his term of office, hold any other governmental or public office or position.

A bill providing something of that sort was introduced in the last Congress. I feel very strongly that that would be a great protection to the Court. Perhaps it is enough protection to embody it in an act of Congress. It may be a little out of part for me to speak on this subject, for, as you know, I accepted, at the hands of two Presidents, commissions to do work not strictly of a judicial nature. I have every reason to regret that I ever did so. I do not think it was good for my position as a Justice, nor do I think it was a good thing for the Court.

I had an unfortunate experience in the German-American Mixed Claims Commission, in which the German Commissioner accused me of bias and unfairness and walked out of the arbitration. I had another unpleasant experience as a result of the Pearl Harbor Commission report, when a congressional investigating committee sought to comb over what was done, and there might have been rather an unfortunate reflection on the Justice who was a member of that Commission.

In the last administration, the Roosevelt administration, it got to be a very common thing to call on Federal judges, not only of the Supreme Court but from other Federal courts, to take part in administrative work. I think that is a bad thing for the courts, and I think it is not a good thing for the standing of the judges.

EXTENT OF AMENDMENT OF THE CONSTITUTION

Of course, there is the question of how far you are going in amending the Constitution of the United States. I am all for the view that it ought to be a document stating great principles and not attempting the minuteness of a regulatory statute. Every time you suggest an amendment, you violate, to some extent, that great principle.

I want to say that in my opinion this prohibition should extend not only to the Supreme Court but to all of the Federal courts. If any of the Federal Judges have time to run around on all sorts of administrative work, then we have too many Federal Judges.

When I went to Pearl Harbor for 3 weeks I was out of the arguments and consultations in my Court. Chief Justice Stone agreed to my going with the greatest reluctance because he said: "There are some important cases coming up here, and I do not want a Court of eight to hear them. A full Court ought to hear them." But, as I say, he regretfully gave his consent as the President wanted me to go.

I agreed to take the chairmanship of the German-American Mixed Claims Commission with the understanding that it would be but a few hours' work. It was years of work. It took time off from my judicial duties.

The last time that Chief Justice Hughes took a position of this kind, which was that of an international arbitrator between two South American countries, he said to me: "I will never do that sort of thing again. It is not fair to the Court for one of us to take time from the Court's work."

Some people think that if those proposals were adopted, the independence and integrity of the Court would be well protected. Others, and I am one of them, think that this does not go nearly far enough. Now why?

PROPOSAL TO PROTECT COURT'S APPELLATE JURISDICTION

Well, the third proposal to which I said I would return, suggests an amendment of the Judiciary article of the Constitution which would give the Supreme Court appellate jurisdiction in all cases arising under the Constitution, and give it appellate jurisdiction both as to matters of law and matters of fact.

That is a major amendment of the authority of the Supreme Court. It is a major enlargement of it. It is interesting that the Founding Fathers fixed a very narrow obligatory jurisdiction, and a jurisdiction that could not be touched or taken away, that affecting ambassadors, other public ministers and suits in which States would be a party.

Why did they then leave it to Congress to regulate the appellate jurisdiction of the Court? I think they did not envisage any such large Federal Judiciary as we have today. The Federal Judiciary was rather in the background—that is, the lower Judiciary. The theory was that constitutional questions would arise in State courts and then an appeal would come to the Supreme Court from a decision of a State court on a constitutional question.

There came into play State pride, the States' rights feeling, and another feeling that since Anglo-Saxons prize the jury system, giving the Supreme Court appellate jurisdiction as to matters of law and fact would give it the opportunity to overturn jury verdicts, jury decisions, judgments based on jury decisions in New York, in Pennsylvania and elsewhere. The best compromise that could be made in the situation was to leave to Congress the right to define the appellate jurisdiction of the Supreme Court.

APPELLATE JURISDICTION DEPENDS ON CONGRESSIONAL LEGISLATION

You know what the result of that has been. The appellate jurisdiction of the Supreme Court depends upon the Judiciary acts—the original Judiciary Act passed in the first session of Congress and the amendments that have been adopted to it since—and Congress has set forth in what cases the Supreme Court can entertain an appeal.

Very early the Court was faced with the question whether it had a general appellate jurisdiction, modified by what Congress had said on the subject. Chief Justice Marshall, in two decisions, said that was not the way to read the Constitution. He said that the Congress and the Judiciary acts, having set forth in which cases the Supreme Court might have jurisdiction on appeal, impliedly provided that it should not take jurisdiction in any other class of cases.

That is the settled law and I think it is right. It remains, therefore, so far as we can see, that Congress could affect the Court's powers, just as President

Roosevelt could have in his way, unless there were a popular uprising that would frighten them out of doing what they threatened to do.

You have, of course, in mind *Ex parte McCordle*. There was a case that had come up under the jurisdiction then existing under the Judiciary acts. The case had been briefed, argued, and submitted and was ready for a decision, when the Congress removed the appellate jurisdiction of the Supreme Court in that specific class of case. The Chief Justice wrote a short opinion in which he said that the jurisdiction was subject to regulation by Congress and that the Court had lost the power to deal with that case. The case was dismissed for want of jurisdiction.

That has never been done again. Nothing like it has ever been attempted, but it was done for political reasons and in a political exigency to meet a supposed emergency. The Court might well have said that, jurisdiction having existed when the case was submitted and the case now being in the bosom of the Court, it was too late for Congress to take away its jurisdiction; but you know how deferential the Court has been to the doctrine of the division of powers, and evidently it was felt that that would be a straining of the Court's authority and that it should not do it. So it submitted to having its jurisdiction taken away after the case was ready for decision.

It is difficult to say that Congress could not reach the same result by a rather indirect route. Following the precedent that existed when the Emergency Court of Appeals was created to deal with OPA questions, Congress, it seems to me under the present phraseology of the Constitution, could create a Federal court to hear certain classes of questions and provide that its decisions should be final.

Such a court might have to decide very serious constitutional questions, as the Emergency Court of Appeals had to do, and yet, if the Congress provided that its decision should be final and binding on the parties, and without appeal, what is there in the Constitution to prevent it? What is there to prevent Congress taking away, bit by bit, all the appellate jurisdiction of the Supreme Court of the United States, not doing it by direct attack but by that sort of indirect attack?

I see nothing. I do not see any reason why Congress cannot, if it elects to do so, take away entirely the appellate jurisdiction of the Supreme Court of the United States over State supreme court decisions. The jurisdiction is exercised now under the terms of the Judiciary Act. Suppose Congress should decide to let the decisions of State courts of appeal be final on constitutional questions. How could the Supreme Court assert a power to take those questions, notwithstanding the act of Congress, in view of the language of the third article of the Constitution?

That is the real loophole. What is the use of talking about limiting and fixing the number of Justices so that the Court cannot be packed; what is the utility of saying that Justices must retire at a certain period so as not have an old, tired, superannuated Court; what is the good of providing that we shall make the Court less conscious of the political movements in the country by depriving the Justices of the right to have an ambition for future office; if you leave the Court's appellate powers open to be dealt with and be set aside by action of Congress in any given class of cases or in all the cases which, traditionally, it has dealt with as the final appellate body under the Constitution?

PROTECTING COURT'S JURISDICTION IS MOST IMPORTANT PROPOSAL.

For some reason or other this proposal has met with more opposition than the others. In my opinion, without it you have made a bucket and left a hole through which the bucket can empty itself. In other words, this carefully envisaged plan to protect the Judiciary would be left with a defect which renders the protective measures futile.

I want to speak a moment about the objections that have been presented. The opposition says that the whole project of amending the judiciary article of the Constitution is to be frowned upon; that we ought not to tinker with our fundamental law; that we have lived under this Judiciary Act for these 100 years; that we have gotten along pretty well; and that it is reasonable to suppose we would get along in the future.

They take the position, on the other hand, that it is a pretty good thing the Constitution left this hole in it so that the Congress can act as a safety valve if the Court gets too heady.

The arguments are rather inconsistent. The one says "Don't touch the Constitution." The other says "It has a great big hole in it. Nobody has run through the hole yet, and let's take a chance that nobody ever will."

They argue that it would be futile to adopt these amendments. They say that if the people rise and attempt to destroy the Court, it will not matter what the Constitution says about the powers of the Court. But what we are trying to provide against is not an overthrow of the Constitution but a tinkering with the Court by legislative or administrative action without violating the letter of the Constitution.

If we have a revolution and the constitutional system under which we live is destroyed by main force, it will not matter what the Constitution provides. But those who are supporting these amendments are supporting them in the belief that the general framework of our constitutional Government is to be perpetuated and they want that framework of Government to go on along the lines that traditionally we have been led to understand were the divisional lines between the executive, the judicial, and the legislative.

Then, finally, there has been a suggestion that the Court ought not to be strengthened because the Court, as presently constituted, does not have the entire respect of the bar. This I think a desperately bad argument. The Court is a great institution. Just because you and I may not like its decisions today, why should we encourage an opportunity to a politician some time to reach in and change its personnel, or change its jurisdiction? I do not think it is a worthy argument.

The Court could, in effect, be destroyed by a President's appointing consistently desperately bad men to it. But are we to indulge a fear of that? I think not.

CONSTITUTIONAL AMENDMENTS SHOULD BE ADOPTED

That is a summary of the opposition, as I understand it, and I do not think the arguments are valid. I do not see why we should not write into the Judiciary article what right-thinking citizens and the bar have felt is the tradition of the Court and is the core of the Court's fulfilling its independent functions in our system of government. I do not see any reason why we should fear to stand up for our views in this respect because it is a bad thing to get into discussions about constitutional amendments and about our system, and that it is only putting bad ideas into people's heads. We would never have any progress if we were afraid to stand up for what we think right.

We have seen what the dangers are that have popped up now and again, in *Ex parte McCardle* and in the last administration in 2 or 3 aspects. It is just good housekeeping and just good insurance and just good commonsense to put into the Constitution explicitly what you and I all think has been there by tradition for a long time and which ought not to be subject to change.

So, while I am generally against tinkering with the Constitution, I am for making the Judiciary branch as safe from attack as the Founding Fathers evidently expected and desired it should be, and I think the proposed amendments taken together will do that effectively, and that nothing short of them will do it.

(Los Angeles Times, February 18, 1958)

SENATOR JENNER'S COURT AMENDMENT

By Holmes Alexander

"A great cannon, loaded to the lips" was somebody's description of Daniel Webster in 1852 at his last momentous appearance in the United States Senate. Tone the description down a little, but not much, and you could use it to identify Senator William Jenner (Republican, Indiana), who is in his last session.

Jenner, like Webster, has suffered the slings and arrows of irrational radicalism, but he is a better man than his detractors. And Jenner, like Webster, has a set of convictions that are married to the Constitution and are impervious to the seductions of unlicensed liberalism.

A gun in Jenner's valedictorian salute is his bill which would limit the Supreme Court's jurisdiction in considering certain appeals. Hearings have just begun, but the ideological lines were drawn behind closed doors in scrimmages within the Senate Judiciary Committee.

It is the familiar battle, as old as the Republic, between fundamentalists who believe that our freedoms are best protected by strict adherence to the Constitution and loose constructionists who believe in bending the law to fit the

continuing crises. Personalities apart, this is how the argument on the Jenner bill is shaping:

Fundamentalism: The Founding Fathers devised their incomparable system of checks and balances to make certain—among other things—that none of the three branches of Government should ever become too powerful. Thus the Congress, the Presidency and the Supreme Court—while all-powerful in unison—cannot separately infringe upon one another's duties and cannot threaten the people's numerous freedoms. In article III, section 2, there is a check by Congress upon the power of the Supreme Court. It reads:

"* * * the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

This clause, according to constitutional fundamentalism, clearly means that Congress has the right and duty to check the Supreme Court from assuming runaway authority.

Loose constructionism: The Jenner bill is an attempt to discipline the Supreme Court for decisions which certain Members of Congress do not like. This would be an arbitrary and capricious act. The law is kept alive and up to date by these judicial decisions.

Senator Jenner and his conservative colleagues admit that they do not like many Supreme Court decisions. They contend that, far from being arbitrary and capricious, they are following the instructions in the Constitution by attaching "exceptions" and "regulations" to the Court's appellate jurisdiction. The following are the five fields in which the Jenner bill would prohibit the Court from overruling:

1. Action against a witness for contempt of Congress.
2. Action of the Federal Government in firing a security risk, as long as it was done under an act of Congress.
3. Legislation in any State for the control of subversive activities within the State.
4. Action of any school or college to control subversive activities within its teaching body.
5. Regulation by any State concerning admission of persons to practice law within the State.

Obviously backers of the Jenner bill believe that the Supreme Court has abused its powers in recent decisions concerning contempt of Congress, Federal Internal security firings, State antismersion laws, college antismersion rules for faculty members, State laws to prevent Communists and their supporters from practicing in the local courts.

Does Congress have this right? The fundamentalist case, I am told, rests upon the Reconstruction era decision in which a Mississippi newspaper editor named McCordle was arrested for some alleged infringement of Reconstruction law. McCordle appealed to the Supreme Court. Congress quickly enacted a statute which withdrew (as the Jenner bill would do) the Supreme Court's appellate jurisdiction in the pertinent field of law. The case against McCordle was automatically dismissed. Chief Justice Chase acknowledged the right of Congress to act as it did. He declared:

"Without jurisdiction the Court cannot proceed at all in any case * * * the only function remaining to the Court is that of announcing the fact and dismissing the cause."

Thus if Congress should pass the Jenner bill, the Supreme Court would be bound by precedent to treat it as law of the land.

TESTIMONY BEFORE THE INTERNAL SECURITY SUBCOMMITTEE, ON WEDNESDAY, AUGUST 14, 1957, IN ITS INQUIRY ON SCOPE OF SOVIET ACTIVITY IN THE UNITED STATES

UNITED STATES SENATE,
SUBCOMMITTEE TO INVESTIGATE THE ADMINISTRATION
OF THE INTERNAL SECURITY ACT AND OTHER INTERNAL
SECURITY LAWS, OF THE COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The subcommittee met, pursuant to call, at 9:35 a. m., in room 457, Senate Office Building, Senator William F. Jenner presiding.

Also present: Robert Morris, chief counsel; Benjamin Mandel, research director; and F. W. Schroeder, chief investigator.

Senator JENNER. The committee will come to order.

The witness will be sworn.

Do you swear that the testimony you give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Miss HORVATH. I do.

Senator JENNER. Proceed, Mr. Morris.

Mr. MORRIS. We have here, Senator, a witness who I believe is competent to give testimony about recent developments in the Communist Party, the subject that is under consideration by the Internal Security Subcommittee at this time.

Will you give your full name and address to the reporter?

TESTIMONY OF STEPHANIE HORVATH, DETECTIVE, NEW YORK CITY POLICE DEPARTMENT

Miss HORVATH. Stephanie Horvath, New York City.

Mr. MORRIS. What is your business or profession?

Miss HORVATH. I am employed by the New York City Police Department, holding the rank of detective.

Mr. MORRIS. I wonder if you could give the subcommittee a short description of your duties?

Miss HORVATH. In 1943, shortly after I was appointed to the police department, I was assigned to undercover work, and requested to seek entry into the Communist Party and report on the members and their activities.

I was a member of the Communist Party from 1943 to the end of 1947.

Mr. MORRIS. You say you joined the police department in 1943?

Miss HORVATH. 1942.

Mr. MORRIS. Did they ask you to go into the Communist Party?

Miss HORVATH. Yes. I was specially assigned by the police department to become a Communist for the police department. I did not do that of my own volition.

Mr. MORRIS. Yes.

And then you reported back to the police department; is that correct?

Miss HORVATH. I reported back to the police department until I was expelled from the party. And since my expulsion I have maintained my contacts. Well, I have been kept in subversive activities work which has kept me abreast of what has happened in the Communist Party.

Mr. MORRIS. Now, do you get reports from those in the Communist Party?

Miss HORVATH. Yes. I am still assigned to cover meetings which I report on and all the information which comes in from different agencies is thoroughly studied by me so that I have a pretty good knowledge of the present situation.

Mr. MORRIS. Then you officially report when you learn what goes on in the Communist Party to the New York police special squad?

Miss HORVATH. And whatever agency might be interested, also.

Mr. MORRIS. I see. You do cooperate with other agencies?

Miss HORVATH. Yes.

Mr. MORRIS. I wonder if you could, based on your experience, tell us what the recent developments have been in the Communist Party as a result of the recent Supreme Court decisions?

Miss HORVATH. Well, as I see it, following the end of World War II, and even in the subsequent period of the cold war, the Communist Party in the United States was at that time at its numeric peak. The Communists were not fearful of openly declaring themselves to be members of the Communist Party, nor did they expect dire consequences, except for the small minority who, because of party orders or possibly jeopardizing their livelihood, could not reveal such affiliation.

Publicly announced and advertised meetings and rallies were filled to overflowing, and collections taken up thereat in the name of the Communist Party or its numerous front organizations were always responded to generously. It was not until after the initial blow came—and that was in the form of the first trial of the 11 Communist leaders in Foley Square, wherein they were charged with violation of the Smith Act—that the Communist Party structure first began to weaken.

All throughout that first trial it seemed as if the strong support of the comrades and their open contempt for the effectiveness of the Smith Act insofar as it could curb their activities or penalize them for membership in the Communist Party might affect the decision of the Court.

Mr. MORRIS. And you were in the Communist Party then; were you not?

Miss HORVATH. No; I had already been expelled.

Mr. MORRIS. When were you expelled?

Miss HORVATH. At the end of 1947.

The slow but steady decline in the rank and file membership has been fully realized by the Communist Party as more and more of their leaders and comrades have been tried, convicted, and imprisoned. Ranking as No. 1 on their program has been the weakening or repeal of the Smith Act, the provisions of which the Communist Party has consistently attacked as being the primary cause of the decline and loss of membership.

Closely related to the Smith Act have been the investigations into Communist activities by the congressional committees and the hearings conducted by the Subversive Activities Control Board.

Their adverse decisions on Communist-front organizations and individuals has made deep inroads on the so-called Communist sympathizer who, more often than not, was actually a Communist Party member. Added to this, the publication of the Attorney General's list of subversive organizations and the disclosure of the true purpose and identity of the leaders of the group was another blow to Communist Party membership.

The loyalty oath required not only of persons in Government employ but more and more adopted in private industry has had its effect on weakening the party.

Loss of union affiliation because of Communist Party membership and the subsequent housecleaning of Red leaders in unions has caused still another gap in Communist ranks.

Further, the fear of deportation on grounds of having been a member of the Communist Party at the time of naturalization or if convicted under the Smith Act has had a powerful effect and added to the party's decline. The ever-growing list of difficulties facing the Communist Party on the domestic front and the resultant reduction in the numbers was heightened by the growing unrest and nationalist stirrings in the Soviet dominated and controlled satellites.

Its climax was reached with the outbreak of the Hungarians. The horrors and cruelties of the repressive measures taken by the Communists, and the revelation of the truth by thousands of Hungarian refugees, many of whom had been Communists themselves, was more than many Communists in the United States could swallow.

Yet despite all the obstacles, adversity, and confusion which caused the Communist Party to shrink in numbers through the past years, the hard-core, die-hard party members have never given up hope that their party would some day be rearmored for the battle and would again resume a place as the leaders of the American people.

That shot in the arm which has revitalized the Communist Party and evoked joyous prospects for the future of the party has been the Supreme Court decisions on the Smith Act. Communists have seized upon these decisions as their salvation from the provisions of this act.

Concentrated effort and a vigorous campaign to completely nullify the Smith Act through application of these decisions was the principal theme dominating the welcome home rally and reception for released Smith Act violators.

Mr. MORRIS. Give us some quotes of what went on at this Communist meeting.

Miss HORVATH. This was the report I took.

Mr. MORRIS. What is the date of that?

Miss HORVATH. It was held Wednesday, July 24, 1957, at Carnegie Hall. There were about 1,400 people there.

Mr. MORRIS. You say you attended it?

Miss HORVATH. Yes. I attended it and took stenographic notes of what the speakers said.

Mr. MORRIS. Did anyone interfere with your doing that?

Miss HORVATH. No.

Ben Davis was the chairman of the meeting, and John Gates was one of the speakers, John having been convicted for violation of the Smith Act.

Among the things that John Gates said was:

"The recent decisions of the Supreme Court, as our chairman, Ben Davis, has said, was a victory for the whole American people. I am proud of the modest but very important part that the Daily Worker played in helping to bring about this victory, and in particular I am proud of the role we played in helping to bring about the release of Bob Thompson.

"Now we are going to launch another campaign because, although the Smith Act has received a very heavy blow with the Supreme Court decisions, and

although the tide in our country is against such reprehensible laws as the Smith Act, it is not yet dead and will not be dead so long as Winston, Green, and Polach are still in jail, and so long as other convicts are hanging over the heads of many of our comrades.

"The recent Supreme Court decision threw out the organizing section of the Smith Act indictments; that is, that we were accused of organizing the Communist Party in 1945 as an organization which taught and advocated destruction of the Government."

Another speaker was Pettis Perry, recently released from Federal prison:

"I think, comrades, we have a special responsibility here, taking into account the new energy and initiative that the American people have begun to show, which has reflected itself in the Supreme Court decisions involving the Communist Party. Take this as a new impetus against lingering McCarthyism in our country. I think there is every reason to feel and believe that it is possible for us to bring into being in the United States a broad, yes, and serious, movement for amnesty for Comrades Green and Winston."

Eugene Dennis, convicted under the Smith Act, stated—

Mr. MORRIS. He has been the head of the party?

Miss HORVATH. Yes. He was secretary.

He said: "Further, I would like to salute the host of non-Communist defenders of democracy and peace, many of whom likewise felt the blow of reaction and victimization. Their staunchness and efforts helped create the change in political climate that checked McCarthyism and made possible the significant June 17 decisions of the Supreme Court."

Paul Novick stated: "The Supreme Court decisions in the California Smith Act case in the Jencks-Watkins case substantiated it." And he said: "The defense of the rights of the Communist is the first line of defense of American principles."

John T. McManus, editor of the National Guardian, and long a Communist sympathizer, stated:

"It is, in my opinion, no accident that the Warren Court—and Warren is no accident either—had the courage and determination to right the wrongs of the Vinson Court. . . ."

"I think we must look back also over the behavior of some of the Federal judiciary, and set aside a special niche for Justices Black and Douglas, and I think we should recognize the tremendous force of the dissent of Judge William Hastie and Judge Lazarus in the Pittsburgh cases."

Mr. MORRIS. Is that a direct quote? Were they direct quotes?

Miss HORVATH. These are all verbatim quotes; yes.

Senator JENNER. You were at the meeting?

Miss HORVATH. Yes, sir.

Senator JENNER. You took this down in shorthand?

Miss HORVATH. I did. I have my notes.

McManus also stated: "I wonder whether we can truthfully rejoice that the reign of terror is over. It seems in view of the Supreme Court decisions that no further Smith Act cases can again be undertaken, and those under prosecution must be quashed. It seems that the FBI's nest of rumors and lies must go to wrack or be forced out into the open if they try to use them."

Mr. MORRIS. So, all in all, you say that the Communists have derived a great deal of satisfaction from this decision?

Miss HORVATH. Yes. They are rejoicing over what they consider one of their biggest victories since the party began to decline.

I have still another quote from Weinstock. Would you like to hear it?

Mr. MORRIS. Yes.

Miss HORVATH. Weinstock, who made the collection speech, prefaced his appeal for funds—

Mr. MORRIS. All of these people are Communist leaders; are they not?

Miss HORVATH. Yes.

Louis Weinstock was convicted under the Smith Act and recently released from Federal prison. He asked for funds in order to "declare null and void all the indictments and to return citizenship rights to everyone of us who has spent time in jail."

Then he said:

"I would like to say a word about the Supreme Court decisions.

"I had to go down to Foley Square on July 5 or 6 and report to the parole officer, tell him where I worked, what time I went home last night, what I did

with the money I earned, and who I associated with. I walked in the office and he said, 'You know, Mr. Weinstock, I was thinking of you all day today.'"

Mr. MORRIS. This is the parole officer speaking?

Miss HORVATH. Yes.

Now, this is Weinstock:

"I felt then he must be a social worker of the prison bureau.

"He said, 'The Supreme Court ruled that to teach and advocate the overthrow of the Government by force and violence is not a crime. So what did you spend time in jail for?' " That was the parole officer.

Then Weinstock said:

"No I said to the man, 'First of all, I never advocated it, so I couldn't have been sent to jail because I was found guilty of the charge.'

Then the parole officer said:

"You know, Mr. Weinstock, you shouldn't feel too bad or feel frustrated."

Then Weinstock:

"I looked at the poor guy and said, 'Up to July 22 I can't say anything. But after July 22, you will hear from me and my friends many times. And it is not going to be frustration.'

"The same day I read the remarks made by one Senator who said that the Supreme Court Judges should be impeached. The others said that they should be upheld in the eyes of the people of the United States as people who are defending the Constitution and the Bill of Rights. And he said this is actually what the Communist have been doing ever since they have been carrying on their activities."

Mr. MORRIS. What was the meaning of that last thing?

Miss HORVATH. Well, I got the impression that he meant by his remarks that the public is beginning to be more and more impressed with the incorrectness of the Smith Act, especially as applied to the Communists.

Mr. MORRIS. You mean he was trying to say that the Communists are good people, after all?

Miss HORVATH. That is right; that they are not so wrong.

Mr. MORRIS. Senator, that is the area I wanted to traverse with the witness. I have nothing further.

Senator JENNER. The committee will stand in recess. We may want you to come back at some later time.

(Whereupon, at 9:50 a. m., the subcommittee adjourned.)

[American Bar Association Journal, vol. 44, pp. 35-39]

COMMUNISM AND THE COURT: AN EXAMINATION OF RECENT DEVELOPMENTS

By Frank B. Ober, of the Maryland bar (Baltimore)

Mr. Ober's thesis is that the Supreme Court after recovering from an amazing blindness toward the dangers of the internal threat of the Communists, has in recent months showed symptoms of a recurrence of its postwar myopia. "Internal subversion," writes Mr. Ober, "has been the main weapon by which Communist victories have been won in China and other important areas." He fears that the "new majority" on the Court may return to its pre-Korean policy of putting such a strong emphasis on civil rights that the executive and legislative branches (Federal and State) may be hampered in their efforts to defend the country from subversives.

At the end of World War II a series of decisions by the Supreme Court seemed to indicate that the majority of the Court, as then constituted, were blind to the threat of communism to our internal security. Chief Justice Stone, dissenting in the *Schneiderman* case in 1943, even then, however, recognized and exposed the nature of the Communist conspiracy from the Party's own documents. Justices Roberts, Frankfurter, and Reed often dissented in these cases.¹

¹ Ober, 34 A. B. A. J. 645 (August 1948). See, e. g. *Schneiderman v. U. S.*, 320 U. S. 118 (Chief Justice Stone, Justices Roberts and Frankfurter dissenting); see also *Bridges v. Wilson*, 326 U. S. 135 (Chief Justice Stone, Justices Roberts and Frankfurter dissenting); *Board of Education v. Barnett*, 319 U. S. 624 (Justices Roberts, Reed, and Frankfurter dissenting); *Girouard v. U. S.*, 328 U. S. 61 (Justices Roberts, Reed, and Frankfurter dissenting).

By 1950, the personnel of the Court had changed through the death or retirement of four Judges,¹ and the dangers of communism, both external and internal, had become only too clear.² A new attitude of the majority of the Court, as reconstituted, was foreshadowed in the *Douglas* cases, upholding the validity of the Taft-Hartley requirement that labor union leaders file non-Communist affidavits.³

The *Dennis* case,⁴ in sustaining the conviction of the 11 Communist leaders under the Smith Act in 1951, made it abundantly clear that the entire Court, except Justices Black and Douglas, had finally recognized the danger from the Communist conspiracy and the necessity of legislation against it. The majority opinion by Chief Justice Vinson emphasized the necessity of the Government's preventing its own violent overthrow. Justice Frankfurter, concurring, said:

"The Communist Party was not designed by these defendants as an ordinary political party. For the circumstances of its organization, its aims and methods, and the relation of the defendants to its organization and aims we are concluded by the jury's verdict. . . . We may take judicial notice that the Communist doctrine which these defendants have conspired to advocate are in the ascendancy in powerful nations who cannot be acquitted of unfriendliness to the institutions of this country. We may take account of evidence brought forward at this trial and elsewhere, much of which has long been common knowledge. In sum, it would amply justify a legislature in concluding that recruitment of additional members for the party would create a substantial danger to national security."

Justice Jackson, concurring, said:

"The Communist Party, nevertheless, does not seek its strength primarily in numbers. Its aim is a relatively small party whose strength is in selected, dedicated, indoctrinated, and rigidly disciplined members. From established policy it tolerates no deviation and no debate. It seeks members that are, or may be secreted in strategic posts in transportation, communications, industry, government, and especially in labor unions where it can compel employers to accept and retain its members. It also seeks to infiltrate and control organizations of professional and other groups. Through these placements in positions of power it seeks a leverage over society that will make up in power of coercion what it lacks in power of persuasion."

The Court had little difficulty in holding that the "clear and present danger" rule of reason, applied to laws limiting free speech, could not be used to upset laws directed at sedition of a serious character.⁵ Chief Justice Vinson pointed out that the rule "cannot mean that before the Government can act it must wait until the putsch is about to be executed." Mr. Justice Frankfurter said there was "ample justification for a legislative judgment that the conspiracy now before us is a substantial threat to national order and security." Mr. Justice Jackson said:

"Unless we are to hold our Government captive in a Judge-made verbal trap, we must approach the problem of a well organized nationwide conspiracy, such as I have described, as realistically as our predecessors faced the trivialities that were being prosecuted until they were checked with a rule of reason."

Prosecutions under the Smith Act were hampered by pleas of the fifth amendment before grand juries to questions relating to Communist activity because that was a link in the chain of evidence required for conviction under the Smith

¹ Chief Justice Stone, Justices Roberts, Murphy, and Rutledge, succeeded by Chief Justice Vinson (1946), Justices Burton (1945), Clark (1949), Minton (1949). Justice Byrnes' tenure—1941-42—was too short to have any material effect on the subject under discussion.

² Externally through the fall of China, commencement of Korean war, June 1950. Internally the threat of subversion was dramatized by exposure of Hiss, Fuchs, White, Remington, Coplon, etc., and attested by Federal and State legislative and loyalty programs. These pages of history seemed indeed worth volumes of logic. (N. Y. *Times*, 256 U. S. 349) in their impact on the Court. See *Dennis v. U. S.*, 341 U. S. 404, 548.

³ *American Communications v. Douds*, 330 U. S. 382, 846 (1950). Constitution of United States, Legislative Reference Service Library of Congress, Edward S. Corwin, editor, hereinafter cited "Corwin," p. 195. Cf. *Leedom v. International Union*, 1 L. ed. 2d 201, *Amalgamated Meat Cutters v. N. L. R. B.*, 1 L. ed. 2d 207, holding that union status is not affected by false affidavits of officers.

⁴ *Dennis v. U. S.*, 341 U. S. 494, 510, 546, 564 (1951). Emphasis here and throughout supplied.

⁵ 341 U. S. at pp. 509, 542, 568. Justices Black and Douglas dissented on the basis of the first amendment, and the latter thought that the answer to communism was education which, as has been caustically pointed out, did not prevent the very conspiracy under consideration. (See Corwin, p. 801.) Since the *Dennis* case, through 1956 103 Communist leaders had been convicted and 27 awaited trial. (See U. S. News & World Report (hereinafter cited as U. S. News) December 28, 1956.)

Act.¹ Congress therefore amended and broadened the Immunity Act so that witnesses in investigations relating to national security, upon application to the Court, could be granted immunity and compelled to testify.²

THE ULLMAN CASE . . . THE IMMUNITY ACT UPHOLD

This Act was sustained in 1950 in the Ullmann Case,³ and the Court, in an opinion by Justice Frankfurter, declined to extend the fifth amendment to protect against possible loss of jobs, expulsion from unions and general public opprobrium. Justices Black and Douglas dissented.

Congress meanwhile passed the Subversive Activities Control Act of 1950.⁴ This act proscribed acts substantially contributing to a totalitarian dictatorship, controlled by a foreign government within the United States; required registration of Communist action and front organizations; set up a Subversive Activities Control Board; and made it unlawful for members of totalitarian organizations to hold nonselective offices or to conceal membership therein in seeking employment in defense facilities. While providing certain sanctions, it declared that mere membership in the Communist Party, so disclosed, was not per se a crime.

The Court in 1950 referred back to the Board for further evidence, without reaching constitutional issues, a decision requiring the Communist Party to register. This was because of alleged perjury elsewhere of the notorious Matusow and two other witnesses. Justices Clark, Reed, and Minton dissented on the ground that these three witnesses had all been cross-examined at length on the very issue of perjury, and that the Court should have determined the important issue of constitutionality of the act, which they called "a bulwark of the congressional program to combat the menace of world communism." The Board on rehearing adhered to its prior opinion that the Communist Party should register.⁵

Additions were made to this act by the Communist Control Act of 1954,⁶ extending the net to include Communist-infiltrated organizations and making labor organizations determined to be such ineligible in certain respects to benefits under the National Labor Relations Act. It proscribed the Communist Party, deprived it of the rights and immunities of legal bodies and applied the sanctions of the Internal Security Act to those who knowingly become or remain members of the Communist Party or similar organizations dedicated to the violent overthrow of the Government, under the tests set forth in the statute.

In the Nelson case,⁷ discussed below, the Court cited these later acts as well as the Smith Act as indicating an intention to supersede state power in this field—thus implying their validity. The effectiveness of the Federal legislation against the Communists has been demonstrated by the large decrease in Communist Party membership and the admissions of their leaders.⁸

It would have been reasonable to conclude therefore that the present Court would continue to sustain the Federal criminal laws directed at the Communist conspiracy, but the cases decided in June 1957, indicate that all anti-Communist laws may be so restricted as to lose their effectiveness. Thus in the Yates case,⁹ the Court freed 5 and ordered retrial of 9 other second-string

¹ *Blau v. U. S.*, 340 U. S. 159 (1950).

² 18 U. S. C., Supp. 11, sec. 3486 (c).

³ *Ullman v. U. S.*, 100 L. ed. 511 (1956). Justice Frankfurter's statement that no constitutional guaranty enjoys a preference, if followed, would be contrary to prior decisions. Cf. *Adams v. Maryland*, 347 U. S. 179 (1954), holding testimony before congressional committee could not be used in subsequent state trial for gambling.

⁴ 50 U. S. C., secs. 781-826. This act is a subchapter of the Internal Security Act. Another subchapter provides for the detention of security risks under prescribed procedures during war or fifth column insurrection.

⁵ *Communist Party v. Subversive Activities Control Board*, 351 U. S. 115 (1956). As a postscript to this case it may be noted that the FBI informer, Matusow, who was induced to write a book, presumably under Communist inspiration, recanted his testimony in a number of cases and was convicted for perjury in so doing. *Baltimore Sun*, September 27, 1956. The district court refused to set aside convictions merely because of Matusow's testimony, except as to two of the defendants involved, where his evidence was important. See *Flynn v. U. S.*, 180 F. Supp. 412. The Board filed with U. S. Court of Appeals for District of Columbia, December 18, 1956, a modified report (argued May 27, 1957), containing convincing evidence of the conspiratorial nature of the Communist Party.

⁶ 50 U. S. C., Supp., secs. 782, 784, 789-793, 841-844. See also, secs. 851-857. Cf. Md. Code Art. 85A, provisions as to subversive organizations.

⁷ *Pennsylvania v. Nelson*, 350 U. S. 597.

⁸ The difficulties in maintaining underground apparatus is admitted in Communist documents. See Chief Justice Stone dissenting in *Schneiderman v. U. S.*, 320 U. S. 187-189, 202-203.

⁹ *Yates v. U. S.*, 354 U. S. 208.

Communists because (1) the indictment had relied in part on the organization section of the Smith Act, which had not been involved in the Dennis case, and which it narrowly constructed to mean original organization; and (2) the trial judge did not sufficiently distinguish between advocacy of the violent overthrow of the Government as an abstract doctrine and such advocacy as an incitement to action. Justice Burton dissented as to the first ground and Justice Clark as to both grounds. Justice Clark pointed out, as indeed the majority conceded, that the distinction between the charge in this case and the Dennis case is subtle and difficult to grasp. In any event, of 60 second-string Communists now appealing their convictions many have already been freed, under this ruling.

The Jencks case¹⁸ held that the defendant was entitled to an order directing the Government to produce reports for his inspection containing statements of Government witnesses, overruling what seems to have been the prior uniform practice of requiring their production before the trial judge in whom was vested the discretion to determine relevancy and Government privilege as to state secrets and identity of confidential informants. Thus the Government must open its files to defendants or forgo prosecution. Justice Clark, dissenting, said:

"Unless the Congress changes the rule announced by the Court today, those intelligence agencies of our Government engaged in law enforcement may as well close up shop, for the Court has opened their files to the criminal and thus afforded him a Roman holiday for rummaging through confidential information as well as vital national secrets."

Congress did promptly in large measure reverse the Jencks case.

THE FEDERAL SECURITY PROGRAM

The Federal program designed to protect against infiltration by Communists in Government employ of course raises considerations quite different from criminal laws. It involves the right of the Government, as employer, to set up standards of employment and to discharge employees for reasons which may not involve criminal activity at all.

Congress, in exercise of its constitutional right to prescribe qualifications for Government employment, enacted the Hatch Act in 1939, prohibiting political activity by civil-service employees; this act was sustained in the United Public Workers case.¹⁹ The same act made it unlawful to pay from public funds Federal employees having membership in organizations advocating the overthrow of our constitutional form of government.

The Civil Service Commission passed regulations in 1942 providing for removal from Federal employment for a number of causes, including "a reasonable doubt as to his loyalty to the United States."²⁰ In 1947, acting in part under the Hatch Act, President Truman issued Executive order 9835, as amended in 1951 by Order 10241, changing the standard to "reasonable doubt as to loyalty." An ambitious plan for screening all Federal employees, with many procedural safeguards including a field investigation when necessary was undertaken. The criteria for determining evidence of disloyal conduct included, in addition to sabotage, espionage, sedition, advocacy of the forcible overthrow or alteration of the United States Government, disclosure of confidential information serving the "interests of another government in preference to the interests of the United States" and membership in organizations designated by the Attorney General as totalitarian, Fascist, Communist or subversive, or seeking to alter the form of government of the United States by unconstitutional means.²¹ While it would seem that this order was assumed to be in its major aspects constitutional, the provision for listing by the Attorney General ran into objections in the Joint Anti-Fascist Refugee Committee case, decided in 1951.²² In this case the court reversed the holdings of the lower courts which had denied relief to certain organizations seeking to have their names deleted from the Attorney General's list. Two of the Justices thought the decision not within the Executive order,

¹⁸ *Jencks v. U. S.*, 353 U. S. 657. Justices Burton and Harlan dissented on this point but concurred with the majority on other grounds. Congress immediately reacted by enacting 18 U. S. C., sec. 3500 to keep the FBI files confidential. Cf. *Black v. Ouster*, 100 L. ed. 681, where Chief Justice Warren, Justices Black and Douglas, dissenting, indicated that membership in the Communist Party involved only "political beliefs."

¹⁹ 5 U. S. C. 118 (1) (1); Corwin op. cit. 449. *United Public Workers v. Mitchell*, 330 U. S. 75; *Oklahoma v. U. S. Civil Service Commission*, 330 U. S. 127.

²⁰ 5 U. S. C. sec. 631 ff. See *Friedman v. Schwellenbach*, 159 F. 2d 22; certiorari denied, 331 U. S. 865.

²¹ See notes under 5 U. S. C. sec. 631.

²² *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123 (1951); cf. *Bayley v. Richardson*, 341 U. S. 918; Corwin, op. cit. at 451-452.

and three of the Justices thought it violated procedural due process because of lack of due notice and hearing. Mr. Justice Frankfurter emphasized in his concurring opinion, however, that the claim of national security is the greatest of all public interests, but there is nothing impractical in requiring the disclosure to an organization of the case against it. Justice Reed dissented in an opinion, joined in by the Chief Justice and Justice Minton, on the ground that the decision interfered with executive discretion.

In 1953, the Truman order was superseded by the Eisenhower Order No. 10450,¹¹ which has been several times amended. This substituted, for the "reasonable doubt as to loyalty" standard, the test whether employment was "clearly consistent with the interest of the national security". It thus replaced the standard of loyalty with the broader concept of security, based in part on the Summary Suspension Act of 1950 referred to below. It added to the 1947 evidence to be considered other relevant criteria, not relating only to loyalty, but also to criminal, unreliable or immoral behavior and undue susceptibility of an employee to pressure and likewise the exercise of rights under the fifth amendment before congressional committees.

In the Peters case, the 1953 Court construed the order to deny the right of the Loyalty Review Board to reopen the case of an employee twice cleared. The case turned on the narrow point of construction. It is not without significance, however, that Chief Justice Warren indicated that the granting of certiorari was because the Court thought that it presented serious and far-reaching problems in reconciling fundamental constitutional guarantees with the procedures used to determine the loyalty of Government personnel.¹²

The Summary Suspension Act of 1950¹³ came before the Court in 1950. This act provided for summary suspension in certain named sensitive agencies in the discretion of the agency head, when deemed necessary in the interest of national security. The President extended it to all agencies under the discretionary power given him thereby. An employee in a nonsensitive position was summarily dismissed under this act after he refused a hearing at the administrative level. The dismissal was reversed in the Cole case¹⁴ on the ground that there had been no determination that the employee's position was related to the national security as required by the Summary Suspension Act. It further held that the Executive order implementing the act was invalid insofar as it permitted summary discharge of employees charged with disloyalty without making any determination with respect to the relationship between the employee's retention in view of the nature of his job and the national security. In the course of this opinion the Court, however, seems to assume the validity of the general provisions of Executive Orders Nos. 9835 and 10450. Justices Clark, Reed, and Minton dissented on the ground that the decision frustrated the clear purpose of Congress in delegating discretion to the agency head to dismiss summarily.

ANOTHER STEP * * * THE HATCH ACT

In 1953 Congress extended the Hatch Act to deny employment to and penalize employees accepting pay, who themselves were engaging in strikes against the Government or were members of employees' organizations exercising such a right to strike, or who advocated, or were members of organizations advocating, its forcible overthrow. This was implemented by the requirement of an affidavit.¹⁵

That a reasonable security program must be maintained seems self-evident, though there are admittedly difficulties in administrative procedures. The Court has in other security areas deferred to the greater knowledge of the political branches of the Government which have the awesome public responsibility for our national security.¹⁶ The successive orders have improved the many procedural safeguards of employees. No doubt some of the suggestions currently made for further improvements can and should be adopted. But proposals for restricting the program to persons in sensitive positions, restricting use of con-

¹¹ See notes under 5 U. S. C. sec. 631 Supp.

¹² *Peters v. Hobby*, 349 U. S. 331 (1955). Justices Reed and Burton dissented. *Service v. Dulles*, 1 L. ed. 2d 143.

¹³ 5 U. S. C., sec. 22 (1-3).

¹⁴ *Cole v. Young*, 351 U. S. 536 (1956).

¹⁵ U. S. C. sec. 118 (1) (p) (q). The Atomic Energy Commission under the Act of 1946, the Defense Department through defense contracts, and the Coast Guard under the Act of August 6, 1950, operate separate security programs.

¹⁶ *Harisiades v. Shaughnessy*, 342 U. S. 580, 589, 596-7; *Shaughnessy v. Mezei*, 345 U. S. 206 (dissenting opinion of Justices Jackson and Frankfurter at p. 222); *Dennis v. U. S.*, *supra*, pp. 542, 547.

Confidential information to cases more closely related to national security, and the like, must be sifted to make certain they do not hamstring the agencies responsible for the program.

Meanwhile, the highly articulate broadsides against the loyalty program seem often to ignore some of its most fundamental aspects. The objective is not an effort to convict at a criminal trial and hence to insure that no innocent person be improperly convicted. In a security system, the objective is to assure, so far as possible, discharge of security risks with a minimum injury to employees who may not in fact be security risks. While it is better to let some criminals go free than occasionally to convict one innocent, national security demands that there should be a minimum possibility of retaining security risks. It seems clear, therefore, that all of the judicial procedures are not applicable in a loyalty program. Indeed, with the responsibility of an executive normally should go the power to hire and fire in government employ, no less than in private employ. It has always been the law, except as limited by civil service statutes or other statutes, that employees can be discharged without a hearing. But in the interest of fair play, administrative hearings have been provided. Unquestionably, in this comparatively new and delicate field injustices have arisen from faulty administration of the loyalty program. These instances have been exaggerated in the public mind by ignorance of the nature of the proceedings and the tremendous publicity given to a few *causes célèbres*.

Much of the criticism has centered on the use of confidential information or, as it is emotionally stated, "faceless informers." As has been pointed out repeatedly by the Department of Justice and Mr. J. Edgar Hoover, the security program would be destroyed if the FBI had to uncover its agents and lose the cooperation of informants in every security case. The British, after the Burgess and Maclean episode, were reluctantly forced to the conclusion that confidential information had to be used to some extent in their security program.

To put the matter in proper perspective, it must be noted that the screening process means that few employees ever face an administrative hearing and but one in a little over a thousand is dismissed for reasons involving possible disloyalty; more important, even those discharged are protected by the provisions of the Executive order requiring proceedings to be kept confidential, so that only when the employee himself publicizes (his version of) the facts—or in half of 1 percent—even in the relatively few cases of those dismissed is there publicity. Since all present employees have been screened, it is hardly likely that there will be as much cause for criticism of the program in the future. There is less likelihood of stigma being attached to failure of applicants to get jobs.

ALIENS

Congress has many times exercised the sovereign right of any nation to exclude or deport undesirable aliens.²² For more than 60 years Congress has excluded anarchists and persons who believe in or advocate the violent overthrow of the Government. More recently, through the Alien Registration Act of 1940, the Sub-

²² The necessity of using confidential information as provided by Executive orders since 1947 has been repeatedly affirmed by the President. See reprint of 1952 speech in U. S. News, September 9, 1955; Brownell, U. S. News, April 20, 1955, p. 58. For percentage of cases where there is publicity see p. 64, where it is also pointed out that where the employee publishes his side of the case the Government is at a disadvantage, since it cannot disclose its own confidential information. Occasionally, however, reporters themselves dig out derogatory information from public records. See U. S. News, May 13, 1955, p. 55, on Dr. Peters, who was the person involved in *Peters v. Hobby*, discussed supra, note 22. See also Report of the Comm. of the Association of the Bar of N. Y., New York Times, July 10, 1956, indicating only about 9,400 employees out of about 7,000,000 involved in the several security programs were affected. See also Harkness' Report on Eisenhower Program, U. S. News, November 25, 1955, p. 77; Report British Privy Counsellors on Security, U. S. News, March 30, 1956, p. 108. The Report of the Wright Commission on Government Security, summarized, New York Times, June 25, 1957, recommends retention of Federal security programs; creation of central security office to study security matters and furnish advisory decisions to department heads; a return to the earlier conception of separation of loyalty from security cases; continuance with changed procedure of the Attorney General's list; compulsory process against witnesses; right of person subjected to loyalty investigation to confront accusers and cross-examine them "whenever it can be done without endangering the national security"; emphasizes the prime duty of the Government to preserve itself and to avail itself of information from confidential sources, but recommends that no derogatory information shall be considered against objection without the right of cross-examination, except where supplied by regularly employed confidential informants engaged in intelligence work for the Government whose identity may not be disclosed without compromising the national security; that it be made criminal for anyone in or out of Government to willfully disclose classified information.

²³ Const. Article I sec. 8 (4); Chinese Exclusion Case, 130 U. S. 581, 604, 606; Corwin, op. cit. 259-260.

versive Control Act of 1950 as amended and incorporated in part in the Immigration and Nationality Act, congressional efforts have been directed more particularly against Communists.²⁷ The latter act tightens the provisions for excluding Communists and others associated with totalitarian organizations, and vests in the Attorney General power to exclude and deport on confidential information. On the other hand, it contains a redemption clause in favor of subversive aliens who have ceased their subversive association for more than five years and have since actively opposed world communism.

In the *Harislaides* case²⁸ in 1952, the deportation of legally resident aliens under the Alien Registration Act of 1940 because of former membership in the Communist Party was upheld as not violating due process requirements in spite of the severity of the results in some cases. The Court, in an opinion, by Mr. Justice Jackson, reasoned that resident aliens are in an ambiguous status, retaining certain immunities which the citizens must shoulder, that their right to remain in this country is permissive only, and hence the Government may terminate this right. The Court said, page 600:

"Certainly no responsible American would say that there were then or are now no possible grounds on which Congress might believe that Communists in our midst are inimical to our security.

"Congress received evidence that the Communist movement here has been heavily laden with aliens and that Soviet control of the American Communist Party has been largely through alien Communists. It would be easy for those of us who do not have security responsibility to say that those who do are taking communism too seriously and overestimating its danger. But we have an act of one Congress which, for a decade, subsequent Congresses have never repealed but have strengthened and extended."

While detention without bail in the discretion of the Attorney General was upheld in the *Carlson* case,²⁹ and even confinement for 2 years during deportation proceedings of long-time resident aliens,³⁰ nevertheless four Justices dissented in each case. Procedural due process was held to require notice and hearing in the *Kwong* case.³¹

In the *Jay* case,³² (1950) the Attorney Generals' denial of a deportation suspension order on the basis of confidential information was held valid under section 244 (a) of the Immigration and Nationality Act, on the ground that in administering this relief provision his discretion should be unfettered, like the discretion of a board of parole. Chief Justice Warren, Justices Black and Douglas dissented on the ground of abuse of statutory power, and Justice Frankfurter on the ground that this discretionary power should not be delegated. In the *Zuka* case,³³ however, the Court in the same year reversed an administrative practice of 30 years under which a verified bill of complaint was considered the equivalent of the affidavit required by the act in denaturalization proceedings. Justices Clark, Reed and Minton dissented.

In this very important area of congressional statutes against communism it would seem that the basic right to exclude or deport aliens is so clear that

²⁷ This act, popularly known as the McCarran-Walter Act, recodified the immigration laws. Its historical background is set forth by the Legislative Assistant to the House Judiciary Committee, 8 U. S. C., pp. 2-91. The more important provisions relating to subversion are contained in 8 U. S. C. (1101 (a) (37); 1181 (a) (28); 1225 (c); 1421 (d)).

²⁸ *Harislaides v. Shaughnessy*, 342 U. S. 580; 84 S. Ct. 836. Justices Black and Douglas dissenting. See also *Garcia v. Press*, 347 U. S. 522 (1954), upholding sec. 22 of the Internal Security Act permitting deportation of resident aliens members of Communist Party without proof of knowledge of objectives. Justices Black and Douglas dissenting. But the Court, in December, 1957, *Rovoldt v. Perfetto*, 26 U. S. Law Week 4034, denied the deportation in a case hardly distinguishable. Justices Harlan, Burton, Clark, and Whitaker dissenting. In *Bridges v. U. S.*, 346 U. S. 209, the Court held limitations barred prosecution of Harry Bridges for perjury in testifying on his naturalization in 1945 that he was not a member of the Communist Party, thus writing a postscript to the long and unsuccessful efforts to deport him. Chief Justice Vinson and Justices Reed and Minton dissented.

²⁹ *Carlson v. Landon*, 342 U. S. 524. Justices Black, Frankfurter, Douglas, and Burton dissenting.

³⁰ *Shaughnessy v. Mezel*, 345 U. S. 206 (1953). Justices Frankfurter and Jackson dissenting for lack of procedural due process, said (223) "Close to the maximum of respect is due from the Judiciary to the political departments in policies affecting security and alien exclusion." Justices Black and Douglas dissented on broader grounds.

³¹ *Kwong v. Golding*, 344 U. S. 590 (1953). Justice Minton dissented.

³² *Jay v. Boyd*, 100 L. ed. 732. Justices Frankfurter and Douglas quoted President Eisenhower's approval of Wild Bill Hickok's code, which, however, was presumably made in connection with criminal matters as it follows a reference to jail. Although the detention procedure in some cases may make the reference to some extent apt, it is inapplicable to the loyalty program, where no criminal punishment is involved. See note 27, supra.

³³ *U. S. v. Zuka*, 100 L. ed. 539.

appropriate statutes will continue to be sustained. But it cannot be doubted that the Court is, under the due process clause, increasingly protecting aliens, particularly resident aliens, and further that there is dissatisfaction by some of the Justices with the use of confidential information in this area.

STATE STATUTES

A. Loyalty procedure

The same considerations that governed the Federal loyalty program resulted in a tightening of State laws and regulations relating to loyalty. States have long required oaths of members of the legislature as well as executive and judicial officers to support the Federal Constitution as required therein, and likewise to support the constitutions of the several States.²⁴ These constitutional provisions have been supplemented by State loyalty legislation aimed by various methods at keeping out of State employ those who seek to forcibly overthrow the Federal or State governments or who are knowingly members of an organization engaged in such an endeavor. Some statutes permit the questioning of candidates for office under penalties of perjury. This permits effective verification of the candidate's record. The factual statements as to a candidate's past history may be thus checked, while a mere loyalty oath may mean little to such candidates.²⁵

State loyalty legislation has been generally upheld.²⁶

In 1952, in the *Adler* case,²⁷ the Court sustained the drastic Feinberg law of New York. This not only made ineligible for public employment members of subversive organizations, but required public school teachers to list such organizations to which they belonged and made membership therein prima facie evidence of disqualification. Justice Minton said for the Court:

"A teacher works in a sensitive area in the schoolroom. There he shapes the attitude of young minds toward the society in which they live. In this, the State has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps. In the employment of officials and teachers of the school system, the State may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the State, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate."

In the *Stoehower* case,²⁸ in 1955, however, a City College teacher was summarily dismissed under section 603 of the New York City Charter, which provide for automatic dismissal of employees using the fifth amendment to avoid answering in official investigations a question relating to their conduct. *Stoehower* had refused to answer before a congressional subcommittee, investigating subversive influences in the American educational system, questions concerning his membership in the Communist Party in 1940 and 1941. The Court held that his summary dismissal violated the due process clause of the 14th amendment. The majority opinion by Justice Clark construed the action of

²⁴ See Constitution, Art. VI, sec. 3; e. g., Maryland Constitution, art. I, sec. 6.

²⁵ See, for example, Maryland Code, art. 85, secs. 10-17.

²⁶ *Gerrard v. Board of Superintendents*, 341 U. S. 56 (1951). Maryland loyalty oath for candidates for election.

²⁷ *Garnier v. Los Angeles*, 341 U. S. 716 (1951). Justices Black and Douglas dissenting; Justices Burton and Frankfurter concurring in part. The latter pointed out that "the Constitution does not guarantee public employment" and that "No unit of government can be denied the right to keep out of its employ those who seek to overthrow the government by force or violence, or are knowingly members of an organization engaged in such endeavor."

²⁸ *Adler v. Board of Education*, 342 U. S. 485, 493 (1952). Justices Black and Douglas dissenting. Justice Frankfurter dissented on jurisdictional grounds. Cf. *Wieman v. Updegraff*, 341 U. S. 185 (1952).

²⁹ *Stoehower v. Board of Higher Education of the City of New York*, 350 U. S. 551. This section of the charter was inserted as the result of the Senbury investigation of corruption. Its validity seems not to have been questioned for 25 years until applied to a professor. (See Saturday Evening Post editorial, May 10, 1956.) Denial of admission to bar for lack of moral character evidenced by long past Communist activities held violated due process. *Schwartz v. Board of Examiners*, 1 L. ed. 2d, 706; *Konigsberg v. State Bar of California*, 1 L. ed. 2d, 810 (Justices Harlan and Clark dissenting because of refusal to answer questions. The extension by the Court of its jurisdiction into a field theretofore almost exclusively left to the States is without justification. (See Maxwell, 43 A. B. A. J. 786.)

the State as being based on an inference of guilt from pleading the privilege, which it held served to protect the innocent who might be ensnared by ambiguous circumstances.⁴¹ The minority, on the other hand, consisting of Justices Reed, Burton, Minton and Harlan, adopted the view of the New York Court of Appeals that the discharge under this section of the New York Charter did not depend upon any inferences as to guilt, but that public employers could reasonably conclude, without violating due process, that a refusal to cooperate by furnishing information to appropriate public bodies in official investigations would be a proper basis for discharge. Justice Reed refers to the statement of the Court quoted above in the Adler case, referring to the vital importance of screening teachers in order to preserve the integrity of the schools. Justice Harlan, in his dissenting opinion, said:

"In effect, what New York has done is to say that it will not employ teachers who refuse to cooperate with public authorities when asked questions relating to official conduct."

The majority opinion seems to indicate that the case may be explained on the narrow ground that the discharge was based largely on events occurring before a Federal committee, whose inquiry was not an effort by State authorities to obtain information. The effect of the majority opinion is not to upset the general features of State loyalty programs, but it may interfere with and restrict the States' prerogative to discharge on a ground that would hardly seem, to most lawyers, so arbitrary as to constitute lack of due process. It does not seem likely, for example, that the Court would have held it lack of due process for the New York police authorities to discharge a policeman under this statute who pleaded the fifth amendment in an investigation of widespread bribery in the department. Nor would it necessarily so hold when the investigation was by a State education board. Certainly, in other areas it has been deemed proper to discharge persons for pleading the fifth amendment before investigating bodies.⁴²

B. State criminal statutes

Forty-two States by 1950 had laws against sedition, many dating back to the Syndicalist movement of the 1920's, and some a century. They, like the Smith Act of 1940, which was copied from the New York statute, make it unlawful to advocate the overthrow of either State or Federal Government. Such State laws had been upheld for more than 30 years. Justices Holmes and Brandeis sometimes dissented when they deemed the acts involved too trivial to present a "clear and present danger," but cast no doubt on the power of the States to enact such statutes.⁴³

In 1956, however, the Court held the Pennsylvania Sedition Act invalid in the Nelson case (Justices Reed, Burton and Minton dissenting), and thus inferentially the criminal laws against sedition in 42 States.⁴⁴ The majority opinion by

⁴¹ Citing *Orsawold, The Fifth Amendment Today*, without discussion of the contrary arguments. See, e. g., Williams, 24 *Fordham L. Rev.* 19; Wyman, 41 *A. B. A. J.* 501; Baker, 42 *A. B. A. J.* 533; cf. Wright, former president of American Bar Association, *U. S. News*, November 28, 1955; Wigmore, *Evidence* (8d ed.), sec. 2250. The Court had construed the fifth amendment with great liberality in favor of witnesses before congressional committees. *Hart v. U. S.*, 340 *U. S.* 210, and cases cited. It placed new and severe limitations on congressional investigation under the first amendment by reversing a contempt conviction of a labor union official with admitted Communist connections. In an investigation relating to proposed labor legislation, who refused to identify persons he had known as Communists in *Watkins v. U. S.*, 354 *U. S.* 178. The Court held in substance that the resolution under which the House Un-American Activities Committee had acted since 1938 was too vague; that the committee could not expose for exposure's sake; and that the legislative purpose and pertinency of questions must be spelled out to the witness with great care. Mr. Justice Clark dissented. See also *Seeger v. N. H.*, 354 *U. S.* 224 (Investigation by State attorney general).

⁴² Cf. denial of certiorari to a professor refusing to answer state board of education in *Reinhardt*, 100 *L. ed.* 538, Justices Black and Douglas dissenting; Chief Justice Warren not participating, and *Hellon v. Board of Education*, 1 *L. ed.* 2d, 913, certiorari granted. The President's Loyalty Order 10150, sec. 8 (a) (8) makes it one of the relevant criteria in loyalty investigations. The recent announcement by the AFL-CIO that labor union leaders who plead the fifth amendment instead of cooperating with Congress in its efforts to expose racketeering would be expelled, indicates the opinion of the Justice of such a procedure in an important element of our society. See *Baltimore Sun*, January 29, 30, 1957.

⁴³ *Gillow v. N. Y.*, 268 *U. S.* 652, 667, 669 (1925), Justices Brandeis and Holmes dissenting; *Whitney v. California*, 274 *U. S.* 357 (1927); *Burns v. U. S.*, 274 *U. S.* 328 (1927), Justice Brandeis dissenting.

⁴⁴ *Pennsylvania v. Nelson*, 350 *U. S.* 497; rehearing denied 881; affirming, 377 *Pa.* 38, 60, 104 *A.* 2d 133 (divided court). For decision below affirming conviction see 172 *Pa.* 125, 92 *A.* 2d 431. The New Hampshire Court shortly thereafter refused to follow the Pennsylvania Court in *Nelson v. Wyman*, 105 *A.* 2d 756, 760. This dangerous Communist conspirator (see H. Rept. 1225, 82d Cong., 2d sess., p. 29), while convicted in the Federal

Chief Justice Warren bases the decision on an intent of Congress to supersede State legislation. Congress, had expressed no such intent. The majority, or six Justices, implied an intent of Congress thus to impair the power of the sovereign States to protect themselves on three grounds:

First: The majority held that the scheme of Federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." In support of this proposition the Court referred to the Smith Act, the Internal Security Act of 1950 and the Communist Control Act of 1954. As precedents for this novel application of supersession the Court, as the dissent pointed out, cited only cases under the expressly delegated power over interstate commerce where it had been used to prevent conflicts with a regulatory scheme, as contrasted with sedition laws which are criminal statutes. There is of course no corresponding express power delegated under article I, section 8, to destroy the police powers of the States, which are on the contrary reserved by the 10th Amendment. In inferring an intent of Congress to supersede State laws, the Court held directly against the legislative history of the Smith Act without discussion. It limited (again contrary to and without discussion of its legislative history) as being only applicable to jurisdiction the express provisions in the Criminal Code to the effect that nothing therein "shall be held to take away or impair the jurisdiction of the Courts of the several States under the laws thereof," which the dissenters cited as conclusive.⁴²

Second: The majority stated that the Federal sedition laws touched a field "in which the Federal interest is so dominant" that they must preclude State laws on the same subject. For this proposition there is cited the Davidowitz case, relating to registration of aliens. As explained in the dissenting opinion, however, the Supreme Court itself, in the Allen-Bradley case, distinguished that case as being based upon its impact on foreign relations—a field in which the Federal Government is of course supreme.⁴³

Third: The majority assumed a danger of conflict with the States in the administration of the Federal program. The only basis for this assumption was inferences from statements by President Roosevelt and the Director of the FBI which, as the dissent pointed out, were merely requests for cooperation and forwarding of information by local authorities. Incidentally, those requests themselves indicate that cooperation is necessary. Moreover, as stated by the executive department officially through the Department of Justice in a brief as *amicus curiae*, there had been no such conflict. Hence, as the dissent pointed out: "Mere fear by courts of possible difficulties does not seem to us in these circumstances a valid reason for ousting a State from exercise of its police power. Those are matters for legislative determination."

The decision in the foregoing case thus brings the six Justices composing the majority of the Court into conflict with all other branches of Government: (1) Congress, which had explicitly provided that there is nothing in the title containing the Federal legislation to take away the powers of the States; (2) the executive by its *ex cathedra* pronouncements that there would be a conflict between State and Federal legislation in spite of the official denial of the executive department; (3) the States, by taking away the most important part of their police power which 42 States had exercised in the belief that it was necessary to

court under another alias, has been again turned loose finally seven years after his first conviction, because the Government doubted the trustworthiness of one of the witnesses it had used—*Messeroux v. U. S.*, 352 U. S. 1—a discordant note to the preemption doctrine. States have discontinued prosecutions, though reserving the possibility in event that the conspiracy can be shown to involve the state alone. *Massachusetts v. Hood and O'Brien*, 134 N. E. 2d 12, 13; *Braden v. Communist*, 201 S. W. 2d 848 (Ky.); *Cf. Albertson v. Miller*, 345 U. S. 242.

⁴² 18 U. S. C. § 3231. See *Seaton v. California*, 189 U. S. 319. This codification combined criminal sections, which plainly left standing State laws in particular fields, and the H. Rept. 504, 80th Cong., 1st sess., p. A148, explicitly states the change in phraseology was with no intent to eliminate State jurisdiction under their respective laws. The legislative history of the 1950 and 1954 laws indicates Congress thought State laws still operative. Sec. 106 of the Internal Security Act broadly states it is not in modification of "existing criminal statutes" which certainly includes State laws in view of the widespread State legislation known to exist. For legislative history see also p. 514, note 4 to Mr. Justice Reed's opinion, and the statements made to Congress at the time of the introduction of the act by Representative Smith, that "This has nothing to do with State laws." See brief of 27th Attorney General's filed as *amicus curiae*, p. 11, referring to the Congressional Record of July 29, 1950, p. 14525. See also the letter of Representative Smith, quoted in the dissenting opinion of J. Bell in the Pennsylvania Court.

⁴³ *Hines v. Davidowitz*, 312 U. S. 52; *Allen-Bradley Local v. Board*, 315 U. S. 740, 749.

their *self-preservation*. It is the more remarkable because the decision is in the field of national security, which the Court in other areas has conceded is a matter in which the political branches of the Government have a responsibility and access to information which the Court cannot possibly have." Thirty-five States asked the Court to reconsider its decision, in vain. Congress immediately reacted by introducing bills in both Houses of Congress to reverse the decision, one of which, S. 3017,⁴⁰ was supported by the Department of Justice and was reported favorably by the Senate Judiciary Committee in the last session of Congress too late for passage.

While the effect of this decision may and probably will be nullified by act of Congress, the radical extension of the doctrine of preemption will remain an ever-present threat to the survival of the States. This question of *power*, though argued for the States and in the dissenting opinion, is of course wholly different from *intent* of Congress. Yet it is not even discussed by the majority of the Court. Admittedly, the powers of the States have been eroded by the extended use of the commerce clause, the taxing power and other delegated powers. Even State police powers have suffered diminution. But the power here involved is more than a "police power" over its *citizens*. Here we are dealing with power of *self-preservation* or *survival of the State itself*. Because this so plainly involves the whole conception of a Federal union, it should be bluntly and widely discussed.

(1) The very conception of a Federal union with its emphasis on sovereign States except as powers are delegated to the central government requires that they have as a minimum the power to preserve themselves. The underlying principles of the *Glittow* case, *supra*, are as true today as when it was decided. Whether their application to the facts was correct or not is unimportant. There the Court said:

"And, for yet more imperative reasons a State may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. These imperil its own existence as a constitutional State * * * And a State may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several States, by violence or other unlawful means * * * In short, this freedom does not deprive a State of the primary and essential right of self-preservation, which, so long as human governments endure they cannot be denied. * * *

As the Attorneys General for the States said in the *Nelson* case in their brief on petition for certiorari:

"* * * An attempt to overthrow the Government of the United States is per se a clear and present danger to the safety, security, and sovereignty of any State government within whose jurisdiction such attempt is made, and this is so regardless of whether the offenders seek the prior or contemporaneous overthrow of the particular State government within whose borders they act.

(2) The power of the States to protect themselves is expressly recognized by the Constitution in its inherent structure delegating only limited powers, the 10th amendment, reciprocal oath requirements under Federal and State constitutions, dual citizenship under the 14th amendment, the militia power, and the right to bear arms and resist invasion.⁴¹

(3) The powers and duties of Federal and State Governments often overlap, but the theoretical conflict should not prevent State enforcement of laws for the protection of its own citizens. Much of the reasoning of the *Nelson* case could be applied to such crimes as kidnapping, burglary, robbery, narcotics, prostitution and a host of other matters. But are the people, without a constitutional amendment, willing to surrender jurisdiction of their States over such crimes, even if the FBI is assumed to be more expert when, as in the case of subversion, the impact is necessarily local? If we are to avoid a totalitarian state

⁴⁰ See note 26 *supra*.

⁴¹ Reintroduced as S. 654, H. R. 7003. Other bills introduced were more general in form, such as H. R. 8 in the last Congress, which is criticized and an alternate procedure suggested by Wham and Merrill, 48 A. B. A. J. 131. The decision has been widely criticized. See, for example, editorial, *Baltimore News-Post*, April 7, 1956; *Ives*, *Baltimore Sun*, April 9, 1956; *U. S. News*, April 20, 1956, p. 68, June 1, 1956, p. 33, p. 104; endorsement of S. 3017 by Justice Department was reported in *Baltimore Sun* on May 18, 1956. That State legislation reflects the wishes of the people is indicated by the referendum under which the Maryland law was approved by an almost 3 to 1 majority.

⁴² See art. I, sec. 8 (16), sec. 10 (3); art. VI, sec. 3; 2d, 10th, and 14th amendments. For an example of oaths required by State constitutions, see Maryland constitution, art. I, sec. 6.

and its chief tool, a Federal police force, it is essential that the States retain their local police power.

Would a constitutional amendment granting *exclusive* powers to the Federal Government over such crimes, or over subversion, have any chance of passage?

That there have been long periods when the Federal laws on sedition have not been vigorously enforced is common knowledge, and this has been fully brought out in hearings in Congress. The qualification in the Nelson opinion that it "does not prevent States from acting when the Federal Government is not acting" seems to be pretty useless in the face of the record and confuses the presence of laws on the books with their enforcement. No political criticism is intended by this statement, as views on subversion and the best way to combat it do not reflect any party division. Is there any assurance, however, that the excellent enforcement under the present Attorney General and the present non-political Director of the FBI will continue? Or is it not quite conceivable that their offices will be filled by successors not alert to the danger from the Communist conspiracy? Are we to ignore the lessons of current history and the successful infiltration in sensitive positions in the central government of our own and other countries?

(4) The duty of both governments is to cooperate. " As the Court said in *Gilbert v. Minnesota*:

" * * * The United States is composed of the States, the States are constituted of the citizens of the United States, who also are citizens of the States, and it is from these citizens that armies are raised and wars waged, and whether to victory and its benefits, or to defeat and its calamities, the States as well as the United States are intimately concerned.

" * * * Cold and technical reasoning in its minute consideration may indeed insist on a separation of the sovereignties, and resistance in each to any cooperation from the other, but there is opposing demonstration in the fact that this country is one composed of many, and must on occasion be animated as one, and that the constituted and constituting sovereignties must have power of cooperation against the enemies of all. * * *

Again the principle is clear and its particular application is unimportant.

(5) Participation by the States will greatly aid in defense against insurrection and fifth column activity. The impact of domestic violence is local, and insurrection involves the State, which has the equal, if not the primary, duty to suppress it. Moreover, the Court ignores, it is submitted, the military importance of dispersed forces to counter fifth column activities. The President himself, from his war experience, has indicated these dangers. " That the danger of subversion is greater than that of another war is emphasized by current history."

The States have police forces numbering infinitely more than those at the command of the FBI and the National Guard or, during war, the militia. States cannot do their part to combat Communism without being *prepared* by previous study and investigation, like the Federal Government. This is provided for by modern statutes, like the Maryland statute. If the States are allowed the power to protect themselves in the event of infiltration of sensitive positions in the central government, or when the political climate may again change and inertia set in, it is suggested that they will constitute bastions of strength, multiplying the difficulties of the enemy. For even if the Trojan horse should gain the entrance to the citadel, the States would remain as centers of resistance and rallying points.

It is submitted that the philosophy of the Nelson case is in kind, and not merely degree, a graver threat to our form of federal union than many recent cases for which the Court has been criticized.

" Art. IV of the Constitution guaranteeing a republican government provides for protection against *domestic* violence only on application of the State.

" 254 U. S. 325, 320-331. The practical difficulty of restricting evidence in State courts to sedition against the State in a field where the conspiracy is directed at all organized government is manifest. The end product is almost always violence within the boundaries of some State.

" U. S. News, September 9, 1955, p. 142, cited *supra*: Report of Maryland Commission on Subversive Activities 1949, and reports of many congressional committees on fifth-column technique.

" E. g., the current infiltration of Syria, Indonesia, Egypt, Algeria, and other parts of the Middle East and Europe.

CONCLUSION

During the period since World War II, international communism, while halted at some points, has made great gains and the increasing strength of Russia places us in constant peril. Internal subversion has been the main weapon by which Communist victories have been won in China and other important areas. It now threatens the stability, not only of many other Asiatic countries such as Indonesia, but, more important, presents a clear and present danger in the Middle East and North Africa. Recognizing the implications of this to our allies and NATO, the administration is desperately trying to meet the external threat. Recognizing also the ever-present internal threat," Congress, the executive and the States have persistently, by legislation and security programs, attempted to combat communism at home. These efforts have been on the whole quite successful, but the battle has not been won. Mistakes and clumsy administration in some areas, while trivial in proper perspective, have given ammunition to the pseudoliberals who, as J. Edgar Hoover points out, though often sincere, are the ready tools of the Communist conspiracy."

How has the Supreme Court stood during this same period?

First: the Court, as reconstituted under Chief Justice Vinson, clearly recognized the true nature of the Communist conspiracy and the menace of internal subversion, and refused to construe the Bill of Rights so as to interfere with a reasonable legislative judgment of what laws are essential to national security.

Second: the trend of the decisions under Chief Justice Warren who, with others, has joined Justice Black and Douglas to make a new majority," seems to indicate that the Court has once again extended the Bill of Rights to a point where it presents great obstacles to the fight against communism which has been carried on by the executive, Congress and the States. True, some of its decisions may be distinguished from the decisions of the Vinson Court on narrow grounds. But the net effect of such decisions seems to subordinate the national security to an extreme extension of civil liberties through the due process clause and other provisions of the Bill of Rights.

The Court seems to have abandoned the judicial self-restraint which has heretofore caused it to defer to the executive and legislature, which are constitutionally charged with the responsibility and alone have available the necessary information to carry out the primary duty of self-preservation, without which civil liberties of individuals would be meaningless. If our Government is to survive, it is submitted that it must defend itself, not only in preparation for external war for which men are still being drafted and sent to foreign lands, but that we must prepare in advance against the new and dangerous preliminary attacks on our internal security, which are the peculiar technique of the Communist conspiracy and the prelude to war. The Constitution, it is submitted, should be construed in accordance with its purpose and as one instrument, and without such preoccupation with civil rights as to endanger national survival.

[National Review, February 15, 1958]

THE SUPREME COURT ON SECURITY—THE RECORD OF 10 MONTHS

(By Marian Stephenson)

In the past 10 months the Supreme Court has reviewed 10 cases that bear on internal security. On all 10, the Court has found in favor of those who appealed against one or another law or administrative regulation designed to protect the Nation against internal subversion.

¹E. g., the grand jury investigation of the United Nations employees; the Rosenberg trial; the still unknown contribution to our failure in Korea, indicated by such incidents as the Peterson abstraction of security codes from the CIA itself, the strategic position held by the British Communists, Burgess and Maclean, where they could obtain our top secret information, and the like.

²See Hoover speech at Valley Forge on February 22, 1957. Whitehead, FBI Story describes the fight against the Communist conspiracy 1910-56.

³Including generally Justices Harlan and Brennan (who replaced Justices Jackson and Minton) and one or more of the other Justices. Justice Whitaker (who replaced Justice Reed) did not take part in the decisions reviewed. There has been much criticism of the present Court in Congress and other responsible quarters—Summary of Senate Judiciary Subcommittee Report, U. S. News, March 15, 1957, page 144; see also U. S. News, June 1, 22, 1956, February 8, June 28, July 5, August 9, 1957, and editorials.

THE DECISIONS

1. *Communist Party v. Subversive Activities Control Board*.—The Court refused to uphold or pass on the constitutionality of the Subversive Activities Control Act of 1950, thus delaying the effectiveness of the act and hamstringing the SACB.

2. *Commonwealth of Pennsylvania v. Steve Nelson*.—The Court held that it was unlawful for Pennsylvania to prosecute a Pennsylvania Communist Party leader under the Pennsylvania Sedition Act, and indicated that the antisedition laws of 42 States and of Alaska and Hawaii cannot be enforced.

3. *Fourteen California Communists v. United States*.—The Court reversed two Federal courts and ruled that teaching and advocating forcible overthrow of our Government, even "with evil intent," was not punishable under the Smith Act as long as it was "divorced from any effort to instigate action to that end," and ordered five Communist Party leaders freed and new trials for another nine.

4. *Cole v. Young*.—The Court reversed two Federal courts and held that, although the Summary Suspension Act of 1950 gave the Federal Government the right to dismiss employees "in the interest of national security of the United States," it was not in the interest of national security to dismiss an employee who contributed funds and services to a concededly subversive organization, unless that employee was in a "sensitive position."

5. *Service v. Dulles*.—The Court reversed two Federal courts which had refused to set aside the discharge of John S. Service by the State Department. The FBI had a recording of a conversation between Service and an editor of the pro-Communist magazine *Amerasia* in the latter's hotel room, in which Service spoke of military plans which were "very secret." Earlier the FBI had found large numbers of secret and confidential State Department documents in the *Amerasia* office. The lower courts had followed the McCarran amendment, which gave the Secretary of State "absolute discretion" to discharge any employee "in the interests of the United States."

6. *Slochover v. Board of Higher Education of New York*.—The Court reversed the decisions of three New York courts and it has held it unconstitutional automatically to discharge a teacher, in accordance with New York law, because he took the fifth amendment when asked about Communist activities. In petition for rehearing, the Court admitted that its opinion was in error in stating that Dr. Harry Slochover was not aware that his claim of the fifth amendment would ipso facto result in his discharge. However, the Court denied a rehearing.

7. *Sweezy v. New Hampshire*.—The Court reversed the New Hampshire Supreme Court and held that the attorney general of New Hampshire was without authority to question Prof. Paul Sweezy, a lecturer at the State University, concerning suspected subversive activities, including a certain lecture.

8. *Konigsberg v. State Bar of California*.—The Court reversed the decisions of the California Committee of Bar Examiners and of the California Supreme Court and held that it was unconstitutional to deny a license to practice law to an applicant who refused to answer this question put by the bar committee: "Mr. Raphael Konigsberg, are you a Communist?" and a series of similar questions.

9. *Jencks v. United States*.—The Court reversed two Federal courts and held that Clinton Jencks, who was convicted of filing a false non-Communist affidavit, must be given the contents of all confidential FBI reports made by any Government witness in the case, even though Jencks "restricted his motions to a request for production of the reports to the trial judge for the judge's inspection and determination whether and to what extent the reports should be made available."

10. *Watkins v. United States*.—The Court reversed the Federal district court and six judges of the Court of Appeals of the District of Columbia and held that the House Committee on Un-American Activities could not require a witness, who admitted "I freely cooperated with the Communist Party," to name his Communist associates, even though the witness did not invoke the fifth amendment. The Court said: "We remain unenlightened as to the subject to which the questions asked petitioner were pertinent."

Other decisions have been based on the 10 listed above, including at least three based on the Watkins decision.

The accompanying rollcall shows how the Justices voted on the 10 internal security measures.

The rollcall--Voices on internal security measures

	Against	For
Earl Warren.....	10	0
Hugo L. Black.....	10	0
William O. Douglas.....	10	0
Felix Frankfurter.....	9	1
John M. Harlan.....	8	2
William J. Brennan, Jr.....	5	0
Harold H. Burton.....	6	3
Tom Clark.....	2	7
Charles Evans Whittaker.....	1	0

"THE POWER OF THE SUPREME COURT—A BRIEF HISTORICAL STUDY"

By Rev. Robert G. Forbes

Sovereignty is a product of advanced national culture. It was unknown when societies were in a crude state. It was after the city and the State became coterminous that sovereignty developed.

Plato observed: "I see a State in which the law is above the rulers. The only valid sovereignty is that of the rule of the law." In his *Laws* he made reference to "the rule of the Laws." Aristotle discussed in his *Politics*: "What is the supreme power in the State." He defined the state as "an aggregate of citizens." It is their right to express their "collective will" that is called a gem in their political diadem.

Woodrow Wilson said that "sovereignty" resides in the community. The Hegellians insisted that "sovereignty" described the real will of the community. Colonies develop sovereignty to the degree they are self-governed. This was true of the American Colonies.

Cognizant of the constitutional tripartite divisions of the Government of the United States and their checks and balances, our respected and revered President, George Washington, during his Farewell Address in 1796, advised that any constitutional change should be made by way of prescribed amendment process and not by usurpation. This term had been used three times in our Declaration of Independence to indicate the illegal and unlawful assumption or seizure of sovereign power. Usurpation is an enemy of sovereignty.

President Washington was conversant with article II of the Articles of Confederation approved and signed by the representation of the Thirteen Colonies March 1, 1781. Among its several provisions was one of the vast importance, to wit: "Each State retains its sovereignty, freedom and independence, and every Power, Jurisdiction and Right, which is not by this confederation expressly delegated to the United States, in Congress assembled." This was before the Constitution was adopted.

President Washington was also acquainted with the import and provisions of our Bill of Rights which had been proclaimed in force December 15, 1791, particularly that part known as the 10th amendment, to wit: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Historical political science records the strength and the weakness of human mentality. In our early era the mentality of those who framed our destinies was noticeably virile. In *McCullough v. Maryland* (4 Wheaton 316 (1819)), Chief Justice Marshall observed: "No political dreamer was ever wild enough to think of breaking down the lines which separate the States and compounding the American people into one common mass." In our modern era, a brain-washed element in the United States has advocated the eradication of all boundary lines between the States. No longer does the 10th amendment to the Federal Constitution afford the intended protection to the several States. Especially is this true of State police powers. The United States, as such, has no police power. All police power resides in the State governments. To the States alone is given the power to enact proper laws to protect and promote State morals, health, order, safety, and the general welfare of its particular social organization.

It will be recalled that on June 4, 1787, a resolution was submitted to the Constitutional Convention by Mr. Edmund Randolph, a Delegate from Virginia, requesting "That a national judiciary be established," to which was added

"to consist of one supreme tribunal, and of one or more inferior tribunals." This resolution was passed in the affirmative, and appears as article III, section 1, of our Federal Constitution.

The debates of the Convention resulted in bestowing on the national judiciary its "original" jurisdiction. George Mason, of Virginia, contended in the Convention that the national judiciary was "so constructed and extended as to absorb and destroy the judiciaries of the several States." It was Edmund Randolph, of Virginia, who insisted that the power of the judiciary be limited and defined. Mr. Elbridge Gerry, of Massachusetts, suggested that the judiciary had a star chamber atmosphere. Mr. Luther Martin, of Maryland, objected to the exclusive (original) jurisdiction of the national court.

George Washington, President of the Constitutional Convention and Deputy from Virginia, was aware that the Supreme Court of the United States was the unique creation of the framers of our Federal Constitution, that there existed no exact precedent for it in the ancient or in the modern world, that this Court was established by our Federal Constitution and not by Congress, and that when our Constitution was framed it was correctly assumed that all judicial power emanates from the people of the several Colonies, which Colonies later became known as States.

The United States Supreme Court having thus been created by a provision of the Federal Constitution, it became necessary to designate its jurisdiction, which, in general, is the power to do justice in causes brought before it when it applies the law. The Constitution designates the original jurisdiction of the United States Supreme Court. This type of jurisdiction is derived directly from the Constitution, and is self-executing without any action of or by Congress.

In *Marbury v. Madison* (1 Cranch 137 (1803)), Chief Justice Marshall observed that Congress can neither restrict nor enlarge the Court's original jurisdiction. In this case a controversy had arisen as to whether or not Congress could confer upon the Supreme Court any original jurisdiction aside from that constitutionally provided.

Article III, section 2, clause 1, in the Federal Constitution provides in reference to the original jurisdiction of the Supreme Court of the United States: "The judicial power shall extend to all Cases, in law and equity, arising under this Constitution, the Laws of the United States and treaties made, or which shall be made, under their authority. To all Cases affecting Ambassadors, other public Ministers and Consuls. To all cases of Admiralty and Maritime Jurisdiction. To Controversies to which the United States shall be a party. To controversies between two or more States, between a State and Citizens of another State, between Citizens of different States, between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." The 11th amendment restricted the judicial power, preventing its extension to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subject of any foreign State.

Mr. Chairman, contradistinguished from the original jurisdiction of the United States Supreme Court is what may be termed the appellate power. That part which concerns the Courts of our several States has been, and is now, the source of considerable controversy. When viewed in the context of the 10th amendment to our Federal Constitution, this seems to be one of the sources of usurpation.

In special reference to appellate power our Federal Constitution provides, in article III, section 2: "In all the other cases mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exception, and under such regulations as the Congress shall make." The "other cases" refer to the instances of original jurisdiction in article III, section 2. The Constitution of the United States does not grant to the Supreme Court appellate powers in respect to decisions in the State or Federal district courts. Cases in the classification groups named in article III, section 2, of the Federal Constitution can only be "originally" filed in the Supreme Court of the United States. Any cases coming within the appellate jurisdiction of the Supreme Court of the United States are filed in some State or Federal court other than the Supreme Court of the United States to which it may be carried on appeal.

The Delegates to our Constitutional Convention of 1787 evidently did not desire to place the future of the United States at the mercy of one group of men who arbitrarily might disregard valid legislation, or even hold it unconstitutional, ignore sound precedents, override State police regulatory laws and constitutional provisions, and cause the decisions of the State courts to have no force and effect,

for from the decisions of the Supreme Court of the United States there is no appeal.

Appellate jurisdiction in reference to the Supreme Court of the United States was the subject of much debate in the Constitutional Convention. The second part of article III, section 2, was referred to on August 27, 1787, when Governor Morris of Pennsylvania inquired as to the meaning of the words "In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such Regulations as the Congress shall make." He inquired, did it extend to matters of fact as well as law, and to cases of common as well as civil law? Mr. James Wilson, of Pennsylvania, observed: "The committee," he believed, "meant facts as well as law and Common as well as Civil Law." Mr. John Dickenson, of Delaware, moved to add after the word "appellate" the words "as to law and fact"; this was agreed to. Mr. Madison of Virginia and Mr. Morris of Pennsylvania moved to strike the words "Jurisdiction of the Supreme Court" and insert the "Judicial powers," which was agreed to. Mr. Randolph of Virginia directed the attention of the Delegates to "The difficulty in establishing the powers of the judiciary." His suggestion that "In all other cases before mentioned the Judicial Power shall be exercised in such manner as the legislature shall direct" did not coincide with the wishes of the Convention. Fear may have been present in the minds of some of the Delegates to the Constitutional Convention that the "Judicial power," at some future time, might become formidable. It was remarked and recorded in the proceedings of the Convention: "The Ephori at Sparta became in the end absolute."

Theoretically, the appellate jurisdiction of the United States Supreme Court may be subject to a limited control by Congress; but here Congress must not exceed its Constitutional limitations. In *Wiscart et al. v. Dauchy* (3 Dallas 321 (1790)), Chief Justice Ellsworth observed: "The appellate jurisdiction is qualified; inasmuch as it is given 'with such exceptions, and under such regulations, as the Congress shall make'." This power of Congress to make exceptions to the appellate jurisdiction of the Supreme Court, apparently developed, with the aid of Congress, into a plenary power to bestow, withhold, and withdraw appellate jurisdiction, even to the point of its abolition.

In *Ex parte McCordle* (6 Wall. 318 (1860)), Chief Justice Salmon P. Chase advised that the appellate jurisdiction of the Supreme Court is conferred and not derived from acts of Congress; but is conferred with such exceptions, and under such regulations, as Congress shall make, and therefore, acts of Congress affirming such jurisdiction have always been construed as excepting from it all cases not expressly described and provided for. In the *McCordle* case, Congress had enacted a statute withdrawing appellate jurisdiction from the Supreme Court in certain habeas corpus proceedings. The Supreme Court dismissed the appeal for want of jurisdiction, without which the Court could not proceed at all in any case. The *McCordle* case was the product of the stresses and tensions of the Reconstruction period; it has frequently been reaffirmed and approved. In *U. S. v. Billy* (208 U. S. 303 (1908)), the Court held that there is no right of appeal to the United States Supreme Court except as an act of Congress confers it. Here it should be stressed that the act of Congress must be constitutionally valid. In the *Frances Wright* case (105 U. S. 381 (1882)), the United States Supreme Court sustained the validity of an act of Congress which limited the Court's review in admiralty cases to questions of law appearing on the record. In *Ex Parte Bollman* (4 Cranch 75 (1807)), Chief Justice Marshall observed that "Courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction."

Two years, two months and twenty-one days prior to the time our Bill of Rights was proclaimed to be in force, our Federal Congress exercised its constitutional legislative powers and on September 24, 1789, passed the Judiciary Act, the object of which was to establish the judicial system of the United States. At the time this Judiciary Act became a law, the 10th amendment was not in force. This Judiciary Act consisted of 35 sections. The Senate of the United States formulated the act, which involved considerable difficulty. Section 13 of the Judiciary Act related to the exclusive while section 25 was concerned with appellate jurisdiction.

Article III, section 2, clause 1, of the Federal Constitution, and the 13th section of the Judiciary Act of 1789 relate to the exclusive jurisdiction of the United States Supreme Court. The portion of article III relating to exclusive jurisdiction has already been cited. Section 13 of the Judiciary Act of 1789

provides: "Controversies of a civil nature where a state is a party, except where a state and the citizens, and except also between a state and the citizens of another state or states, or aliens, in which latter case it shall have original but not exclusive jurisdiction, and shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in consul or vice-consul shall be a party. The Supreme Court shall also have appellate jurisdiction from circuit courts and courts of the several states, in cases hereinafter specially provided for."

Section 25 of the Judiciary Act of 1789 was in reference to the appeal of cases from the highest State courts to the Supreme Court of the United States, and provides: "Cases in which judgments and decrees of the higher court of a state may be examined by the Supreme Court. That a final judgment or decree in any suit, in the highest court of law or equity of a state in which a decision in the suit would be had, where is drawn in question the validity of a treaty, or statute of, or an authority exercised under treaty or statute or authority of the United States and the decision is against their validity, or where is drawn in question the validity of a statute of or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute, or commission, may be reexamined, and reversed or affirmed in the Supreme Court of the United States upon a Writ of Error."

The Judiciary Act became a law September 24, 1789. The 10th amendment to the Federal Constitution became in force December 15, 1791 and provided that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people. Eventually, it became apparent that the Judiciary Act of 1789 should be changed. This resulted in the act of Congress dated February 5, 1867, which modified, if not repealed the 25th section of the Judiciary Act of 1789. This act of 1867 provided for three classes of cases in which the Supreme Court of the United States might review the final judgment or decree of the highest court of a State: "First, where is drawn in question the validity of a treaty or statute of, or an authority under, the United States and the decision is against their validity; second, where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; third, where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority." This act enlarged the powers of the United States Supreme Court as to cases brought before it by writ of error to the State courts in two respects. It gave the Court authority to look at the opinion delivered by the State court as well as at the technical record. This rendered useless the clause of the act of September 24, 1789, which provided: "but no other error shall be assigned or regarded as a ground of reversal." The act of February 5, 1867, gave the Supreme Court discretionary power to proceed to a final decision. The Judiciary Act of 1789 provided that this power was given only "if the cause shall have been remanded before."

Article III, section 2, clause 2, Congress is empowered to regulate the judicial powers bestowed on the Supreme Court by the Federal Constitution, except in cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party. Should our Federal Congress depart from these limitations and legislate for judicial powers not bestowed on the Supreme Court by the constitution, legally, such laws would have no effect. Otherwise, such action would be tantamount to amending the Federal Constitution by an Act of Congress and not by the required constitutional procedure under article V. In the event the Supreme Court should attempt the same objective by juridical interpretation, the same rule would apply.

Any validity of section 25 of the Judiciary Act of 1789 and the act of Congress dated February 5, 1867, in special reference to the appellate jurisdiction of the United States Supreme Court is to be tested in connection with the provisions of the 10th amendment to the Federal Constitution. No arbitrary interpretation should have legal effect. Two of the above are acts of Congress; the other is the supreme law of our land. No unconstitutional act of Congress or illegal interpretation by the members of the United States Supreme Court should be permitted to bestow powers to the United States not delegated by the States and the people thereof. The several States have not authorized the United States to interfere with their respective police powers. Regardless of any opinion as to right or wrong of segregation, the recent segregation decisions of the United States Supreme Court, in declaring provisions in State statutes and State constitutions unlawful, has undoubtedly encroached on the police power of several States in their endeavor to deal with the racial question in a manner best suited to keep law and order within the respective States involved.

Judge B. R. Curtis, an accepted authority, refers to a strange device reputedly used by the United States Supreme Court to expand its appellate jurisdiction. In his legal textbook (1890), entitled "Jurisdiction, Practice, and Peculiar Jurisprudence Pertaining to the Courts of the United States," pages 24 and 25, which consists of a group of lectures delivered at the Harvard Law School, advises as to the implied source of the appellate power in reference to the courts of the several States. He writes that it is only an implied power, which they claim to be based on the second clause of article VI of the Federal Constitution, which provides: "This Constitution and the Laws of the United States which shall be made in pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be made the Supreme Law of the Land." In order to justify the juridical absurdity of basing appellate jurisdiction on this part of article VI, they invented, propounded, and also answered the question, to wit: "How could this Constitution, these treaties, and these laws be supreme law throughout the United States, unless the judicial power of the United States could take cognizance of all questions arising under them, and give final effect to them." Under this new and unconstitutional method of amending the Federal Constitution, the Supreme Court took over the appellate power in reference to State and Federal district court decisions, regardless of the 10th amendment, States rights, and people's rights.

Instances of disobedience by State Courts to order of the Supreme Court of the United States have occurred. In fact all appellate power claimed by the United States Supreme Courts over the courts of several States has not only been severely questioned, but absolutely denied. Two cases in Virginia may be cited as examples.

1. *Martin v. Hunter* (1 Wheaton 304 (1816)). The original suit was an action of ejectment. The Virginia State Court of Appeals had refused to make a return on a writ of error from the United States Supreme Court. The Virginia Court had refused to obey the mandate of the Supreme Court, which required that the judgment rendered in the same case be carried into due execution. It was contended that while the courts of Virginia were constitutionally obliged to prefer "the supreme law of the land over conflicting State Laws, it was only by their own interpretation of the said supreme law that they, as a court of a sovereign State were bound. Mr. Justice Story observed: 'This power of removal is not to be found in express terms in any part of the Constitution.'"

2. *Cohen v. The State of Virginia* (6 Wheaton 264 (1821)). This case developed out of the sale in Virginia of lottery tickets to a lottery to be drawn in Washington, D. C. The State of Virginia had prohibited such sales. The State Court of Virginia refused to carry into effect the mandate of the United States Supreme Court. The State court was then advised by the Supreme Court that it would force the final decision of the case and award execution thereon, as the Virginia Court had refused to execute penal laws. Part of the case was based on the 25th section of the Judiciary Act of 1789, which was not changed until 1867, an interim of 78 years between the date of the Judiciary Act and the act of 1867; this case arose in 1821. The opinion was delivered by Mr. Chief Justice Marshall, who based some of it on section 25 of the Judiciary Act of 1789.

The recent public education decisions, respectfully dated May 17, 1954, and May 31, 1955, handed down by the United States Supreme Court, cited seven of its Supreme Court decisions upholding the "Separate, but equal" doctrine in education. These judicial precedents related to cases originating in Louisiana, Georgia, Mississippi, Oklahoma and Texas, dating between 1896 and 1950, to wit:

Plessy v. Ferguson (103 U. S. 537); *Cumming v. Board of Education* (175 U. S. 528); *Gong Lum v. Rice* (275 U. S. 78); *Missouri ex rel Gaines v. Canada* (305 U. S. 237); *Sipuel v. Oklahoma* (332 U. S. 631); *Sweatt v. Painter* (330 U. S. 629); *Molavin v. Oklahoma State Regents* (330 U. S. 637).

In the course of these decisions the United States Supreme Court approved all State statutes and State constitutional provisions of the several States directly concerned in the above-cited cases, which formed a long list of precedents.

The instant public education decisions directly concerned Kansas, South Carolina, Virginia, and Delaware. These States have similar statutes and constitutional provisions as the States of Louisiana, Georgia, Missouri, Oklahoma, and Texas. In the first-named group of States, statutes and constitutional provisions, in reference to public education, were held to be unconstitutional, whereas in the second group of States statutes and constitutional provisions of a similar nature had been held constitutional.

Two of the recent public education cases came to the United States Supreme Court on writs of certiorari. The case of *Francis H. Gebhart et al. Petitioners v. Ethel Louise Bellon et al.*, came to the United States Supreme Court on writ of certiorari to the Supreme Court of the State of Delaware. The case began in the Delaware Court of Chancery. Its purpose being to enjoin enforcement of the provisions of the State constitution and statutory code requiring segregation in public schools. The chancellor gave judgment in favor of the Negro children plaintiffs, and ordered their admission to the white public schools. His decree was affirmed by the Supreme Court of Delaware. The case should have stopped there, but it came to the United States Supreme Court on a writ of certiorari. In the event the majority of the people of Delaware desired to have mixed public schools as against a minority will, that, it is assumed, is their affair.

Legal proceedings were filed in three of the United States district courts in the following cases: *Davis et al. v. County School Board of Prince Edward County, Virginia, et al.*; *Harry Briggs, Jr. et al. v. B. W. Elliott et al., South Carolina*; *Oliver Brown et al. v. Board of Education of Topeka, Shawnee County, Kansas, et al.* These three cases were directly appealed to the United States Supreme Court from their respective district courts which had denied the requests of the several colored children that they be allowed to integrate with white children in the public schools. In granting these appeals the Court not only usurped the sovereignty of the people of these three States, but of all of the States, and ignored their reserved rights according to the 10th amendment to the Federal Constitution, and denied the right of the majority of the people who inhabit our 48 States.

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IMPLICATIONS OF THE SEGREGATION DECISION

By Jared Y. Sanders, Jr.

Since the segregation decision by the United States Supreme Court has been rendered, quite a few have recalled the cynical remark attributed to Justice Hughes that "the Constitution is what the Supreme Court says it is." It has also been suggested by certain eminent authorities that it is absurd to even suggest that the Supreme Court can do anything that is "unconstitutional."

However, a moment's reflection without emotion on this point should satisfy one that the Constitution is what it is. No statement by the Supreme Court or by any other group of men can make it anything but what it is.

Has the Supreme Court the right to change the Constitution by interpretation?

Has the Supreme Court the right to rule by edict where it considers the Congress in error in failing to legislate?

Have we exchanged the "divine right of kings" for "divine right of the Supreme Court"?

Have we substituted for the government of checks and balances instituted by the Founding Fathers a supreme omnipotent and infallible Supreme Court as the final arbiter of our destinies?

These are not idle questions. They are very profound questions.

When the kings of the Middle Ages began to assume an autocratic power that the elected chieftains of their ancestors had not claimed, it finally became necessary for their so-called subjects to acquiesce in this arbitrary use of power or to resist it. The terrible revolutions that convulsed Europe at the end of the Middle Ages culminating in the beheading of Charles I of England

and the overthrow of the Bourbons in the French Revolution ended in Europe the theory of the divine right of kings to rule by edict.

Whither are we drifting in the United States?

If the Supreme Court should by decree declare that the republic set up by the Founding Fathers was outmoded and that the time had come to have a king and anoint former Governor, now Chief Justice, Earl Warren, President Dwight Eisenhower or some other man of their choosing to be the king of the United States, would this act be constitutional because the Supreme Court did it?

The question answers itself.

Yet, if it is admitted that such an act, which while remote nevertheless is a possibility, would not be constitutional, then it follows necessarily that some acts that the Supreme Court could do would not be constitutional. If this is conceded, why then the question follows as to where is the line to be drawn? This necessarily admits the possibility of debate and discussion and of questioning the right of the Supreme Court to do certain things on the ground that it is unconstitutional.

The arbitrary manner in which the Supreme Court, in the *Brown* (segregation) decision, reinterpreted the Constitution in accordance with its own opinions of what the law should be, completely setting aside the reservation of power to the Congress to legislate: claiming for itself the right to legislate when Congress failed to do so; claiming for itself the right to rewrite the Constitution on the grounds it was outmoded and that modern conditions made it necessary for the Supreme Court to do so, ignoring and overruling in effect the 10th amendment, completely ignores the constitutional method of amending the Constitution set up in the Constitution itself.

This usurpation of power by the Supreme Court in its pretended right to amend the Constitution by interpretation in accordance with the personal views of nine men or with a majority of nine men appointed for life and themselves not subject to any form of check or restraint constitutes a most radical change in our whole form and substance of government.

If the Supreme Court can rewrite the Constitution to suit its views on social questions what is to prevent it from rewriting the Constitution and imposing upon the country some other economic system different from the one which we now enjoy?

There is herewith presented a fictitious decision of the United States Supreme Court in the year 1996 involving the question of free enterprise. The wording and reasoning are practically identical with the wording and reasoning of the segregation decision. Is the segregation decision the forerunner of something like this hypothetical case herewith presented? There is reproduced below the *Brown v. Board of Education of Topeka* segregation decision (347 U. S. 483, 98 L. ed. 873, 74 S. Ct. 686, 38 A. L. R. 2d 1180) in the lefthand column and a hypothetical case attributed to the year 1996 A. D. in the righthand column:

Brown v. Board of Education of Topeka (347 U. S. 483, 98 L. ed. 873, 74 S. Ct. 686, 38 A. L. R. 2d 1180):

"Mr. Chief Justice Warren delivered the opinion of the Court.

"These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.

"In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a non-segregated basis. In each instance, they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the

Paul Marques, et als. v. Bon H. Richard (A. D. 1996), *John Doe v. Richard Roe*, etc., etc.

Mr. Chief Justice ----- delivered the opinion of the Court.

These cases come to us from the States of New York, Pennsylvania, New Jersey, Illinois, Michigan, Ohio, Indiana, and California. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.

In each of these cases, the plaintiff, each in his own behalf and on behalf of others similarly situated, seeks admission to and use of certain property of defendants. Plaintiffs allege in substance that they have each of them been denied admission to and use of certain property "owned" by defendants under State law or custom requiring or permitting private ownership of property.

equal protection of the laws under the 14th amendment. In each of the cases other than the Delaware case, a three-judge Federal district court denied relief to the plaintiffs on the so-called 'separate but equal' doctrine announced by this Court in *Plessy v. Ferguson* (103 U. S. 537, 41 L. ed. 250, 10 S. Ct. 1138). Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

"The plaintiffs contend that segregated public schools are not 'equal' and cannot be made 'equal,' and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction. Argument was heard in the 1952 term, and reargument was heard this term on certain questions propounded by the Court.

"Reargument was largely devoted to the circumstances surrounding the adoption of the 14th Amendment in 1868. It covered exhaustively consideration of the amendment in Congress, ratification by the States, then existing practices in racial segregation, and the views of proponents and opponents of the amendment. This discussion and our own investigation convince us, that although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best they are inconclusive. The most avid proponents of the postwar amendments

This "ownership" of private property was alleged to deprive the plaintiffs of equal protection of the laws under the 14th amendment. In each case a three-judge Federal district court denied relief to the plaintiffs on the so-called "private ownership of property" doctrine previously announced and upheld by this Court in numerous cases. Under that doctrine private ownership of property is upheld under the so-called "free enterprise" or "capitalistic" system.

Plaintiffs contend that under the private ownership of property doctrine certain favored people are protected by law in the use and so-called "ownership" of property, that this "right of ownership" may be and frequently is inherited so that these favored individuals can and frequently do come into the ownership of great wealth without any exertion on their part other than the accident of birth, and without any contribution to society, that those who are born of poor parents inherit nothing and under the operation of the "private ownership" theory are thereby deprived of equal rights in and to the "private property" so owned and are in fact denied equality of treatment under the law in that they are denied even any opportunity of acquiring equal use and ownership of the property so "owned" and inherited, and that under this theory property is not owned equally and that ownership of property cannot be made "equal" under the so-called free enterprise system and that hence plaintiffs are deprived of equal protection of the law. Because of the obvious importance of the question presented, the Court has taken jurisdiction. Argument was heard in the 1953 term and reargument was heard this term on certain questions propounded by the Court.

Reargument was largely devoted to the circumstances surrounding the adoption of the 14th amendment in 1868. It covered exhaustively consideration of the amendment in Congress, ratification by the States, then existing practices in regard to the ownership of property, the profit motive, and the free enterprise system, and the views of proponents and opponents of the amendment. This discussion and our own investigation convince us that although the sources cast some light it is not enough to resolve the problem with which we are faced. At best, they are

undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.' Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the amendments and wished them to have the most limited effect. What others in Congress and the State legislatures had in mind cannot be determined with any degree of certainty.

"An additional reason for the inconclusive nature of the amendment's history, with respect to segregated schools, is the status of public education at that time. In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some States. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public education had already advanced further in the North, but the effect of the amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but 3 months a year in many States; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the 14th amendment relating to its intended effect on public education.

"In the first cases in this Court construing the 14th amendment, decided shortly after its adoption, the Court interpreted it as proscribing all State-imposed discriminations against the Negro race. The doctrine of 'separate but equal' did not make its appearance in this Court until 1896 in the case of *Plessy v. Ferguson* (U. S.) *supra*, involving not education but transportation. American courts have since la-

inconclusive. The most ardent proponents of the postwar amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents just as certainly were antagonistic to both the letter and the spirit of the amendments and wished them to have the most limited effect. What others in Congress and the State legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the amendment's history, with respect to the capitalistic system, free enterprise and the profit motive, is the status of our economic system at that time as well as at the time of the adoption of the Federal Constitution. At the time of the adoption of the Federal Constitution this Nation was largely rural and agricultural. Equality of treatment under the law with regard to the ownership of property, especially real property, was not presented because of the fact that anyone who desired ownership of land could find vast areas of land in the then uninhabited, except for savages, areas to the west. The Thirteen Colonies comprised a narrow strip along the Atlantic seaboard and except for some settlements of the French and Spanish in various other parts of the continent vast areas of the continent were awaiting population. This great abundance of property, especially real property, created equality of opportunity under the law and hence the question of private ownership of property was never presented to the framers of the Constitution. This same condition continued to obtain with some modification at the time of the adoption of the 14th amendment. While certain areas of the North had become industrialized, the South was largely agricultural and the West was mainly unpopulated and awaiting development. As a consequence, it is not surprising that there should be so little in the history of the 14th amendment relating to its intended effect on the free enterprise system, the profit motive and the capitalistic system as a whole.

In the relatively few cases that have been presented to this Court in which the question of equality of opportunity under the law has been presented, relief has been possible owing to the fact that there were still public domains awaiting to be homesteaded, that there were large areas of this country undeveloped and it was possible to find relief for those seeking redress at the hands of the Court by a method short

bored with the doctrine for over half a century. In this Court, there have been six cases involving the 'separate but equal' doctrine in the field of public education. In *Cumming v. County Board of Education* (175 U. S. 528, 44 L. ed. 202, 20 S. Ct. 107), and *Gong Lum v. Rice* (275 U. S. 78, 72 L. ed. 172, 48 S. Ct. 91), the validity of the doctrine itself was not challenged. In more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. *Missouri ex rel. Gaines v. Canada* (305 U. S. 337, 83 L. ed. 208, 60 S. Ct. 232), *Sipuel v. University of Oklahoma* (332 U. S. 631, 92 L. ed. 247, 68 S. Ct. 209), *Sweatt v. Painter* (339 U. S. 629, 94 L. ed. 1114, 70 S. Ct. 848), *McLaurin v. Oklahoma State Regents* (339 U. S. 637, 94 L. ed. 1140, 70 S. Ct. 851). In none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff. And in *Sweatt v. Painter* (U. S.) supra, the Court expressly reserved decision on the question whether *Plessy v. Ferguson* should be held inapplicable to public education.

"In the instant cases, that question is directly presented. Here, unlike *Sweatt v. Painter*, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

"In approaching this problem, we cannot turn the clock back to 1868 when the amendment was adopted, or even to 1890 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and

of the reinterpretation of the Constitution. In the case of *Perspire v. Plaster* (U. S. 106 S. Ct. 2d 601 (1982)), the Court expressly reserved decision on the question of whether various other cases cited in the opinion should be held inapplicable to the question of the free enterprise system and the private ownership of property.

In the instant cases, that question is directly presented. Here, unlike *Perspire v. Plaster*, there are findings below that go to the effect that there are no public lands awaiting to be homesteaded, that the entire arable portions of our land have been populated as densely as circumstances will permit and there is evidence to the effect that it is extremely unlikely that defendants or their descendants will ever be inclined to part with their holdings on terms that plaintiffs could meet or that plaintiffs on their part would ever be in a position to acquire property either real estate or personal that would enable them to live in the same conditions and upon the same terms and enjoyments as plaintiff. Our decision, therefore, cannot turn merely on the question of whether or not the plaintiffs by their own efforts and ingenuity can possess themselves of arable land or by their own efforts can come into possession of enough wealth to support themselves in comfort. We must look instead on the effect of the capitalistic system and of free enterprise as a whole and determine what effect the private ownership of property has itself upon the public mind.

In approaching this problem, we cannot turn the clock back to 1868 when the amendment was adopted. Nor can we turn it back to the conditions obtaining at the time the Federal Constitution was adopted. We must consider the

its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

"Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in the awakening of the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

"We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

"In *Sweatt v. Painter* (U. S.) *supra*, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this court relied in large part on 'those qualities which are incapable of objective measurement but which make for greatness in a law school.' In *McLaurin v. Oklahoma State Regents*, 339 U. S. 637, 84 L. ed. 1149, 70 S. Ct. 851, *supra*, the court in requiring that a Negro admitted to a white graduate school be treated like other students, again resorted to intangible considerations: . . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.' Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was

free enterprise system, the profit motive and the capitalistic system as a whole in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined whether the free enterprise system of itself deprives these plaintiffs of equal protection of the laws.

Today, the free enterprise system is probably the greatest influence in perpetuating classes in our society, in keeping the rich man rich and the poor man poor. In these days of a highly industrialized society the arable land of our country already taken up with no public domain awaiting to be homesteaded and with those already in control of tremendous resources firmly entrenched in their control thereof by the so-called law of private ownership, it is extremely doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of equal economic development with his fellows. Such an opportunity is a right which must be made available to all on equal terms.

We come to the question then presented: Does the free enterprise system, the profit motive and the capitalistic system as a whole deprive the members of the poorer group of equal economic opportunities? We believe that it does.

To separate people into classes on account of differences in economic opportunity, to separate the children of the rich from the children of the poor in their homes and in their general economic standards solely because of their wealth or lack of wealth generates a feeling of inferiority as to the status of the poorer in the community. This may affect the hearts and minds of these people both children and adults alike in a way unlikely ever to be undone. The effect of this separation on the economic, political, and social development of our citizenry was well stated by the finding in the *California* case by a court which nevertheless felt compelled to rule against the plaintiff.

well stated by a finding in the *Kausas* case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

"Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system."

"Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.

"We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the fourteenth amendment. This disposition makes unnecessary any discussion whether such segregation also violates the due process clause of the fourteenth amendment.

The theory of private ownership of property in our country has a detrimental effect upon those who do not own property. The impact is all the greater in that it has the sanction of the law. The policy of separating the classes on account of their wealth or lack of wealth is usually interpreted as indicating an inferiority of the poorer group. This sense of inferiority affects the character of the adult and seriously affects the motivation of the children of the poor. The fact that one class of people live in fine houses while another class of people are compelled by the operation of this so-called law (private ownership) to live in tenements or even "slums" has a tendency to retard the political, social, and economic as well as the mental development of the poorer class of children and creates a sense of inferiority and class frustration upon the poorer classes who feel that they are deprived of an inherent right by the operation of this so-called artificial law.

Whatever may have been the extent of economic knowledge at the time of the adoption of the 14th amendment or even at the time of the adoption of the Federal Constitution, this finding is amply supported by modern authority.¹ Any language in *Perspire v. Pilaster* or other cases cited to the contrary to this finding is rejected.

We conclude that in the field of economics the doctrine of private ownership of property has no place. Separate and private ownership of property is inherently unequal. Therefore, we rule that the plaintiffs and all similarly situated for whom the actions have been brought are by reason of the so-called law of private ownership complained of, deprived of equal protection of the law as guaranteed by the fourteenth amendment. This disposition makes unnecessary any discussion whether such deprivation of equal rights under the private ownership theory also violates the due process clause of the fourteenth amendment. Defendants raise the point that section 4 of the fourteenth amendment stipulates that "the Congress shall have power to enforce, by appropriate legislation, the provisions of this article," and that

¹ On the detrimental effects of private ownership of property in the capitalistic system see "Das Capital" by Karl Marx, *The Proletarian Revolution* by Lenin, *The Philosophy of Communism* by Stalin. On the inequalities of the United States Constitution, its unworkability, and its nearly being a fraud on the common people, see generally Myrdal, *An American Dilemma*, cited in *Brown v. Board of Education of Topeka*, *supra*.

"Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases present problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question—the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on questions 4 and 5 previously propounded by the Court for the reargument this term. The Attorney General of the United States is again invited to participate. The attorneys general of the States requiring or permitting segregation in public education will also be permitted to appear as amici curiae upon request to do so by September 15, 1954, and submission of briefs by October 1, 1954.

"It is so ordered."

this means that only Congress has that power. This argument was disposed of summarily by the Court in *Brown v. Board of Education of Topeka* (347 U. S. 483, 68 L. ed. 873, 74 S. Ct. 686, 37 ALR 2d 1180). It is sufficient to say that in any case where the Congress fails to act this Court will, if it deems it wise to do so, issue the necessary edict.

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases present problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question—the constitutionality of private ownership of property. We have now announced that such private ownership of property is a denial of equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket and the parties are requested to present further arguments on these questions for reargument at this time. The Attorney General of the United States is again invited to participate. The attorneys general of the several States requiring or permitting private ownership of property will also be permitted to appear as amici curiae upon request to do so by September 15, 1957, and submission of briefs by October 1, 1957.

It is so ordered.

[From the American Legion Firing Line, vol. VII, No. 4, February 15, 1958]

REACTION BY SUBVERSIVE ELEMENTS TO RECENT SUPREME COURT DECISIONS

Within the past 2 years, decisions of the Supreme Court of the United States in matters pertaining to the field of internal security have greatly favored the Communist Party, U. S. A., and its membership. Several of these rulings have seriously hindered the effectiveness of congressional investigative committees and United States intelligence agencies. One decision of April 2, 1956 (*Commonwealth of Pennsylvania v. Steve Nelson*), nullified sedition laws in 42 States, Alaska, and Hawaii. Last year, the Firing Line reviewed 18 recent Supreme Court decisions affecting security. These were inserted in the Congressional Record of July 19 and August 5, 1957, by the Honorable James C. Davis of Georgia.

In an attitude reflecting their awareness of the trend, the Communist Party and its front organizations have enthusiastically greeted these Supreme Court rulings. Several Communist Party functionaries have publicly praised the decisions as a "great victory" for the "Communists." The following is a brief compilation of their most significant statements concerning the decisions:

(1) "It may still be too early to say that 'calmer times' are here, but Monday's Supreme Court decisions (June 17, 1957: *Paul M. Sweezy v. State of New Hampshire*; *John T. Watkins v. United States of America*; *Oleta O'Connor Yates, et al. v. U. S. A.*; *Al Richmond and Philip Marshall Connelly v. U. S. A.*; and *William Schneiderman v. U. S. A.*) go a long way towards restoring civil liberties for all Americans. These landmark rulings in one great flash illuminate the re-

cent McCarthyism darkens and light up the promise of a restored Bill of Rights." (See *Daily Worker*, June 10, 1957, p. 1.)

(2) "A wave of elation and relief broke over democratic-minded America yesterday (June 18, 1957), with news of the battery of decisions from the Supreme Court that go far to cleanse the air of the smog of McCarthyism."

(3) "A Communist Party club up in the Kingsbridge area of the Bronx (New York City) has set itself the job of raising \$800 for the *Daily Worker's* \$100,000 fund appeal. One of its members, a faithful plugger for our paper named Bernie, turned over \$200 of it yesterday (June 18, 1957). But Bernie was so elated over the Supreme Court decisions handed down Monday (June 17, 1957), that he drew out an additional \$100 of his own money to add to the \$200 collected by the club thus far." (See *Daily Worker*, June 10, 1957, p. 1.)

(4) "The Supreme Court decision in the *California Smith Act* case marks another important step in the restoration of the first amendment. * * * The 'Communist conspiracy' hoax which Monday's decision (June 17, 1957), in effect rejected, is written into the congressional 'findings of fact' of the Internal Security, and Communist Control Acts. It has provided the basis for the conviction—many of which will now require reversal of—114 persons under the Smith Act. * * * Undoubtedly the reactionaries will attack the Court for Monday's far-reaching action. But all liberty-loving Americans will greet the decision and, I am confident, seize the opportunity it gives to administer further rebuffs to the advocates of cold war. * * * (See statement of Eugene Dennis, secretary of national affairs, Communist Party, U. S. A., *Daily Worker*, June 19, 1957, p. 5.)

(5) "Amid the general elation among democratic-minded citizens over yesterday's Supreme Court decision (June 17, 1957), on the *California Smith Act* case, several score Communist leaders were studying the Court's words carefully both because of their general political significance and the effect on their personal lives." (See *Daily Worker*, June 18, 1957, p. 1.)

(6) " * * * the decisions were a great victory for the democratic rights of all Americans. When the rights of Americans, including Communists, to engage in their constitutional advocacy of socialism are upheld, the Bill of Rights is thereby strengthened in its traditional protection of free speech, free association, and free press for all varieties of opinions." (See statement of Dorothy Healey Connelly, chairman of Los Angeles Communist Party, *Daily Worker*, June 21, 1957, p. 1.)

(7) "We rejoice. Victory is, indeed, sweet. Especially a victory so long in coming. A victory that was gained against what seemed like insuperable odds when the fight began. Of course, we are elated that two of this paper's editors, Al Richmond and Philip M. Connelly, were fully vindicated by the Supreme Court. We regard their direct acquittal by the Nation's highest tribunal as a resounding triumph for freedom of the press. * * * We know that * * * thousands share in our jubilation. Let this wonderful enthusiasm and optimism and sense of self-confidence, generated by last Monday's victory (June 17, 1957), now be transformed into the will and energy to reap the fruits of victory by insuring the continued existence and growth of the People's World." (See *People's World*, June 22, 1957, p. 1.)

(8) "This decision (*Oleta O'Connor Yates, et al. v. United States of America*, June 17, 1957) is the beginning of the end of the Smith Act. * * * By this victory for the rights of Communists, freedom of political opinion for all Americans has thereby been made the safer from the inroad of the inquisitors and the witch-hunters. It was the growing revulsion of the American people to these witch-hunts which has turned the tide. The Supreme Court has heeded this sentiment, and acted in the best traditions of American democracy. * * * The decision of the Supreme Court, while it did not deal directly with the issue, also struck a blow at the 'big lie' that the Communist Party advocated the violent overthrow of the U. S. Government." (Statement of the 14 defendants, *People's World*, June 22, 1957, p. 12.)

(9) "Recent Supreme Court decisions in the areas of civil rights and civil liberties reflect mounting domestic and international popular pressures, mirror the deep hold in our country of traditions and conceptions of individual freedoms, and themselves enormously stimulate, of course, the continuing effort to eradicate the last vestiges of McCarthyism. * * * While there remains a tendency toward 'moderation' in the Supreme Court so far as implementing its generally antisegregation views is concerned, and a pronounced ambiguity—to put it mildly—when it comes to the rights of Communists and radicals in any organizational sense, the present Court is notably strong in defending civil

liberties as these pertain to persons in their individual capacities." (See "Ideas In Our Time", by Herbert Aptheker, Political Affairs, July 1957, pp. 1 and 2.)

(10) "The National Lawyers Guild * * * has consistently maintained that the Smith Act violates the guarantees laid down in the first amendment and that the type of inquisition carried on by congressional committees and under State authorities under the pretense that all kinds of questions could be asked of people regarding their political beliefs, have represented a dangerous trend in American life. We, therefore, hail the action of the Supreme Court in these cases as a great victory for the principles upon which our country was founded." (See statement by Royal France, executive secretary of the National Lawyers Guild, Daily Worker, June 18, 1957, p. 7.)

(11) "The Eisenhower-Warren Court has made an impressive and heartening start on the job of digging the Bill of Rights out from under the rationalizations by which a fear-ridden decade had buried it." (See National Lawyers Guild quarterly, Lawyers Review, Fall 1957, p. 70.)

(12) "The recent Supreme Court decisions have opened a new era of freedom for all of us. The First Amendment has been put back into the Constitution. Once more it may become possible for the non-conformist to say what is on his mind without fear of going to jail, losing his job, being blacklisted, or hounded into suicide. * * * Our most important task, at the moment, is to back up the Bill of Rights by writing our Senators, Congressmen and editors in support of the Court's decisions." (See Emergency Civil Liberties Committee letterhead, July 1957.)

(13) "A Return To Sanity—The combined effect of the rulings announced Monday (June 17, 1957) and other recent ones is to reaffirm the basic constitutional rights of individuals, to suggest definite limits on the powers of Congressional Investigating Committees, and to warn the government against abuse of its powers. Although the Court has overturned no existing laws, it has by now set up a body of opinion to curb the government's reckless treatment of the individual in the name of 'national security'." (See "National Guardian," June 24, 1957, p. 1.)

(14) "Here at home, a heartening aspect of the recent Supreme Court decisions is the fact that they go a long way toward destroying one of the main pretexts for the cold war—the alleged worldwide conspiracy headed by the USSR for the violent overthrow of capitalist governments including our own. This, according to Justice Harlan's opinion on behalf of six Supreme Court members, the government had been unable to prove in the California Smith Act case." (See "Bomb Tests Must End!" by Jessica Smith, "New World Review", July 1957, p. 4.)

COMMUNIST PLOT IN THE LABOR FIELD

On January 6, 1958, eight persons were brought to trial in Federal court in Cleveland, Ohio, on "charges of conspiracy to file false non-Communist union officer affidavits (form 1081) with the National Labor Relations Board" under a provision of the Taft-Hartley law. According to a Department of Justice release dated January 23, 1957, the indictment alleged these individuals "were aware that statements and representations * * * made in the affidavits" denying membership in the "Communist Party, were false." The indictment accused the defendants of conspiring "to fake resignations from the Communist Party and conceal the plot by using aliases, secret codes, and other deceptions." (See The Evening Star, Washington, D. C., January 24, 1957, p. A-30.)

Two of the defendants, Marie Reed Haug and her husband, Fred Haug, are also charged with having signed false non-communist affidavits in a previous indictment. The other six defendants who allegedly conspired with the Haugs to willfully violate the Taft-Hartley law provision were: Edward Joseph Chaka, Hyman Lumer, Sam Reed, Andrew Remes, Eric Jerome Reinthaler, and James S. West. This case was the first of its kind in which prosecution was instituted by the Department of Justice. The indictment charged a direct relationship between alleged subversives in the labor field and national leaders of the Communist Party, U. S. A. Listed in the indictment as coconspirators but not as defendants were the following eight known Communist officials: Joe Brandt, Martin Chancey, Gus Hall, Frank Hashmall, Anthony Krehmarek, Steve Nelson, Sidney Stein, and John Williamson. Since their January 1957 indictments, the defendants have been supported by two newly created defense organizations in the Midwest. According to recent letterheads, Mrs. Betty Chaka, is Secretary of the Committee for Taft-Hartley Defendants, room 202, 2014 East 105th Street, Cleveland 6, Ohio; and Rev. Harold H. Hester and Harry J. Canter are affiliated

with the Provisional Committee to Aid Victims of Taft-Hartley, room 402, 180 West Madison Street, Chicago 2, Ill. (See National Guardian, December 23, 1957, p. 3.)

As chairman of the Provisional Committee to Aid Victims of Taft-Hartley, Canter is a veteran of the Communist movement in the United States. In 1930, he was a Communist candidate for governor of the Commonwealth of Massachusetts. During that period, he served 1 year in a Massachusetts jail for carrying a banner "In Boston's Sacco and Vanzetti demonstration, denouncing Governor Fuller as the murderer of these two workers * * *." Canter was listed as an instructor at the Communist Abraham Lincoln School in Chicago, Ill., during its 1943 fall session. (See Special Committee on Un-American Activities, Appendix IX, 1944, p. 202; Special Committee to Investigate Communist Activities in the United States, Investigation of Communist Propaganda, pt. 6, vol. 4, 1930, p. 757; and HUAC, Guide to Subversive Organizations and Publications, 1957, p. 5.)

In 1950, Canter was secretary of the James Keller Defense Committee of room 825, 431 South Dearborn Street, Chicago 6, Ill. This organization was apparently a defense front for James A. Keller who had been "ordered deported in 1953 on charges of past membership in the Communist Party." A 1955 indictment against Keller was dismissed last year when the Supreme Court ruled in the case of *United States of America v. George J. Witkovich*, that "an alien awaiting deportation was not compelled to answer questions about Communist activities." According to the June 23, 1957, issue of *The Worker*, Sunday edition of the recently defunct Communist Daily Worker, Canter wrote a congratulatory letter to this paper's editor. (See Daily Worker, May 17, 1957, p. 3; and Firing Line, July 1, 1957, pp. 6 and 7.)

The Provisional Committee to Aid Victims of Taft-Hartley is currently using the office facilities of the Chicago Joint Defense Committee to Defeat the Smith Act. Formerly known as the Claude Lightfoot Defense Committee, the Chicago Joint Defense Committee's October 1957 letterhead reflects their following officers: Leon Katzen, chairman; John T. Bernard, vice chairman; Geraldine Lightfoot, projects director and Richard Criley, publicity and research. Katzen, Bernard and Criley were identified as members of the Communist Party before the House Committee on Un-American Activities in 1952. Both Katzen and Criley have been listed as Communist leaders. Like Canter, Geraldine Lightfoot and Katzen are former instructors of the aforementioned Abraham Lincoln School. (See HUAC, Annual Report, 1952, pp. 20 and 31; and HUAC, testimony of Walter S. Steele Regarding Communist Activities in the United States, 1947, p. 52.)

SPECIAL NOTICE.—Our 28-page 1957 Firing Line index is now ready. Paper-bound 1957 editions, with index, are available for \$3 a copy. Send your letter requests directly to the National Americanism Commission, The American Legion, Post Office Box 1035, Indianapolis, Ind.

[From the American Legion Firing Line, vol. VI, No. 13, July 1, 1957]

RECENT DECISIONS OF THE SUPREME COURT OF THE UNITED STATES

In its December 31, 1956 report to the Senate Committee on the Judiciary, the Internal Security Subcommittee sharply declared certain Supreme Court decisions have "seriously restrained the course and progress of America's struggle against its domestic Communist enemies." While these rulings have "created legislative problems" in Congress, The American Legion, in a 1956 National Convention resolution, stated the Supreme Court "has, in all practical effect, repealed Article Ten of the Bill of Rights of our Constitution." For a better understanding of the background of these aforementioned assertions, let us examine 13 of the following more important Supreme Court decisions in the field of internal security:

1956 RULINGS

1. *Commonwealth of Pennsylvania v. Steve Nelson* (April 2, 1956.) Steve Nelson, "an acknowledged member of the Communist Party, was convicted in the Court of Quarter Sessions of Allegheny County, Pennsylvania, of a violation of the Pennsylvania Sedition Act and sentenced to imprisonment for 20 years and to a fine of \$10,000 and to costs of prosecution in the sum of \$13,000." While the State's superior court affirmed the conviction, the Supreme Court of Pennsylvania subsequently reversed the lower court's ruling on the grounds that

only Federal law applied to such offenses. (See Supreme Court of the United States, No. 10—October Term, 1955, pages 1 and 2.)

In affirming the decision of Pennsylvania's high court, the Supreme Court of the United States held that Congress, "in enacting the Smith Act of 1940, the Internal Security Act of 1950, and the Communist Control Act of 1954, had intended to occupy the field of sedition to the exclusion of State legislation on the same subject, and that, accordingly, the Pennsylvania Sedition Act was unenforceable. As a result of this decision, comparable sedition laws in 41 other States were likewise rendered ineffective and the work of State legislative committees investigating Communist penetration was seriously curtailed." (See Internal Security Subcommittee, Report for the Year 1956, Section XII, page 218.)

Three Supreme Court Justices filed dissenting opinions in this case. They declared "the State and national legislative bodies have legislated within constitutional limits so as to allow the widest participation by the law enforcement officers of the respective governments. The individual States were not told that they are powerless to punish local acts of sedition, nominally directed against the United States. Courts should not interfere. We would reverse the judgment of the Supreme Court of Pennsylvania." (See Supreme Court of the United States, No. 10—October Term, Minority Decision, 1955, p. 9.)

On April 25, 1956, 35 State Attorney Generals petitioned the Supreme Court "for rehearing of decision of April 2, 1956," and warned "it is dangerous to public safety as well as to State Security to leave the States impotent to regulate acts of sedition or subversion occurring within State borders." This petition declared "the majority opinion (of the Supreme Court) is believed to be in error in failing to have considered and ruled upon that portion of the record showing separable counts of the indictment against Steve Nelson charging criminal conduct with a view to overthrowing and destroying by force and violence the government of the Commonwealth of Pennsylvania as well as the Government of the United States of America." (See Supreme Court of the United States, No. 10—October Term, 1955, Petition for Rehearing of Decision of April 2, 1956, pp. 1, 6, 7 and 8.)

The Attorney General of New York, in a separate brief filed with the Supreme Court on May 10, 1956, joined the other 35 State Attorney Generals in petitioning for a rehearing of the high court's decision in the Steve Nelson case. In the form of a brief order ignoring the State Attorney Generals' petition, the Supreme Court announced on May 14, 1956, it had refused to reconsider its April 2, 1956, decision invalidating State sedition laws. Fourteen bills have been introduced in the House of Representatives and two in the United States Senate, for remedial action to permit each State to enact anti-sedition legislation within its own limits. (See "Daily Worker," May 15, 1956, p. 8.)

2. Harry Blochower v. The Board of Higher Education of The City of New York (April 9, 1956.) Harry Blochower, an associate professor at Brooklyn College, New York City, appeared before the Senate Internal Security Subcommittee and invoked the Fifth Amendment when asked whether he had been a member of the Communist Party during 1940 and 1941. Shortly after his appearance before this congressional committee, "Blochower was notified that he was suspended from his position * * * three days later his position was declared vacant pursuant to the provisions of Section 903 of the New York City Charter." (See Supreme Court of the United States, No. 23—October Term, 1955, pp. 2 and 3.)

In deciding this case, the Supreme Court reversed all lower court rulings and "held unconstitutional * * * section 903 of the New York City charter, which provided for the discharge of any city employee who pleaded the privilege against self-incrimination to avoid answering a question relating to official matters." The Internal Security Subcommittee reported recently, "as a result of the Court's decision in this case, proceedings already have been commenced to compel the reinstatement of more than a dozen teachers in New York City educational institutions." (See Internal Security Subcommittee, Report for the Year 1956, Section XII, page 218.)

Dissenting from the majority opinion, three Supreme Court Justices wrote the "Court finds it a denial of due process to discharge an employee merely because he relied upon the fifth amendment plea of self-incrimination to avoid answering questions which he would be otherwise required to answer. We assert the contrary—the city does have reasonable ground to require its employees either to give evidence regarding facts of official conduct within

their knowledge or to give up the positions they hold * * * Numerous * * * colleges and universities have treated the plea of the fifth amendment as a justification for dismissal of faculty members. When educational institutions themselves feel the impropriety of reserving full disclosure of facts from duly authorized official investigations, can we properly say a city cannot protect itself against such conduct by its teachers?" (See Supreme Court of the United States, No. 23—October Term, Minority Decision, 1955, pages 2, 5, and 6.)

In another minority opinion, a fourth Supreme Court Justice declared "I dissent because I think the Court has misconceived the nature of Section 103 as construed and applied by the New York Court of Appeals, and has unduly circumscribed the power of the State to ensure the qualifications of its teachers." Complying with the Supreme Court ruling, Stochower was reinstated as a professor of German with back pay and interest of about \$10,000. Upon his reinstatement, he was immediately suspended by Brooklyn College President Harry Glouse, "on a broader charge of conduct unbecoming a member of the staff." On February 26, 1957, the eve before his scheduled appearance before the New York City board of higher education "on charges of misconduct," Stochower unexpectedly announced his intention to resign from the public school system. (See Supreme Court of the United States, No. 23—October Term, Minority Decision, 1955, page 1; "The New York Times," February 27, 1957, page C-14; and "The Philadelphia Inquirer," February 27, 1957, page 14.)

3. *Communist Party, U. S. A. v. Subversive Activities Control Board* (April 30, 1956). The Supreme Court "reversed and remanded an order of the Subversive Activities Control Board directing the Communist Party of the United States to register with the Attorney General as a 'Communist-action' organization, as required by the Subversive Activities Control (Internal Security) Act of 1950. The majority opinion pointed out that the testimony of three witnesses before the Board may have been 'tailed,' in view of evidence of their possible perjury adduced subsequently to the issuance of the Board's order." (See Internal Security Subcommittee, Report for the Year 1956, sec. XII, p. 218.)

Three Supreme Court Justices filed a dissenting opinion in this case. They argued that the Supreme Court "refuses to pass on the important questions relating to the constitutionality of the Internal Security Act of 1950, a bulwark of the congressional program to combat the menace of world communism. Believing that the Court here disregards its plain responsibility and duty to decide these important constitutional questions" Justice Tom Clark said "I cannot join in its action." (See Supreme Court of the United States, No. 48—October Term, Minority Decision, 1955, p. 3.)

In strong language, Justice Clark's minority opinion declared "I have not found any case in the history of the Court where important constitutional issues have been avoided on such a pretext * * * In this case the motion itself was wholly inadequate and even if the testimony of all three challenged witnesses were omitted from the record the result could not have been different. There is no reasonable basis on which we could say that the Court of Appeals has abused its discretion. I abhor the use of perjured testimony as much as anyone, but we must recognize that never before have mere allegations of perjury, so flimsily supported, been considered grounds for reopening a proceeding or granting a new trial. The Communist Party makes no claim that the Government knowingly used false testimony, and it is far too realistic to contend that the Board's action will be any different on remand."

Continuing his dissenting opinion, Justice Clark stated: "The only purpose of this procedural maneuver is to gain additional time before the order to register can become effective. This proceeding has dragged out for many years now, and the function of the Board remains suspended and the congressional purpose frustrated at a most critical time in world history. Ironically enough, we are returning the case to a Board whose very existence is challenged on constitutional grounds. We are asking the Board to pass on the credibility of witnesses after we have refused to say whether it has the power to do so. The constitutional questions are fairly presented here for our decision. If all or any part of the act is unconstitutional it should be declared so on the record before us. If not, the Nation is entitled to effective operation of the statute deemed to be of vital importance to its well-being at the time it was passed by the Congress * * *" (See Supreme Court of the United States, No. 48—October Term, Minority Decision, 1955, pp. 3, 5, and 6.)

The Firing Line of May 15, 1957, page 43, reported the Subversive Activities Control Board, in a reaffirmed order (modified report) dated December 18, 1956, "recommended that the United States Court of Appeals for the District of

Columbia Circuit affirm the Board's order entered April 20, 1953, requiring the Communist Party of the United States to register as a Communist-action organization under section 7 of the Subversive Activities Control Act of 1950." "The constitutional question of the aforementioned act 'will undoubtedly be raised again and passed upon by the (Supreme) Court on a future appeal.' In a tactic to forestall registration as agents of a foreign power, representatives of the Communist Party on June 6, 1957, used the *Ulinton H. Jencks v. U. S. A.* case (See p. 8 of this issue) to demand access to confidential Federal Bureau of Investigation reports. (See Internal Security Subcommittee, Report for the Year 1956, sec. XII, p. 210; and the New York Times, June 8, 1957, p. 10.)

4. *Kendrick M. Cole v. Philip Young et al.* (June 11, 1950). Kendrick M. Cole, a food and drug inspector for the New York District of the Food and Drug Administration, Department of Health, Education, and Welfare, was suspended without pay in November 1953 "pending investigation to determine whether his employment should be terminated." When confronted with charges of alleged subversive activities, he declined to answer these charges or request a hearing. Subsequently, the Secretary of the Department of Health, Education, and Welfare, determined that Cole's "continued employment was not 'clearly consistent with the interests of national security' and ordered the termination of his employment." (See Supreme Court of the United States, No. 442—October Term, 1955, pp. 2 and 3.)

After Cole's appeal to the Supreme Court, the judicial body upset the Government's decision in this case, and ruled a "Federal employee can be fired as a security risk only if he holds a 'sensitive' position." Cole's position with the Food and Drug Administration was classified as nonsensitive. Speaking before the 38th annual convention of the Department of Pennsylvania American Legion in July 1956, the chairman of the House Committee on Un-American Activities, Francis E. Walter, declared: "The United States Supreme Court's recent decision overturning the law under which Federal employees could be fired for alleged Communist associations has had the effect of opening the entire Government 'to the infiltration of our mortal enemies.'" (See the Philadelphia Inquirer, July 21, 1956, p. 1; and Daily Worker, June 12, 1956, p. 1.)

In a dissenting opinion, three Supreme Court Justices clearly remarked: "We believe the Court's order has stricken down the most effective weapon against subversive activity available to the Government * * * (and) might leave the Government honeycombed with subversive employees * * * It is not realistic to say that the Government can be protected merely by applying the act to sensitive jobs. One never knows just which job is sensitive." (See Supreme Court of the United States, No. 442—October Term, Minority Decision, 1955, pp. 2 and 5.)

5. *Steve Nelson (Stephen Mesarosh) et al. v. United States of America* (October 10, 1956). Five Communist Party leaders in western Pennsylvania, namely, Steve Nelson, William Albertson, Benjamin L. Careathers, James H. Dolsen and Irving Weissman, convicted of advocating the overthrow of the United States Government by force and violence, were freed and granted new trials by another Supreme Court ruling. The Court stated that Joseph D. Mazzel, a principal Government witness "may have lied" in the defendants' first trial. Two weeks prior to the high court's decision, the United States Department of Justice asked the Supreme Court "to send the case back for determination as to Mazzel's credibility. It said it believed the testimony he had given was the truth, but statements he made before other tribunals had cast doubt on his credibility." With three dissenters, the Supreme Court denied the Government's motion and vacated a lower court judgment. (See the New York Times, October 11, 1956, p. C-10; and the Washington Post and Times Herald, October 11, 1956, p. 1.)

1957 RULINGS

6. *Ben Gold v. United States of America* (January 28, 1957.) Ben Gold, former president of the now defunct International Fur and Leather Workers Union, "swore before the National Labor Relations Board on August 30, 1950, that he was not a member of the Communist Party nor affiliated with it. He had announced his resignation a few days previously." The Government subsequently claimed Gold "lied when he made the oath, required by the Taft-Hartley Act, and that the resignation had no real meaning." He was indicted in 1953 and was later convicted of falsifying the non-Communist affidavit. (See the Washington Post and Times Herald, January 28, 1957, p. A-10.)

In a split decision ordering a new trial, the Supreme Court held that when the Federal Bureau of Investigation inadvertently questioned three members of the Gold jury in "probing an unrelated case," such action by the FBI was "official intrusion into the privacy of the jury." It acknowledged the violation was unintentional but this "does not remove the effect of the intrusion." Resulting from this decision, the Government announced on May 9, 1957, its dismissal of the Gold case "since the alleged commission of the crime, and careful reappraisal of the evidence against Gold has led to the conclusion that certain material evidence is not available. 'Considering this loss of testimony in light of the age of the case it was concluded that Gold could not be successfully retried.'" (See the Washington Post and Times Herald, May 10, 1957, p. A-12.)

Four Supreme Court Justices filed dissenting opinions. Three charged that the FBI interviewing incident had "no effect upon the jurors adverse to the defendant." In a very strongly worded separate minority opinion, Justice Clark declared: "I am . . . disturbed by the refusal of the Court to decide . . . important questions urged upon us . . . Among these are the applicability of the perjury rule of evidence to the false statement statute . . . admissibility of evidence of prior activity in the Communist Party to disprove the sincerity of a resignation therefrom, the use of expert witnesses to prove continuing membership and the correctness of the Court's charges as to membership in the Party, etc. . . . The refusal of the majority (this Supreme Court decision) today to pass upon them thus deprives the Federal Judiciary of this Court's opinion, which renders today's error multifold. It will cause undue hardship in the trial of all of these cases, not only on the Government but on the defendants as well . . ." (See Supreme Court of the United States, No. 137—October Term, Minority Decision, 1956, p. 2.)

7. *Rudolph Schware v. Board of Bar Examiners of the State of New Mexico* (May 6, 1957). In examining Rudolph Schware's application for admission to the New Mexico State Bar, the Board of bar examiners denied "Schware the right to take the bar examination" because of his admissions concerning membership in the Communist Party from 1932 to 1940 and other criminal activities. After appealing to the New Mexico Supreme Court, this body concurred with the State in denying Schware's motion. This Court stated ("Schware's membership in the Communist Party), together with his other former actions, in the use of aliases and record of arrests, and his present attitude toward those matters, were the considerations upon which (we approved the denial of his application.)" Adversely, claiming "there is nothing in the record which suggests that Schware has engaged in any conduct during the past 15 years which reflects . . . (against) . . . his character", the Supreme Court of the United States concluded that Schware's "past membership in the Communist Party does not justify an inference that he presently has bad moral character . . . There is no evidence in the record which rationally justifies a finding that Schware was morally unfit to practice law." (See United States Supreme Court, No. 92—October Term, 1956, pp. 6, 7, 13, 14.)

8. *Raphael Konigsberg v. The State Bar of California and the Committee of Bar Examiners of the State Bar of California* (May 6, 1957). Raphael Konigsberg, in applying for admission to the California State Bar, the "State Committee of Bar Examiners . . . refused to certify him to practice law on the grounds he had failed to prove (1) that he was of good moral character and (2) that he did not advocate overthrow of the Government of the United States or California by unconstitutional means." Like the aforementioned Schware decision, the Supreme Court upset the State's ruling and upheld the right of Konigsberg to practice law. In his dissenting remarks, a Supreme Court Justice claimed "what the (Supreme) Court has really done . . . is simply to impose on California its own notions of public policy and judgment. For me, today's decision represents an unacceptable intrusion into a matter of State concern." (See Supreme Court of the United States, No. 5—October Term, Minority Decision, 1956, pp. 1 and 36.)

9. *United States of America v. George I. Witkovich* (April 28, 1957). George I. Witkovich, a former employee of the Slovenian-English language newspaper *Prosveta*, was ordered deported in 1953 for membership in the Communist Party. When the United States attempted to deport him to Yugoslavia, that country refused to admit Witkovich. Remaining in the United States, he was subject to the supervision of the Attorney General, which was made possible by a statute of the Immigration and Nationality Act of 1952. In October 1955, he was indicted "for having refused to answer questions about his activities, including whether he had attended Communist meetings since the deportation order was issued."

When Federal District Court quashed the indictment, the Government appealed directly to the Supreme Court. The Government claimed that if the lower court ruling was upheld, it "would hamper * * * (the Government) efforts to control subversive aliens and would jeopardize internal security." The Government pointed out that more than 3,000 deportation cases could be affected by the ruling." (See the New York Times, April 30, 1957, p. C-11.)

Ruling against the Government's motion, the Supreme Court said that "an alien awaiting deportation was not compelled to answer questions about Communist activities." In a minority opinion, two Supreme Court Justices claimed that the "majority (Supreme Court) decision stripped the Attorney General of an 'important power' necessary to the protection of internal security." (See the New York Times, April 30, 1957, p. C-11.)

10. *United States of America v. Mrs. Antonio Senthner* (May 20, 1957). While under a deportation order in April 1953 "on the ground that she was a member of the Communist Party," Mrs. Antonio Senthner was served an order by the Attorney General to terminate membership in this subversive organization. When a Federal district court criticized the Immigration and Naturalization Service for its handling of the case, the Department of Justice appealed directly to the Supreme Court. Upholding the lower court, the high court ruled "the Justice Department lacks authority to ban Communist activity by an alien who has been under a deportation order for six months." In a dissenting opinion, two Supreme Court Justices warned that this decision "makes ineffective those clauses of the McCarran-Walter Immigration (Immigration and Nationality) Act of 1952 which 'are vital to effectuation of the purpose of Congress in controlling subversives whose order of deportation has been forestalled by technical difficulties.'" (See the Washington Post and Times Herald, May 21, 1957.)

11. *Max Halperin v. United States of America* (May 30, 1957). When Max Halperin, a New York lawyer, was called before a Brooklyn, N. Y., grand jury, "investigating corruption in the Bureau of Internal Revenue," he refused to answer certain questions on the grounds that it may tend to incriminate him. Halperin was subsequently indicted. At his trial, he repeatedly invoked the Fifth Amendment when asked the same questions he had refused to answer before the grand jury. Prior to Halperin's conviction, the trial judge instructed the jury "that Mr. Halperin's claim of his constitutional privilege not to be a witness against himself could be considered in determining what weight should be given to his testimony." (See the New York Times, May 31, 1957, pp. 1 and 11.)

In a unanimous ruling, the Supreme Court held in effect "against the popular tendency of assuming that a man must be guilty of some wrong-doing if he invokes the Fifth Amendment." The Court held that "under the circumstances of this case it was prejudicial error for the trial judge to permit cross-examination of petitioner (Halperin) on his plea of the Fifth Amendment privilege before the grand jury, and that Halperin must therefore be given a new trial." (See the New York Times, May 31, 1957, p. 11.)

Commenting on the subject of the Fifth Amendment at a news conference on March 27, 1957, President Dwight D. Eisenhower declared, "that in some instances it is absolutely a basic safeguard of American liberty or it would not have been written as the Fifth Amendment to the Constitution, although I must say I probably share the common reaction: If a man has to go to the Fifth Amendment, there must be something he doesn't want to tell." (See the New York Times, May 31, 1957, p. 1.)

12. *Shirley Kremen et al. v. United States of America* (May 13, 1957). Convicted of harboring fugitive Communist Party national leader, Robert Thompson, three individuals, namely, Shirley Kremen, Samuel Irving Coleman and Sydney Steinberg, won new trials in a divided Supreme Court decision. The majority ruling declared "the seizure of the entire contents of the house and its removal some 200 miles away to the Federal Bureau of Investigation offices for the purpose of examination is beyond the sanction of any of our cases. While the evidence seized from the persons of the petitioners (Kremen, Coleman and Steinberg) might have been legally admissible the introduction against each of petitioners of some items seized in the house * * * rendered the guilty verdicts illegal." (See Supreme Court of the United States, No. 162—October term, 1956, p. 2.)

A minority decision claimed "only a fragmentary part of the items listed by the Court as seized was admitted into evidence and if any items were illegally

APPENDIX III

Following is a reproduction of representative communications received by the subcommittee and ordered printed as a part of the hearing record on S. 2646. Communications not ordered printed may be examined in the subcommittee file.

JAMAICA, N. Y., February 18, 1958.

Re Jenner bill, S. 2646

Hon. JAMES O. EASTLAND,
United States Senator,
Chairman, of Senate Committee on Judiciary,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: I write in support of the above-mentioned bill, on which public hearings are scheduled to commence tomorrow, which bill would withdraw appellate jurisdiction by the Supreme Court in matters pertaining to the investigative activities of Congress, the security program of the executive branch of Government, State legislation against subversive activities, home rule over local schools, and States rights to determine who shall be licensed to practice law.

In 1925 I commenced work in a law office and since I have been admitted to practice law, the bulk of my practice has been in the courts. I have observed that there has been a continued trend by the courts away from the hard and fast principles of law which constituted the real basis of the American way of life as contemplated by the Founding Fathers. It appears today that all too many judicial determinations are based solely upon the expediency of the moment, with little or no thought given to the well-established legal principles. Then, too, we have judicial determinations based only upon sociological beliefs of members of the judiciary. I do not believe that manmade laws are likely to be any more effective against the continued judicial abuses the Jenner bill is designed to curb than would a beautiful sign placed in an apple orchard serve to keep the worms from destroying apples. However, until such time as improvement in the judiciary may be accomplished, the people of America may find some protection by limiting the appellate powers of the Supreme Court as proposed by the Jenner bill. It is quite apparent that the Supreme Court has, on many occasions during the past several decades, misconceived the purpose for which it was created. It was not created to usurp the legislative powers of Congress or of the various States. Neither was it created to give the executive branch of the Government powers not given it by the people through Congress. The juridical duties of any court are, of necessity, limited to the administration of justice under a system of American jurisprudence based upon principles of positive law and legal relations. It may not be the popular thing for a lawyer to say, but it is my opinion that past experience indicates that judicial appointments as now made in the Federal courts are unwise; it is practically impossible to impeach a member of the judiciary, as matters now stand. I would suggest that legislation now be considered whereby every Federal judge, including the Supreme Court, have his official acts reviewed at frequent intervals by an impartial lay body with a view to determining the advisability of his continuance in office. The public welfare requires protection against future damage by what have come to be known as "Red Monday" decisions, etc. It can best be protected by the removal from the Judiciary of those who participate in "Red Monday" decisions.

Sincerely yours,

E. F. W. WILDERMUTH.

SPEAKING FRANKLY,
Pomona, Calif., February 18, 1958.

Hon. JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SENATOR: I write this letter in support of Senate bill 2646 to curtail and limit the jurisdiction of the Supreme Court of the United States in matters

affecting the security of this Republic and all other matters relating thereto, such as—

1. The investigative functions of the Congress.
2. The security program of the executive branch of the Federal Government.
3. Antisubversive legislation of the various States.
4. Local rule over the school systems.
5. Admission of persons to practice law within the individual States.

With best wishes for the success of this bill's passage and kindest regards,
I am,

Respectfully,

HARVEY G. WOLF, *Editor.*

ST. PETERSBURG, FLA., February 20, 1958.

GENTLEMEN: We are very interested in Senator Jenner's bill to restrict authority of the Supreme Court in certain stated cases. We hope this bill will receive immediate attention and that the wrongs perpetrated upon this country by the present Supreme Court will be corrected as soon as possible.

Respectfully,

JAMES E. S. KINSELLA.

ST. PETERSBURG, FLA., February 20, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SIR: Please pass S. 2646 to limit the jurisdiction of the Supreme Court of the United States of America to prevent them from taking away our State rights.

Very truly,

CORAL H. VAN ALLAN.

DALLAS, TEX., February 18, 1958.

DEAR SENATOR EASTLAND: The Jenner resolution (S. 2646) which is now before your Internal Security Subcommittee, is of the greatest importance to our country.

The powers of the Supreme Court must be re-defined.

Please do everything you can to expedite the passing of this resolution.

Sincerely,

LA VONNE C. CRAWFORD.
Mrs. WM. L. CRAWFORD III.

INGLEWOOD, CALIF., February 20, 1958.

Re S. 2646

HON. JAMES O. EASTLAND,
*Chairman, Subcommittee to Investigate the Administration of the Internal Security Laws,
Senate Office Building,
Washington, D. C.*

DEAR SENATOR EASTLAND: This is to thank you and the members of the subcommittee for your attention and efforts on behalf of Senator Jenner's bill S. 2646, to limit the appellate jurisdiction of the Supreme Court in certain cases.

This is critically needed legislation, as has been so expertly brought out by the hearings last August 1957.

Please know that we appreciate your work, and please continue to support vigorously all efforts leading to enactment of S. 2646 into law.

Respectfully,

JO HINDMAN.

PHILADELPHIA, PA., February 22, 1958.

HON. JAMES O. EASTLAND,
Chairman, Judiciary Committee,
United States Senate Office Building,
Washington, D. C.:

Pennsylvania Society for Constitutional Security urges immediate favorable action upon S. 2040 to limit appellate jurisdiction United States Supreme Court.

DELLA M. BARRETT, Secretary.

LOS ANGELES, CALIF., February 19, 1958.

Re S. 2040.

Senator JAMES O. EASTLAND,
Senate Office Building,
Washington, D. C.

DEAR SENATOR EASTLAND: Enclosed is Holmes Alexander's article from the Los Angeles Times of February 18. No doubt you have seen it.

My husband and I wish to urge the passage of this bill, S. 2040, and hope you are doing all you can to get it to the Congress for a vote.

The passage of this bill will give us a start back onto the road of constitutional government, out of the dead-end street where the last decisions of the Supreme Court have led us. If they hand down any more decisions in favor of communism we might as well close up shop.

Our thanks to you for your wonderful work in upholding States rights.

Best wishes.

Sincerely,

VIOLA W. FRADENECK.

ILLINOIS FEDERATION OF REPUBLICAN WOMEN,
Alton, Ill., February 20, 1958.

Mr. J. G. SOURWINE,
Senate Internal Security Subcommittee,
Senate Office Building, Washington, D. C.

DEAR MR. SOURWINE: In connection with the current hearings on the Jenner bill to limit the jurisdiction of the Supreme Court, it has occurred to me that perhaps you would like to see how the grassroots feel about recent decisions of the Supreme Court relating to communism. I have enclosed a copy of a resolution passed unanimously by the Illinois Federation of Republican Women at our statewide meeting earlier this month.

With best wishes.

Sincerely yours,

Mrs. J. F. SCHLAFLY, Legislative Chairman.

THE SUPREME COURT

Whereas in the Jencks case, the United States Supreme Court opened confidential FBI files to Communists, spies, dope peddlers, and others being prosecuted for criminal charges; and

Whereas in the Watkins case, the Supreme Court severely impeded the anti-Communist investigations of congressional committees; and

Whereas in the Nelson case, the Supreme Court outlawed enforcement of the antisection laws of 42 States and of Alaska and Hawaii; and

Whereas in the Cole and Service cases, the Supreme Court made it almost impossible to dismiss Federal employees who are found to be security risks; and

Whereas in the Slochower and Sweezy cases, the Supreme Court forbade the discharge of fifth-amendment teachers and ruled that teachers in public schools could not be questioned about their Communist activities; and

Whereas in the Yates case, the Supreme Court made it difficult if not impossible to enforce the Smith Act, so that dozens of defendants have since been released because of this decision; and

Whereas the Communist Daily Worker described the effect of these decisions as follows: "the curtain is closing on one of our worst periods";

Resolved, That the Illinois Federation of Republican Women commend President Eisenhower for proposing and signing immediate legislation to correct the evil effects of the Jencks decision; and

Resolved further, That the Illinois Federation of Republican Women urge Congress to pass appropriate legislation to repair the damage to our internal defenses against communism caused by other recent Supreme Court decisions; and

Resolved further, That a copy of this resolution be sent to President Eisenhower, to Senator Dirksen, and to all Illinois Republican Congressmen.

Passed February 6, 1958, Springfield, Ill.

*THE COLONIAL DAMES OF AMERICA,
Philadelphia, February 15, 1958.*

HON. JAMES O. EASTLAND,
*Chairman, Senate Internal Security Subcommittee,
United States Senate, Washington, D. C.*

DEAR MR. EASTLAND: The officers and board of managers of the above chapter II have read and studied S. 2040, now before the Senate Internal Security Subcommittee for hearings.

We are unanimously in favor of this bill. We feel that it is vital to the continuance of constitutional government, particularly in the field of States rights, and to the continued security of these United States.

We, therefore, urge the Senate Internal Security Subcommittee to approve S. 2040, and to send it to the floor of the Senate recommended for passage, as quickly as possible. Every day that passes, without the safeguards this bill would provide, gives aid and comfort to those who would destroy this Nation.

We ask that this resolution be included in the report of these hearings, as testimony in favor of S. 2040.

Sincerely yours,

CHABIOTTE C. STARR,
Chairman, National Affairs Committee.

*ALASKA HISTORICAL LIBRARY AND MUSEUM,
Juneau, Alaska, February 18, 1958.*

CHIEF CLERK,
*Committee on Judiciary, Senate,
United States Congress, Washington, D. C.*

SIR: While I cannot afford to travel to Washington to testify before the hearings on bill S. 2040, I wish to state for the record that I fully support the bill S. 2040. Furthermore, I am absolutely convinced that the passage of this bill will contribute substantially to the internal security of our country.

Very truly yours,

DR. HELEN A. SIENITZ,
*1953 and 1956 Chairman, Countersubversive Activities Committee,
Department of Alaska, American Legion.*

*HUDSON COUNTY BRANCH,
CATHOLIC CENTRAL SOCIETY AND CATHOLIC WOMEN'S UNION,
Union City, N. J., February 18, 1958.*

DEAR SIR: I am instructed to communicate with you with reference to Senate bill 2040 before your committee. Our societies are in favor of this bill, and ask you to release it to the Senate. Details were stated in the Tablet. We believe its content is necessary to protect the country.

Respectfully yours,

CHARLES P. SALINO, *State Counsellor.*

NORTH ABINGTON, MASS., February 18, 1958.

HON. JAMES O. EASTLAND,
*Chairman, Judiciary Committee,
Senate Office Building, Washington, D. C.*

DEAR SENATOR EASTLAND: The Massachusetts Committees of Correspondence, an affiliate of the American Coalition of Patriotic Societies, with a membership

PHILADELPHIA, Pa., February 22, 1958.

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Our thanks to you for your wonderful work in upholding States rights.

Best wishes.

Sincerely,

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Senate Office Building, Washington, D. C.

DEAR MR. SOURWINE: In connection with the current hearings on the Jenner bill to limit the jurisdiction of the Supreme Court, it has occurred to me that perhaps you would like to see how the grassroots feel about recent decisions of the Supreme Court relating to communism. I have enclosed a copy of a resolution passed unanimously by the Illinois Federation of Republican Women at our statewide meeting earlier this month.

With best wishes.

Sincerely yours,

Mrs. J. F. SCHLAFLY, Legislative Chairman.

THE SUPREME COURT

Whereas in the Jencks case, the United States Supreme Court opened confidential FBI files to Communists, spies, dope peddlers, and others being prosecuted for criminal charges; and

Whereas in the Watkins case, the Supreme Court severely impeded the anti-Communist investigations of congressional committees; and

Whereas in the Nelson case, the Supreme Court outlawed enforcement of the antisedition laws of 42 States and of Alaska and Hawaii; and

Whereas in the Cole and Service cases, the Supreme Court made it almost impossible to dismiss Federal employees who are found to be security risks; and

Whereas in the Slochower and Sweezy cases, the Supreme Court forbade the discharge of fifth-amendment teachers and ruled that teachers in public schools could not be questioned about their Communist activities; and

Whereas in the Yates case, the Supreme Court made it difficult if not impossible to enforce the Smith Act, so that dozens of defendants have since been released because of this decision; and

Whereas the Communist Daily Worker described the effect of these decisions as follows: "the curtain is closing on one of our worst periods";

Resolved, That the Illinois Federation of Republican Women commend President Eisenhower for proposing and signing immediate legislation to correct the evil effects of the Jencks decision; and

Resolved further, That the Illinois Federation of Republican Women urge Congress to pass appropriate legislation to repair the damage to our internal defenses against communism caused by other recent Supreme Court decisions; and

Resolved further, That a copy of this resolution be sent to President Eisenhower, to Senator Dirksen, and to all Illinois Republican Congressmen.

Passed February 6, 1958, Springfield, Ill.

*THE COLONIAL DAMES OF AMERICA,
Philadelphia, February 15, 1958.*

HON. JAMES O. EASTLAND,
*Chairman, Senate Internal Security Subcommittee,
United States Senate, Washington, D. O.*

DEAR MR. EASTLAND: The officers and board of managers of the above chapter II have read and studied S. 2040, now before the Senate Internal Security Subcommittee for hearings.

We are unanimously in favor of this bill. We feel that it is vital to the continuance of constitutional government, particularly in the field of States rights, and to the continued security of these United States.

We, therefore, urge the Senate Internal Security Subcommittee to approve S. 2040, and to send it to the floor of the Senate recommended for passage, as quickly as possible. Every day that passes, without the safeguards this bill would provide, gives aid and comfort to those who would destroy this Nation.

We ask that this resolution be included in the report of these hearings, as testimony in favor of S. 2040.

Sincerely yours,

CHARLOTTE C. STARR,
Chairman, National Affairs Committee.

ALASKA HISTORICAL LIBRARY AND MUSEUM,
Juneau, Alaska, February 18, 1958.

CHIEF CLERK,
*Committee on Judiciary, Senate,
United States Congress, Washington, D. O.*

SIR: While I cannot afford to travel to Washington to testify before the hearings on bill S. 2040, I wish to state for the record that I fully support the bill S. 2040. Furthermore, I am absolutely convinced that the passage of this bill will contribute substantially to the internal security of our country.

Very truly yours,

DR. HELEN A. SIENITZ,
*1953 and 1956 Chairman, Countersubversive Activities Committee,
Department of Alaska, American Legion.*

HUDSON COUNTY BRANCH,
CATHOLIC CENTRAL SOCIETY AND CATHOLIC WOMEN'S UNION,
Union City, N. J., February 18, 1958.

DEAR SIRS: I am instructed to communicate with you with reference to Senate bill 2040 before your committee. Our societies are in favor of this bill, and ask you to release it to the Senate. Details were stated in the Tablet. We believe its content is necessary to protect the country.

Respectfully yours,

CHARLES P. SALINO, *State Counsellor.*

NORTH ABINGTON, MASS., February 18, 1958.

HON. JAMES O. EASTLAND,
*Chairman, Judiciary Committee,
Senate Office Building, Washington, D. O.*

DEAR SENATOR EASTLAND: The Massachusetts Committees of Correspondence, an affiliate of the American Coalition of Patriotic Societies, with a membership

of nearly 40,000 in eastern Massachusetts, wish to have this written statement made a part of the hearings on Senator Jenner's S. 2046.

We demand passage of this bill, S. 2046, to limit the appellate jurisdiction of the Supreme Court in cases concerning investigative functions of the Congress, the security program of the executive branch of the Federal Government, State antislavery legislation, and the admission of persons to the practice of law within individual States.

We request that this written statement be made a part of the record that is reported back to the full committee on March 10.

We also support the resolution requesting impeachment of six members of the Supreme Court, adopted by the General Assembly of Georgia, February 22, 1957.

Very truly yours,

GWEN M. SCHOFIELD,

Chairman, Massachusetts Committee of Correspondence

BROOKLYN, N. Y., February 19, 1958.

SENATOR JAMES O. EASTLAND,

*Chairman, Senate Judiciary Committee,
Senate Chamber, Washington, D. C.*

DEAR SENATOR EASTLAND. May I first thank you for keeping my name on the committee's list for your hearings. The record is invaluable, and at times gruesome. The past weekend I read *No Wonder We Are Losing*. How true it is.

This letter is primarily to urge your committee to back Senator Jenner's bill to limit the jurisdiction of the Supreme Court. I feel so bitterly about their actions that I suggested to my Representative we exchange the members for our POW's. I except Mr. Justice Clark. If it were possible, I think it would be a very good exchange. Since this exchange isn't possible, then let the legislative use its full powers for the security of our country. Kat-Shek's Soviet Russia in China, conforms the world plan and method of the Soviets, inclusive of our homegrown ones.

All good wishes to you and your committee, that is those not blighted by the liberal viewpoint.

Sincerely yours,

MRS MADELINE M. LARKIN.

DANBURG, CONN., February 20, 1958.

DEAR SENATOR EASTLAND: You are probably not interested in hearing from a Connecticut Democrat but never thought I would live to see the Supreme Court of the United States sink so low as they have under Warren. Every one of them except Tom Clark should at once be impeached.

Where are we headed, Senator, if this is not done?

The FBI brings in the worst criminals in the country and Warren and his gang of nitwits lets them go. What inducement is there for Edgar Hoover to bring them in?

If something drastic is not done at once to trim the wings of these Justices, I fall to see at this writing where we will be headed.

Thank you for now.

Yours very truly,

FRED. H. BARNES.

HADDONFIELD, N. J., February 19, 1958.

SENATOR JAMES O. EASTLAND,

*Chairman of the Senate Internal Subcommittee,
Washington, D. C.*

DEAR SENATOR EASTLAND: In reference to bill S. 2046 introduced by Senator Jenner limiting the appellate jurisdiction of the Supreme Court. I feel it is most important the individual States be given the power to make and to enforce their own laws in order to protect their security.

Also, the investigating function of Congress and security branch of the Federal Government be safeguarded so that the files of the FBI of the security program

of the investigating branch of the Government will be preserved as in the past in order to keep our country "one Nation Under God."

Yours sincerely,

MARY M. ALLEN.

LOUISVILLE, KY., *February 19, 1958.*

Senator JAMES O. EASTLAND,
Senate Office Building,
Washington, D. C.

DEAR SIR: We heartily approve passage of Senator Jenner's bill, S. 2640, to limit jurisdiction of Supreme Court.

We heartily approve anything that will curb, limit, suppress, or halt the Supreme Court.

Sincerely yours,

G. T. LOVE,
G. T. LOVE, Jr.

ST. PETERSBURG, FLA., *February 20, 1958.*

Hon. JAMES O. EASTLAND,
Senate Judiciary Committee,
Washington, D. C.

DEAR SENATOR EASTLAND: We request that the Judiciary Committee act immediately to bring S. 2646 out of committee and get this passed on the floor of the Senate.

It is most important to restrict the Supreme Court of the United States from usurping power that constitutionally belongs to the Congress—and to the States.

We beseech each of the Members to act quickly before it is too late.

FLORENCE DEAN POST,
Mrs. William Glenn Post, Jr.

BILLINGS, MONT., *February 20, 1958.*

Senator JAMES O. EASTLAND,
Senate Office Building,
Washington, D. C.

DEAR SENATOR EASTLAND: I am writing you in support of the Jenner bill to curb the Supreme Court in matters dealing with subversion and Red treason. I believe this bill is absolutely necessary if we are not to be stripped of all protection against Red infiltration by a continuing parade of outrageous Red Monday decisions by the Supreme Court.

I understand, Senator Eastland, that this bill is in the Judiciary Committee of which you are chairman. I realize that you, like Senator Jenner, are concerned about the abuses of the Court in recent years. It is for that reason that I am hoping that you will bring this bill up for consideration "with all deliberate speed."

I am sorry to see that Senator Jenner is leaving the Senate at the end of this year. We need more men in public life such as he, and yourself, who are vigilant in the fight against communism. I am hoping that before he retires to private life, he will see his bill enacted into law. It is absolutely necessary for the protection of all Americans.

Sincerely,

WESTON VERNON.

CONCORDIA, KANS., *February 19, 1958.*

Hon. JAMES O. EASTLAND,
Senate Office Building,
Washington, D. C.

DEAR SENATOR EASTLAND: I want to go on record in favor of all of the provisions of Senator Jenner's bill, No. 2646, which has for its object the limiting of the appellate powers of the Supreme Court of the United States.

The Supreme Court of the United States has demonstrated its unfitness to deal with the topics specified in Senator Jenner's bill. The Supreme Court of the United States has shown by its actions that it is the most dangerous single agency of the Government of the United States from the standpoint of security.

The Supreme Court of the United States has arrogated to itself by judicial fiat the usurpation, the position of super congressional legislator, super Presidential executive, and continuing constitutional assembly.

Unfortunately, in these times when the moods are controlled and adjusted by means of mass indoctrination and propaganda, rather than intelligent study, our people are not generally aware of the faults and errors of our Supreme Court. In other words, the Supreme Court has been following in the propaganda groove of the liberal establishment.

I want to take this opportunity to thank you and the members of your committee, and particularly the Subcommittee on Internal Security. I greatly regret the passing of so many conservative Members of the Senate. I also wish to commend Judge Morris for his heroic work.

Very sincerely yours,

CHARLES A. WALSH.

10TH ENGINEER BATTALION,
FORT GEORGE G. MEADE, MD.,
February 20, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SIR: In Human Events this week I noticed an article about your committee's hearing on Senator Jenner's bill (2040) to limit the jurisdiction of the Supreme Court. I'm not a legal analyst nor do I represent any citizen's group, but I am strongly in favor of Senator Jenner's bill.

I have read and studied much about the recent Supreme Court decisions, and the current far left trend. I believe it to be one of the greatest dangers to American freedom and our Constitution today. I would be more than happy to express my thoughts to your committee. I know that I speak for many young men my age with whom I have discussed this subject. The Supreme Court may be responsible for the world that we and our children will live in. What will be the future consequences of the Court's decisions if they are not corrected? That's the important thing, and therefore I think that a young person's viewpoint is important.

Sincerely yours,

GEORGE B. SUTER.

HOLLYWOOD, CALIF., February 19, 1958.

Re S. 2040.

Senator JAMES O. EASTLAND,
Chairman, Judiciary Committee,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: All patriots are depending upon you and your committee to stop the Supreme Court's actions to lead us into further socialism; also to stop aiding Communists and destroying State rights.

If you can find a way to get rid of Earl Warren in his position all good Californians will rejoice.

ANXIOUS AMERICAN.
RUTH MARIE FIELD.

RESEDA, CALIF., February 19, 1958.

Hon. JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SIR: I support Senate bill S. 2040.

Yours truly,

RUTH MURKISON.

INGLEWOOD, CALIF., February 19, 1958.

Re Senate bill 2040.

Hon. JAMES O. EASTLAND,
Internal Security Subcommittee,
Senate Office Building, Washington, D. C.

DEAR SIR: With reference to Senate bill 2040 which comes up for hearing on February 25, I urge passage of this bill.

The Supreme Court's jurisdiction in considering certain appeals needs to be limited—the feeling among the citizens of this country is that this branch of the Government has become too powerful.

Respectfully yours,

MRS. FRANCES FOSTER.

BALTIMORE, Md., February 19, 1958.

HON. JAMES O. EASTLAND,
Chairman, Judiciary Committee,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: I am writing to express the hope that your committee will report out favorably Senator Jenner's bill (S. 2646) to limit the jurisdiction of the Supreme Court.

Every single one of my friends feels that the Supreme Court is no longer a judicial body, but a political body, and certainly congressional action is in order to limit its pernicious and nonjudicial activities.

Believe me,

Faithfully yours,

AMOS R. KOONTZ, M. D.

LOS ANGELES, CALIF., February 19, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building,
Washington, D. C.

DEAR SENATOR EASTLAND: I have been very concerned with some decisions of the Supreme Court. I believe Senator Jenner's Court amendment, S. 2646, would greatly remedy matters. I urgently ask your effort to get S. 2646 passed.

Sincerely yours,

JESSIE M. GEORGE.

LOS ANGELES, CALIF.

DEAR SENATOR EASTLAND: I respectfully urge you to support S. 2646.

Sincerely,

MARY E. GOUPPINGER.

JAMAICA, N. Y.

We urge you to vote for bill S. 2646, to limit the appellate jurisdiction of the Supreme Court in certain cases.

MARIE J. FOLEY.

HENRY J. FOLEY.

ALEXANDRIA, LA., February 19, 1958.

The SENATE JUDICIARY COMMITTEE,
Washington, D. C.

Strongly urge passage of bill S. 2646 by Senator Jenner together with the suggested amendment by T. Wynn Holloman of Alexandria, La.

Mrs. SAM WHEADEN.

Mrs. STAFFORD HERRERT.

Mrs. AUGUSTA MAY ROBINSON.

SHIRLEY ALLEN.

Mrs. S. B. STAPLES.

BALTIMORE, Md., February 17, 1958.

Senator JAMES O. EASTLAND,
United States Senate, Washington, D. C.

DEAR SENATOR: Knowing what havoc has been played by the Communists in regard to the jurisdiction of the Supreme Court, I hereby request your Committee on the Judiciary to take speedy affirmative action upon Senate bill S. 2646.

Hoping this will be passed.

Yours very truly,

Mrs. HELEN HOPKINS CASEY.

SOUTHPORT, CONN.

MY DEAR SENATOR EASTLAND: I am in complete agreement with you concerning Senate bill 2040 to limit the appellate jurisdiction of the Supreme Court in many cases, and I think you are doing a splendid job.

I am,

Very sincerely,

KATHLEEN RAE FINN.

COLORADO SPRINGS, COLO., February 10, 1958.

DEAR SENATOR: Your declaration of intensive hearings on Senator Jenner's S. 2040 to limit Supreme Court appellate jurisdiction is heart warming.

I don't know who the Supreme Court is serving completely, but, feel it is not the Republic of the United States nor, its people. I know we are not popularly a republic—but, when we were, we made real progress. As a democracy, we are going in the hole further and further. Looks as though, to save ourselves, we must be unpopular, for a time at least.

Yours truly,

H. L. ROUSE.

HOLLYWOOD, CALIF., February 17, 1958.

Re S. 2040

SENATE INTERNAL SECURITY SUBCOMMITTEE,
Washington, D. C.

GENTLEMEN: The way the Supreme Court has invalidated State laws is disgraceful.

I strongly urge passage of the strongest possible legislation to curb these nine men. Impeachment is what they deserve, as the Communists continue to operate with protection.

If States rights are abolished, all is lost.

Thank all you members for your fine efforts to save America.

Respectfully yours,

ALICE MOORE.

ANAHEIM, CALIF., February 19, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: I hope that you will give your support to Senate bill 2040, limiting the jurisdiction of the Supreme Court. Our country needs your support for the passage of this bill.

Sincerely,

LLOYD D. MOSS.

JUNEAU, ALASKA, February 18, 1958.

Mr. J. G. SOURWINE,
Counsel, Subcommittee on Internal Security,
Senate Committee on the Judiciary, Washington, D. C.

DEAR SIR: I have received from Dr. Helen A. Shultz a copy of notice of hearing on Senate bill 2040. While I am in no position to attend a hearing on this measure, I would like to say that I am wholeheartedly in support of this bill. I am convinced that the passage of S. 2040 would be an essential contribution to our national security.

Through the courtesy of Dr. Shultz, I have had the opportunity to study a large number of the records and reports of the subcommittee hearings. I would greatly appreciate being put on the mailing list for these publications. Thank you.

Very truly yours,

H. S. WEIDNER.

WILMINGTON, CALIF., *February 19, 1958.*

Hon. Senator JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SIR: As it is pouring rain and I have only stamps for one letter, but no cards in the house, I am writing to all of you via you—honorable Senators James O. Eastland, Roman L. Hruska, John Marshall Butler, Arthur V. Watkins, Samuel J. Erwin, Jr., John L. McClellan, Olin B. Johnston.

Speaking for myself first as it is, and for many American friends; this is to request your support of S. 2040 for the good of our beloved Nation. Your support is vital in appreciation of our forefathers, for the safety of the present generation and the security of the future generations.

Thanking you.

Sincerely,

Mrs. BERTHA McCULLOUGH.

LOS ANGELES, CALIF., *February 18, 1958.*

Senator JAMES O. EASTLAND.

DEAR SENATOR: I have been reading of the bill introduced by Senator William E. Jenner and very much in favor of it.

It is about time something was done to curb the Supreme Court.

This is Senate bill 2040. Please do all you can to force the passage of this bill.

Very truly yours,

Mrs. HELEN BAUER.

LEXINGTON, KY., *February 18, 1958.*

Senator JAMES O. EASTLAND,
*Senate Judiciary Committee,
Senate Office Building, Washington, D. C.*

DEAR MR. EASTLAND: I would like to urge your committee to recommend and do all that you can to have passed Senate bill No. 2040, the bill withdrawing appellate jurisdiction of the Supreme Court in the areas covered. Many people with whom I have talked feel that the Supreme Court has taken upon itself a legislative function reserved for the Congress and so therefore should be restricted by the Jenner bill.

Sincerely,

P. L. MELLENBROUGH.

DELAWARE, WIS., *February 18, 1958.*

Senator JAMES O. EASTLAND,
*Chairman, Judiciary Committee,
Senate Office Building, Washington, D. C.*

SENATOR EASTLAND: Regarding Senator Jenner's bill (S. 2040), to confine the Supreme Court to its constitutional jurisdiction; there are millions of forthright Americans, organized and unorganized, not in a position to come to Washington to testify in behalf of this measure, that are vitally interested in its passage.

There are other departments and agencies of the Federal Government badly in need of disciplinary measures, too.

Yours very truly,

Dr. CARL E. HILL.

POMONA, CALIF., *February 18, 1958.*

Senator JAMES EASTLAND,
Chairman, Internal Security Committee, Washington, D. C.

DEAR SENATOR EASTLAND: May I urge your support of Senator Jenner's bill, No. 2040. In my opinion, this is an excellent bill to undo some of the damage done by the Supreme Court decisions.

Sincerely yours,

Mrs. A. D. JAYNES.

CHICAGO, ILL., February 18, 1958.

DEAR SENATOR EASTLAND: I wish to express myself as strongly in favor of passage of the Jenner bill, S. 2646.

It is of the utmost importance, both to the security of the country and to the maintenance of our form of government.

Sincerely yours,

Miss PAGE ROBINSON.

FORT WORTH, TEX., February 18, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building, Washington, D. O.

DEAR SENATOR EASTLAND: I wish to assure you of my wholehearted support of Senator William Jenner's bill, S. 2646, for redefining the powers of the Supreme Court.

This bill, S. 2646, must be passed and put into immediate operation or our Constitution and, indeed, our way of life will be completely scrapped by the Supreme Court.

Thanking you for giving your support to this bill also.

Sincerely,

GLADYS SCALING MARTIN.

LOUISVILLE, KY., February 19, 1958.

Senator JAMES O. EASTLAND,
Chairman, Judiciary Committee,
Senate Office Building, Washington, D. O.

DEAR SIR: We are strongly in favor of Senator Jenner's bill (S. 2640) to limit jurisdiction of Supreme Court.

We are in fact, for any measure, any action that will curb the Supreme Court.

Sincerely,

LOUISE W. LOVE.
SELBY V. LOVE.

UNIT PARTS COKE.,
Buffalo, N. Y., February 17, 1958.

Senator JAMES O. EASTLAND,
Chairman on Internal Security,
Senate Office Building, Washington, D. O.

DEAR SENATOR EASTLAND: A great many Americans are highly concerned with the Supreme Court's decisions of recent years in which we saw State sedition laws emasculated, FBI files endangered, and the Smith Act weakened.

This attempted supremacy of the High Court over States' sovereignty must be curbed before the freedom and liberties of our country are destroyed. Communists have openly hailed the Supreme Court's actions as being most helpful in more ways than one.

Senate Resolution 2646 introduced by Senator William Jenner, should be favorably acted upon. The Constitution creates the Supreme Court but Congress can, by resolution, redefine the High Court's powers other than the few given it by the Constitution. "Nine Men Against America" and their young, radical law clerks (who it has been said write some of the Justices' decisions) must be limited in their powers before it is too late.

In 1898 Supreme Court Justice David J. Brewer made the following statement: "It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as being beyond criticism. On the contrary, the life and character of its Justices should be the object of constant watchfulness by all, and its judgments subject to the freest criticism. * * *"

There has not been enough constant watchfulness of the life and character of the Court's Justices and I might add that too often they are wholly unqualified for their appointment to this High Court. The liberties of the American people are being gradually destroyed and Congress seems the last hope to stop this federalism, socialism, or perhaps communism.

Very truly yours,

A. F. BAXTER, President.

DETROIT, MICH., February 19, 1958.

Senator EASTLAND,
United States Senate, Washington, D. C.

Please do all in your power to pass Senator Jenner's bill No. S. 2646.

GRACE M. GORMAN.

POMONA, CALIF., February 18, 1958.

Senator JAMES EASTLAND,
Washington, D. C.

DEAR SENATOR: I am much disturbed over the present "leftist" trend in American politics. When subversive activities by anyone in the employ of any agency of Government is proven, and that person convicted, the matter should end there. Our Supreme Court should not sit in judgment. To this end I am hoping you will support Senator WILLIAM JENNER's bill, S. 2646. We want our Nation to be governed by law and not by opinions of men outside of law.

All good wishes,

Mrs. C. W. HENDERSON.

ORANGE, N. J., February 16, 1958.

Senator JAMES O. EASTLAND,
Chairman, Judiciary Committee,
Washington, D. C.

MY DEAR SENATOR: This letter is in support of Senator Jenner's bill (S. 2646). I think this is one of the most important pieces of legislation. It is a must to save this country.

Most sincerely,

MARGARET H. CAESAR.

WHITE, HOLLAMAN & WHITE,
Alexandria, La., February 12, 1958.

HON. J. G. SOURWINE,
Chief Counsel, United States Senate Committee on the Judiciary,
Washington, D. C.

DEAR MR. SOURWINE: I thank you for the invitation to appear before the committee with reference to Senator Jenner's bill, S. 2646. I am not in a position to do so, but I would like to present this communication for the record and, particularly, to suggest adding the following to the bill:

"(6) Any provision of the constitution of any State or any statute of any State establishing, providing for, regulating, controlling, or supporting public education."

I had hoped to be able to present a broader provision, protecting the powers and rights of the States under the 9th and 10th amendments, but I have not had time to study and work the matter out and Senator Jenner has written me that he has not either.

Perhaps the committee, in its wisdom; and under section 2, clause 2, of the Constitution, can provide further for the protection of the sovereignty of the States, and the powers and rights expressly retained in the people of the States, and not delegated to the United States.

Sincerely yours,

T. W. HOLLAMAN.

COMMERCIAL CREDIT CO.,
Baltimore, Md., February 12, 1958.

Re Senate Resolution 2046.

HON. JAMES O. EASTLAND,
Chairman, Committee on Internal Security,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: I think it is long past time when Congress should clarify the powers of the United States Supreme Court on matters pertaining to State rights, somewhat along the lines of the above Senate resolution.

It has also been most difficult for a large portion of the intelligent citizens of our country to understand how the Supreme Court, usually by a divided group,

could possibly arrive at some of the decisions that have been rendered during the past 2 or 3 years.

It is too bad that the United States Supreme Court is not constituted of judges who are by far more unanimous in their decisions than has been the case for several years. It has become most difficult for able lawyers to really know what is the law and even then, the Court may reverse its own previous decisions, as has been done in recent years.

Very truly yours,

A. E. DUNCAN.

DUNCAN, OKLA., February 12, 1958.

HON. JAMES O. EASTLAND,
United States Senator,
Washington, D. C.

DEAR SENATOR EASTLAND: Allow me to express my interest in the proposed hearings on Senate Resolution 2646, which I will follow, as far as possible, through the press.

What I fear is that any legislation as a result of these hearings will be followed up by a declaration by our Supreme Court, that such legislation is unconstitutional.

I have lost all respect for the Court, when once I held the Court in such high respect, that whenever I passed the Court building, which I have done several hundred times, I felt like taking off my hat.

Opinions in such cases as integration, the Smith Act, FBI files, and the Mallory case are revolting.

As to integration, I have an open mind. For the sake of argument, assuming that the decision was the correct one, why overturn all previous decisions by previous Courts, which Courts were made up of mental giants, when we know that integration was being gradually accepted, and would have been worked out in another generation, instead of bringing on discord throughout the Nation, a severance of the relationship between the North and the South, and resulting in such disgraceful conditions as are now existing in the schools of Washington, New York, Brooklyn, and many other cities.

As to the Smith Act and FBI decisions, the Court has played directly into the hands of the Communists, and the ability of our country to defend itself has been practically destroyed.

As to the Mallory decision, I cannot imagine any court to go to such lengths to protect the "rights" of a self-confessed criminal without giving consideration to the "inalienable rights" of the millions of decent citizens, resulting in the impossibility of conviction, unless there are eyewitnesses, or the accused confesses within a stipulated number of hours. Such nonsense.

The Court is setting itself up as a lawmaking body of the Government, which right they do not possess.

I have felt, for many years, that the question of States rights was one of the most important matters before the American people.

Unless something can be done through legislation, and I am not certain that it can be done, I strongly feel that consideration should be given to the matter of impeachment of all members who have endorsed or joined in the infamous decisions.

I am an active businessman who, throughout his 75 years, has seen our legislative and judicial systems deteriorate, and I am fearful.

Respectfully yours,

C. V. STINCHEUM.

ALEXANDRIA, LA., February 15, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.:

Strongly urge passage S. 2646 and recommend addition of sixth clause to read, "Any provision of the constitution of any State or any statute of any State establishing, providing for, regulating, controlling, or supporting public education."

E. OTIS EDGERTON.

THE MONARCH ENGINEERING CO.,
Dayton, Ohio, February 14, 1958.

CHAIRMAN, UNITED STATES SECURITY SUBCOMMITTEE,
Office of the Senate, Washington, D. C.:

DEAR HONORABLE SIR: The United States should pass a bill, 2040, to limit appellate jurisdiction of the Supreme Court. During the past 2 years, the Court has gone beyond its jurisdiction relative to decisions bearing on internal security.

Yours very truly,

J. CHARLES CUTRELL.

GREENWOOD, IND.

GLEN COVE, N. Y., February 14, 1958.

HONORABLE JAMES O. EASTLAND,
Committee on the Judiciary,
Senate Office Building, Washington, D. C.:

DEAR SENATOR EASTLAND: Re Senate bill 2040, to limit the appellate jurisdiction of the Supreme Court in certain cases, I hope you will support this bill when it comes up for debate. Recent Supreme Court decisions severely handicap the Congress and our States in punishing subversive activities, as you know.

Sincerely,

GWENDOLYN H. MURRAY,

BALTIMORE, Md., February 7, 1958.

Subject: S. 2040.

HON. JAMES O. EASTLAND,
Senate Office Building,
Washington, D. C.

DEAR SENATOR: On February 3, (Record, p. 1268), you announced the hearings and invited witnesses on S. 2040, Senator Jenner's bill to limit the appellate jurisdiction of the Supreme Court.

This letter is my endorsement of some bill which will forever stop the encroachment of the Supreme Court on the other two branches of our Government.

I have laboriously procured and read the Court's decisions and the commentaries on them (Jencks, Steve Nelson, Watkins, Yates, Konigsberg, etc.). My file on them is a foot thick, and the first draft of this letter, including some of the documentation ran to 10 pages. Knowing the indignation of you and your Judiciary Committee, and having read all of your caustic comments of the Court, I decided to cut this letter to size.

Ever since the *Everson* and *McCollum* School cases, back in 1947, we have seen these Red Monday Supreme Court decisions usurp the power of the Congress, the Executive, and the sovereign States of this Republic until, today, the situation is intolerable, confusing, and disastrous to our internal security while we are spending billions yearly to fight communism and Communists. It is a preposterous predicament we are in.

Congress has the sole power, under article I, section I, of the Constitution, to make laws and, therefore, it is the responsibility of the Congress to strike down laws made by the judiciary, the Executive, or anyone else. Certainly, I endorse the Jenner bill. It seems to cover the recommendations made by the American Bar Association through its special committee headed by our old friend Herbert O'Connor. His report was accepted unanimously at the London meeting of the bar association. Still, I think that, in view of the *Wheeling & Belmont Bridge* case (1849), Congress could negate some of these recent decisions.

Anyway, go to it, Senator, and give us a measure that will do the job and have some teeth in it. If I can do anything further to help, please advise. I am writing all of my men on the Hill.

Cordially,

LOUIS D. CARROLL.

WASHINGTON, IND., February 13, 1958.

Hon. JAMES O. EASTLAND,
*Chairman of Judiciary Committee,
 Senate Office Building, Washington, D. C.*

DEAR SENATOR EASTLAND: Since the House of Representatives has not shown the guts to take the proper action, impeachment, against the unconstitutional Supreme Court decisions since Black Monday, I am wholly in accord with Senator Jenner's S. 2040 to specify the several areas that the Supreme Court will not have jurisdiction.

I would like to have the time and money to request a hearing before your committee to testify to the long list of un-American decisions that have made our Supreme Court a tool for socialist subversives, and the great need for measures to curb its usurpation of power; however, I cannot make such a personal appearance.

As a substitute for personal testimony, I ask you and your committee to heed this plea for the prompt recommendation of S. 2040 to the Senate for speedy passage.

Sincerely,

A. G. BLAZEY, M. D.

DALLAS, TEX., February 16, 1958.

Senator JAMES O. EASTLAND,
*Chairman, Senate Committee on Internal Security,
 Washington, D. C.*

DEAR SENATOR EASTLAND: It has been brought to my attention that the Senate Committee on Internal Security, of which you are chairman, is now holding hearings on the Jenner bill, S. 2040. May I urge you not to let this bill die in the committee? It seems to me that it promises to provide a vital bulwark to our internal security.

May I also suggest that this bill be amended to include legislation that would nullify the Supreme Court's Mallory decision?

With best wishes for your valiant stand for us conservatives, I am,

Sincerely,

GUIN PONDROM.
 MRS. L. G. PONDROM.

FORT WORTH, TEX., February 15, 1958.

DEAR SENATOR: I am very interested in the Jenner bill which would limit the powers of the Supreme Court; many of the Court's decisions, such as the one re the Smith Act have made the public aware that the Court is making, rather than interpreting the law. Let the Congress define their powers in clear language.

NETTIE T. GRIFFIN.

DENVER, COLO., February 18, 1958.

Hon. JAMES O. EASTLAND,
*United States Senate Office Building,
 Washington, D. C.:*

All real Americans are for bill S. 2040.

"WE AMERICANS,"
 LEON ALMIRAIL,
 DAVE PATE.

CINCINNATI, OHIO, February 17, 1958.

Mr. J. G. SOURWINE,
*Counsel, Senate Internal Security Subcommittee,
 Washington, D. C.*

DEAR MR. SOURWINE: Notice of the hearings on bill S. 2040 proposing limitations on the appellate jurisdiction of the Supreme Court in certain cases, has come. I feel that action in line with the proposals is necessary but it is not possible to attend the hearings.

Many lawyers have emphasized that the Supreme Court has in recent years been usurping the legislative authority of the Congress. Also, State attorney

generals and justices of State courts have spoken critically of the Supreme Court's decisions. Sharp criticism has been reflected in numerous editorials and articles, and the resolutions of the American Bar Association are significant. Therefore, people naturally wonder why Congress is slow in taking action necessary to return the Supreme Court to its proper function.

Irrespective of what is said by opponents of the proposed bill the truth will be that they reflect the corrosion of morality that reminds one of the beginning of the end of the one-time greatness of Greece. Morality at this time is preservation of the principle that changing the Constitution must be by submission of amendments, not by court decrees.

According to an editorial item last week—"Some 60 Communists have been acquitted or otherwise cleared"—due to the devious interpretations of the law by the Supreme Court.

Equally shocking was the Court's decision in the Girard College case.

The record suggests wilfulness—not law nor logic.

Sincerely yours,

Mrs. MARY LOVE COLLINS.

DALLAS, TEX., February 17, 1958.

Senator JAMES O. EASTLAND,
Chairman, Senate Committee on Internal Security,
The Senate, Washington, D. C.

DEAR SENATOR EASTLAND: This is to inform you that I am highly in favor of States' rights, and hope your committee, the Senate, and Congress can do something to preserve local government.

It is a matter, not of political party, or whether you are liberal or not, but is a matter of fundamental principle of our Nation. We either have consent of the governed, considering the citizen sovereign, or we will have centralized government with eventual tyranny. We should remember that ours is a constitutional Republic, a government of law, not of men.

We should stop this committing national suicide by letting subversives go free because "laws governing subversion are preempted by the Federal statutes," or because of equally silly technicalities used by the courts.

Something must be done about the Supreme Court, even if it takes constitutional amendment to do it.

However, there are some things Congress can do; you know what, and the people know. The information gathered by your committee can determine the best course.

I feel that solving these questions is a matter of freedom and national safety. I sincerely hope the Congress can do something.

Sincerely yours,

GEORGE A. TITTERINGTON.

HAINDALE, ILL., February 17, 1957.

Hon. JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

HONORABLE SIR: We hear much about the "Citizens must march on Washington."

Is this necessary or do we have enough patriots in Congress to pass the Jenner bill, S. 2046 for us?

Sincerely,

EDNA E. BRINKMAN,
Mrs. H. A. BRINKMAN.

LOS ANGELES, CALIF., February 29, 1958.

Senator JAMES O. EASTLAND,
Chairman, Senate Internal Security Committee.

DEAR SENATOR EASTLAND: I am writing you in behalf of Senate bill 2046 introduced by Senator Jenner. This is a very important bill and I urge you to do all in your power to push it through the committee so we can have early action in the Congress.

Yours sincerely,

JOHN F. GILCHRIST.

"FIGHT COMMUNISM,"*Los Angeles, Calif., February 16, 1958.*Senator **JAMES O. EASTLAND.**

DEAR SENATOR: In regard to the hearings to be held on the bill S. 2040 to limit the appellate jurisdiction of the Supreme Court, we heartily endorse this action.

In a meeting of national leaders of our group, this bill was unanimously approved.

We, as are many other groups with whom we come in contact, are deeply concerned with the actions of the Supreme Court. Also the lack of means of jailing or executing spies and traitors. You of course as one of America's stalwart defenders, know the dangers facing us. Here in California, the Communist Party is growing bolder to the extent that they pay no attention to laws, etc., whatsoever.

Most of this attitude has come since they have found allies on the Supreme Court bench. Also that so many in authority go along with the Civil Liberty's emergency committee, and other disguised agents of the Kremlin. We are hopeful of having a representative at the hearing, if not we feel confident that in your hands, we have a real American looking out for humanity's welfare.

Our sincere thanks to you for your herculean efforts over the years, the rattle of chains grows closer, let's all go all out now.

Respectfully,

GEORGE REDSTON,

Chairman, "Fight Communism" Committee.

WEST COVINA, CALIF., February 20, 1958.

DEAR SIR: Please approve the Jenner bill limiting the Supreme Court's appellate jurisdiction.

I am,

Sincerely yours,

GERALDINE C. HIBBERD.

WINTHROP B. HIBBERD.

LOS ANGELES, CALIF., February 22, 1958.

I am strongly in favor of Senator Jenner's bill, S. 2040, curbing the Supreme Court. We cannot afford to lose our State rights. I believe this is vital.

Respectfully,

B. McLANAHAN.

BAKERSFIELD, CALIF., February 21, 1958.

DEAR SENATOR EASTLAND: Senator Jenner's bill (S. 2040) to limit the jurisdiction of the Supreme Court is needed at this time. It is the hope of myself and many others that this bill will become a law.

Yours truly,

EDEN B. VINSEN.

ST. LOUIS, MO., February 20, 1958.

DEAR SENATOR EASTLAND: The organization of Missourians for Constitutional Government supports Senator Jenner's bill, S. 2040.

I speak for myself and the above group.

Sincerely,

GORDON EMERSON,

Second Vice President, Missourians for Constitutional Government.

LOS ANGELES, CALIF., February 20, 1958.

DEAR SIR: I would like to register my approval of the Jenner bill limiting the Supreme Court's jurisdiction.

Sincerely,

VIRGINIA OWENS.

BIRMINGHAM, MICH., *February 19, 1958.*

HON. JAMES O. EASTLAND,
Washington, D. C.

DEAR SENATOR EASTLAND: S. 2646, now before the Committee on the Judiciary, is vital without any crippling changes, to preserve the constitutional government of the United States of America. Your support is urged, and will be greatly appreciated.

Yours very truly,

LUCILE DEGRAFF.
W. H. DEGRAFF.

GLENDAL, CALIF., *February 20, 1958.*

DEAR SENATOR EASTLAND: Please support Senate bill 2646 limiting the appellate jurisdiction of the Supreme Court.

Thank you.

F. M. HEBARD, M. D.

BALTIMORE, MD., *February 23, 1958.*

Senator JAMES O. EASTLAND,
*Chairman, Senate Judiciary Subcommittee,
Senate Office Building, Washington, D. C.*

DEAR SENATOR EASTLAND: Please put this citizen on record as favoring the passage of Jenner bill S. 2646 which seeks to limit the appellate jurisdiction of the Supreme Court in five fields. I feel that you will do all in your power to see that this important bill is reported favorably out of committee.

It is a sad day indeed in our United States when one branch of our Government seizes illegal power. However, the uncanny foresight of our Founding Fathers has supplied a remedy with which to maintain the balance of power that our Constitution envisaged. In this case it is the clear duty of the Senate to curb a runaway Supreme Court and do what it can to offset the vicious decisions of this Court of the last few years.

My sincerest wishes and prayers are with you and your committee in your deliberations of this bill.

Yours very truly,

Mrs. FRANCIS J. HAMIL.

LOS ANGELES, CALIF., *February 21, 1958.*

Senator JAMES EASTLAND.

DEAR SENATOR: I was born in Mississippi and I have watched your courageous defense of States rights with interest.

I believe you are the chairman of the committee which has just brought out S. 2646. We in Southern California are disturbed by the political decisions of the Supreme Court and feel that their usurpation of power, thus weakening our system of checks and balances, should be stopped.

I have written Senators Knowland and Kuchel urging them to support S. 2646 and I hope it will be passed very soon.

Best wishes for success in your patriotic efforts.

Sincerely,

(Mrs.) ANNA CRAWFORD SMITH.

DALLAS, TEX., *February 20, 1958.*

Senator JAMES O. EASTLAND,
Washington, D. C.

DEAR SENATOR EASTLAND: We have grown accustomed to relying upon you to safeguard our constitutional republic against its foes.

The Jenner bill, designed to curb undue assumption of power by the Supreme Court, is certainly the shield and buckler that we need.

Traitors are rampant in the land. The Jenner bill is a step toward controlling them. Let us have it, please.

Sincerely yours,

ELIZABETH STAPLES.

PHILADELPHIA, PA., February 23, 1958.

Subject: Senator Jenner's bill S. 2040.

HON. JAMES O. EASTLAND,
*Chairman, Judiciary Committee,
 Senate Office Building, Washington, D. C.*

DEAR SIR: Referring to above subject please be informed that I am very much in favor of bill S. 2040 in order to repair damage done, and caused by the High Court's "Red Monday" decisions, and to avoid such rulings in the future.

Fair laws to protect individual freedom and privileges are in order but not at the expenses of our Nation's security, domestic as well as foreign.

I would appreciate any printed matter on this bill.

Very truly yours,

FREDERICK TROGE.

CHICAGO, ILL., February 21, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SENATOR: I believe it is of utmost importance that the Jenner bill S. 2040 be reported favorably by your committee.

The rights of the Federal Government as well as the States and cities to protect themselves from Communist subversion must be protected. This can be accomplished by S. 2040.

Sincerely yours,

KEITH T. CAMPBELL.

SANDBORN, IND., February 21, 1958.

Senator JAMES EASTLAND.

DEAR SIR: We wish to write you of our deep concern and fear of the recent actions of the Supreme Court members in this country. We feel, without any doubt, action must be taken by Congress to curb the powers that are being taken by this Court and which is not according to the Constitution of our country.

We are proud of Senator William B. Jenner, whom we believe is a fighter for the Constitution and his country.

We are fed up and tremendously disturbed at the "Liberals" in our Government; we protest the pressuring for more foreign aid, at the taxpayers' expense; our country will be bankrupt and we will become a nation of peasants. It is time for leadership in our Congress of the highest type, and one who can hold out against the "Eisenhower Liberals."

Our best wishes and appreciation of your efforts.

Mrs. N. MYERS.

MEDARIS Co., INC.,
 Dallas, Tex., February 20, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: I would like to go on record in expressing my profound appreciation for the wonderful job you are doing. I thank God that there are still some good Americans left in our Government to defend our heritage and fight those who would take away those rights heretofore thought to be guaranteed by the Constitution.

I pray that God will be with you and give you the strength you will need to regain those rights laid out in the Jenner resolution.

Sincerely yours,

R. N. MEDARIS.

DALLAS, TEX., February 20, 1958.

Senator JAMES O. EASTLAND,
Washington, D. C.

DEAR SENATOR EASTLAND: Count me as a voter who upholds State sovereignty, the Federal Constitution, and sane defense for our national welfare and security.

For those reasons, we need adoption of the Jenner bill to curb arbitrary assumption of powers beyond their jurisdiction, by our Supreme Court.

I appreciate the stand you have taken on various issues in the past, and hope you can help to put over this needed bill.

Yours sincerely,

Mrs. W. E. REID.

DALLAS, TEX., February 20, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: I sincerely hope that favorable action will be taken in your committee on Senator William Jenner's resolution to limit the powers of the Supreme Court as reflected by S. 2040. This is much needed legislation, and I shall urge my representatives to support this bill if and when it comes up for passage. I am today writing Senator Lyndon B. Johnson and Mr. Bruce Alger to give it their support.

Very truly yours,

Mrs. RUTH SCOTT.

ONTARIO, CALIF., February 21, 1958.

DEAR SENATOR EASTLAND: We, as two very concerned Americans, respectfully urge passage of Senator Jenner's bill No. S. 2040.

The Supreme Court can and must be curbed and kept from turning America over to the Communists.

Yours very truly,

Mrs. MARVIN R. GATLING.
MARVIN R. GATLING.

HOLBROOK, MASS., February 22, 1958.

Hon. JAMES O. EASTLAND,
*Chairman, Judiciary Committee,
Senate Office Building, Washington, D. C.*

MY DEAR SENATOR EASTLAND: We patriots here in Massachusetts are greatly interested in Senator Jenner's bill S. 2040, "to limit the appellate jurisdiction of the Supreme Court in certain cases" especially the security program of the executive branch of the Federal Government; the investigative functions of the Congress; admission of persons to the practice of law within individual States; and State antislavery legislation.

As chairman of the South Shore Branch of Massachusetts Committees of Correspondence (an affiliate of the American Coalition of Patriotic Societies) we respectfully request that this letter, demanding passage of Senator Jenner's S. 2040, be made a part of the testimony given in the subcommittee hearings and the full committee hearings which will follow.

We have also requested, before, and again insist on the impeachment of the six members of the Supreme Court who have proven by their actions that they are subversives.

Just 1 year ago today a resolution to impeach these men was adopted by the general assembly of the State of Georgia. Why has not this matter been followed through?

Faithfully, for America,

MARY LAVINIA SILVIA,
*Chairman, South Shore Branch,
Massachusetts Committees of Correspondence.*

PINEVILLE, LA., February 19, 1958.

THE HONORABLE SENATE JUDICIARY COMMITTEE,
Washington, D. C.

GENTLEMEN: I desire herein to express my ardent wish that bill S. 2040, introduced by the Honorable Senator Jenner, of Indiana, together with the suggested amendment by Hon. T. W. Holloman, of Louisiana, be passed by Congress; hence, I humbly and respectfully request that it be favorably reported by your honorable committee.

R. A. CORLEY, Sr.

DENVER, COLO., February 20, 1958.

Note signatures of neighbors (15) on this appeal letter. Last fall 32,000 names were secured in a few days protesting a city income tax. We got the special election and tax repeal.

Do we dare hope for the Senator Jenner R. 2040? Thank God for our patriots in Washington.

M. E. DIXON.

AN APPEAL FOR ACTION

The framers of our Constitution knew the danger of powerful centralized and dictatorial government, and took every precaution to protect the States. They gave to the States sovereign rights, and to the people freedom and justice. Courts were provided to protect our rights as described in the Constitution. It worked--and made our Nation great and universally respected.

Where is that protection now? The Supreme Court has overridden law and justice as provided in the Constitution. It ignores the legislative department of our Government.

We, the people, have confidence in our legislators. We urge you to act in our defense and in the defense of our Constitution. Several procedures have been recommended, including impeachment of the Justices--which they may deserve. We are back of those of you who realize our danger and are bravely fighting. Please take action during this session of Congress.

Thank you for your consideration of these earnest appeals for action.
God save America.

Maud E. Dixon, George H. Collingwood, Julia R. Taylor, J. F. Rasmussen, Anna Rasmussen, Mr. and Mrs. Robert Tipton, Waldo W. Howard, Florence Howard, Lena M. Standley, May N. Clarke, Dorothy J. McNary, A. Boyd, Laura V. Pauls, Jo M. Atkinson, Paul L. Atkinson.

NORTH ARINGTON, MASS., February 18, 1958.

HON. JAMES O. EASTLAND,
Chairman, Judiciary Committee,
Senate Office Building, Washington, D. C.

DEAR CHAIRMAN EASTLAND: While unable personally to appear, we wish to be recorded as urging passage of S. 2040, introduced by Senator Jenner, of Indiana, to limit the appellate jurisdiction of the Supreme Court in certain cases as set forth in S. 2040.

We request that this statement be filed in the records of the Internal Security Subcommittee.

Respectfully yours,

HESTER S. CROWTHER
Mrs. E. George Crowther.

CHULA VISTA, CALIF., February 21, 1958.

SENATOR JAMES EASTLAND,
Senate Office Building,
Washington, D. C.

DEAR SIR: I am asking you to please support the Jenner bill, S. 2040, to counteract the damage done to our country in recent Supreme Court decisions. It is about time Congress upholds our Constitution and Bill of Rights.

Sincerely,

Mrs. HELEN J. MILLARD.

LONG BEACH, CALIF., February 22, 1958.

HON. JAMES O. EASTLAND,
Chairman, Judiciary Committee,
United States Senate, Washington, D. C.

DEAR SENATOR EASTLAND: Concerning the bill, S. 2040, by Senator Jenner to limit the Supreme Court's appellate jurisdiction as so greatly needed, I hope that it soon will be made the law of our land.

May God enable you so to bring out before the Congress and our people the truth about and the need for this proposed law that nothing can prevent its enactment.

Sincerely,

WALTER W. STRONG.

MEMPHIS, TENN., February 21, 1958.

Senator JAMES O. EASTLAND,
Judiciary Committee of the Senate,
Washington, D. C.

Senator JAMES O. EASTLAND: Senator Jenner, of Indiana, is presenting a bill, S. 2640, which I think should by all means be passed. We could retain the prestige the American people have been so proud of in the past.

In this bill lays the foundation of our great Nation, and this bill would stop such subversive act against our laws which our Constitution provides.

Please do what you can to get this bill passed.

Sincerely yours,

Mrs. MARGARET SULLINGER.

UNIVERSITY PARK, IOWA, February 19, 1958.

Hon. JAMES O. EASTLAND,
Chairman of Judiciary Committee,
Senate Building, Washington, D. C.

DEAR MR. EASTLAND: May I take this opportunity to urge you to do all possible to secure passage of the Jenner bill, S. 2640, which relates to limiting the power of the Supreme Court. The activity of the Supreme Court is little short of legalized treason to the country.

Personally, I feel that it's time the legislative power of the country be returned to Congress instead of the Supreme Court. The total mess we're in can be charged to the rulings of the Supreme Court by and large. They date back over a period of 40 years but the goal is the same over the years. Today the Supreme Court is an oligarchy within a government. Its record of giving supreme power to the President on foreign agreements, of violating the intent of Congress in the segregation issue, and "Red Monday" all point to need of something to again return the government to the government.

Anything you can do to help get this bill before Congress will be appreciated.

Sincerely,

IVAN HOWARD.

ROSEVILLE, MICH., February 18, 1958.

Senator EASTLAND,
Washington, D. C.

DEAR SENATOR: I notice the Jenner bill, S. 2640, is coming up before the Senate, and as we are very much interested in it, we wish you everyone to try your utmost to pass and send to the President for we know how the Court has done in the past and will do in the future if something is not done and done quick. Just got my Human Events; suppose you still read it. I know you are busy; will not detain you longer.

G. E. BAKER.

PONTIAC, ILL., February 19, 1958.

Senator JAMES O. EASTLAND,
United States Senate, Washington, D. C.

DEAR SENATOR EASTLAND: Never has there been a time when the responsibility for providing the means for overcoming a crisis lay so completely in the hands of Congress as now that Senator Jenner's bill (S. 2640) is up for action.

The Jenner bill provides a way to wrest unwarranted power from a Supreme Court which, in decision after decision, has shown itself to be against the welfare of the United States, has shown its contempt for our Constitution, has shown its determination to aid and abet communism in this Nation.

You must not—you cannot fail to pass this bill.

We, the citizens, have no hope for protection than in you, whom we have honored by electing you as our representative in Government. We urge you

to use every power you have to enact the Jenner bill into law. If you fail to do this - If you fail to protect us from this anti-American pro-Communist Court, you will have betrayed your trust as Members of the United States Congress.

Yours truly,

J. HELEN VIELEY.

SOUTHWEST WOMEN'S REPUBLICAN CLUB OF LOS ANGELES,
Los Angeles, Calif., February 20, 1958.

Senator JAMES EASTLAND,
Washington, D. C.

DEAR SENATOR EASTLAND: Please use all your influence to pass Senate bill No. 2010, which will limit the power of the Supreme Court. I am writing this as an individual but our whole club wishes that it be brought out of committee and passed immediately.

Most sincerely,

Mrs. WM. L. HIRSH,
WASHINGTON, D. C., February 27, 1958.

Hon. JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee,
Senate Office Building, Washington, D. C.:

We the members of the District of Columbia Public Schools Association ardently support Senator Jenner's bill (S. 2010) now before your committee to curb the powers of the Supreme Court through the exercise of which this tribunal is destroying our basic liberties.

O. L. BRILL,
President, District of Columbia Public Schools Association.

GRANADA HILLS, CALIF., February 25, 1958.

Hon. JAMES O. EASTLAND,
Washington, D. C.

DEAR SIR: Affirmative action on Senate bill S. 2010 is in my opinion desirable. Recent rulings of the Supreme Court make this action necessary.

Yours truly,

Mrs. ELIZABETH B. HAMMOND.

ARLINGTON, VA., February 25, 1958.

Senator JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: I am glad that Senator Jenner introduced S. 2010 to limit appellate jurisdiction of the Supreme Court and that your committee is giving it consideration.

I hope it will be enacted, and in a sufficiently broad form to protect well the five matters concerned, from the powers of the Supreme Court.

That Court in recent years has done the country a terrible lot of harm. Its powers should be curtailed and several others of its many harmful decisions should be corrected. The Mallory case. Frightful criminals are freed. The worst kinds of Communist enemies are freed. The school integration decision is terrible. Can some way be found to prevent the Supreme Court from legislating?

Respectfully yours,

PHILLIPS KERR.

ST. PETERSBURGH, FLA., February 22, 1958.

Hon. JAMES O. EASTLAND,
Chairman of Senate Judiciary Committee,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: Without taking your time to read a lengthy letter, I desire of you that proposed bill S. 2010 have your unfailing attention. It will be the biggest and most important opportunity and responsibility that you have

ever had to do something toward preserving the United States freedom and prevent us from becoming a vanishing race and committing national suicide.

If we destroy State sovereignty we shall lose the Republic of the United States of America. Our enemy has made the claim that they cannot take over America as easily if they have to combat the sovereignty of 48 States. Why hand our country over to our enemy.

Get the bill S. 2046 enacted into law. This is your responsibility to God.

I request that this letter go into the record.

Very truly yours,

J. BALDWIN BRUCE, M. D.

ST. PETERSBURG, FLA., February 24, 1958.

HON. JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee,
Senate Office Building, Washington, D. C.

DEAR MR. EASTLAND: As a citizen of the United States and of Pennsylvania, I am requesting that you do all you possibly can to get Senate bill 2046 out on the floor and have it passed.

There needs to be a limit for appellate jurisdiction of the United States Supreme Court in respect to State legislature, local school bodies, State bar associations, the executive branch of our Government and the United States Congress.

Trusting that America may remain a republic with the help of Senate Judiciary Committee, I am,

Respectfully yours,

MISS MYRTLE G. DAVIS.

BERRYVILLE, VA.

Senator JAMES O. EASTLAND,
United States Senate,
Washington, D. C.

DEAR SENATOR: The best of luck to you in sponsoring the Jenner bill, S. 2046, to limit the appellate jurisdiction of the Supreme Court.

Sincerely,

Mrs. O. H. ST. JOHN.

NORTH HOLLYWOOD, CALIF., February 25, 1958.

SENATOR JAMES O. EASTLAND
Washington, D. C.

DEAR SENATOR EASTLAND: We are most heartily in favor of Senator Jenner's bill which would help curb the flagrant abuses of the Supreme Court.

Sincerely,

Mr. and Mrs. L. D. MACHADO.

HOLLYWOOD, CALIF., February 21, 1958.

SIR: We are delighted with Senator Jenner's bill, S. 2046, to limit the jurisdiction of the Supreme Court. We pray that it may become law so that the Supreme Court may no longer damage our beloved country as they have in the past with their "Ited Monday" decisions.

Sincerely,

LILLIAN ROBERTS.

DALLAS, TEX., February 25, 1958.

Senator WILLIAM E. JENNER,
Senate Subcommittee on Internal Security,
Senate Office Building, Washington, D. C.

MY DEAR SENATOR: I am in complete accord with the proposals contained in Senate bill 2046, which you introduced, to limit appellate jurisdiction of the Supreme Court in specified areas, and request that you register my views in the hearings which are now in progress before the subcommittee of which you are a member.

Respectfully,

NEELY G. LANDRUM.

ED MAHER, INC.,
Dallas, Tex., February 24, 1958.

HON. JAMES O. EASTLAND,
Committee on Internal Security,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: I am firmly of the opinion that S. 2040 should by all means be adopted. I sincerely hope you will pursue it vigorously to its ultimate successful conclusion.

It is high time that not only the Supreme Court but that the other bureaus be estopped from making flat laws. I want to congratulate you on your stand in regard to this matter.

With kindest regards, I am,
Sincerely yours,

EDW. R. MAHER.

VILLANOVA, PA., February 28, 1958.

Senator JAMES O. EASTLAND,
Chairman, Judiciary Committee,
United States Senate, Washington, D. C.

DEAR SENATOR EASTLAND: Please vote for Senator Jenner's bill S. 2040, which will limit the appellate jurisdiction of the United States Supreme Court.

It appears to an increasing number of citizens that the Supreme Court is encroaching on the duties of first one, and then another branch of our Government, nullifying the strength of our constitutional three branches. This must not continue if we are to be a strong United States of America.

Very sincerely,

Helen Hopkins Zeklov.

Houston, Tex.

Senator JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: Please give your attention to Senator William E. Jenner's bill, S. 2040. I am asking you to encourage passage of the bill.

Sincerely,

Mrs. P. H. CHALMERS.

Bellaire, Tex., February 23, 1958.

The Honorable Senator JAMES O. EASTLAND,
Senate Office Building,
Washington, D. C.

DEAR SENATOR EASTLAND: Just a note of encouragement for your support of Senator Jenner's bill--Senate bill 2440--to curb the Supreme Court powers.

Sincerely,

Miss Ethel H. Evans.

SAN LUIS OBISPO, CALIF., February 25, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building,
Washington, D. C.

SIR: This is a brief note to inform you that I am very strongly in favor of Senator Jenner's bill, No. 2040, to curb the Supreme Court. I trust that you will try to see that this bill receives favorable action.

There is grave danger to our Nation from this radical-left Court, as well as the one-world internationalists and welfare-staters. I hope you bellow as I do. Far too few Americans, especially college students, do.

Sincerely,

STEPHEN SHOTTHAVER,
California State Polytechnic College.

DALLAS, TEX., February 24, 1958.

HON. JAMES O. EASTLAND,
Senate Office Building,
Washington, D. C.

DEAR SIR: This is to express my approval of S. 2610, perhaps adding something on the Mallory decision, and to inform you I shall do all I can to have others approving, express themselves also.

Sincerely yours,

Mrs. HERBERT DAVIS.

DALLAS, TEX., February 27, 1958.

SENATOR JAMES O. EASTLAND,
Committee on Internal Security,
Senate Office Building, Washington, D. C.:

My family and friends want you to know we strongly support Senate bill 2610.

Mrs. W. W. LYNN.

PHILADELPHIA, PA., February 25, 1958.

HON. JAMES O. EASTLAND,
Chairman, Judiciary Committee,
United States Senate, Washington, D. C.

DEAR SENATOR EASTLAND: It has come to my attention that Senator Jenner has introduced a bill (S. 2610) limiting the appellate jurisdiction of the United States Supreme Court.

I also understand that hearings are now being conducted on this matter and so I am writing to you at this time urging your committee to vote for Senator Jenner's bill. This seems to me to be a very necessary step if we are to protect the security of our Nation and our constitutional form of government.

Sincerely yours,

ANNE B. HANNA
Mrs. W. Clark Hanna.

SOMER, CALIF., February 24, 1958.

HON. JAMES O. EASTLAND,
United States Senator,
Chairman of the Judiciary Committee,
Senate Office Building, Washington, D. C.

DEAR SIR: As a believer in America, its Constitution, and its system of checks and balances in government, I strongly urge your support of S. 2610. Senator Jenner's bill limiting jurisdiction of the Supreme Court is necessary at a time when the balance of power is in the hands of the Judiciary and the executive working together. Let's get control of Washington back into the hands of the people.

Sincerely,

RICHARD BARD, Jr.

MONTGOMERY COUNTY PENNSYLVANIA FOR AMERICA

ROYERSFORD, PA.

FEBRUARY 24, 1958.

PETITION TO THE JUDICIARY COMMITTEE OF THE UNITED STATES SENATE

Whereas several decisions of the present Supreme Court have greatly reduced our former protection against subversion and subversives, the Montgomery County Chapter of Pennsylvania for America does hereby petition the United States Senate and House of Representatives to vote for Senate bill No. 2610 which removes from future consideration by the Supreme Court questions concerning subversion, particularly in these five fields:

- (1) The investigative activities of Congress;
- (2) The security program of the executive branch;
- (3) State legislation against subversive activities;
- (4) Home rule over local schools;
- (5) Admission to the bar in individual States.

The above was adopted by unanimous vote of the membership of Montgomery County Chapter of Pennsylvania for America in meeting assembled on February 23.

FLOYD E. WILKY, *Chairman.*

BELLAIRE, TEX., February 23, 1958.

Senator JAMES O. EASTLAND,
Washington, D. C.

DEAR SENATOR EASTLAND: I am asking your support of bill offered by Senator William E. Jenner to curb power of Supreme Court.

Respectfully,

LENORA ALLISON.
CARLSTADT, N. J., February 20, 1958.

INTERNAL SECURITY SUBCOMMITTEE.

DEAR SIR: We, the undersigned wish to express our approval of Senate bill No. 2646, introduced by Senator Jenner.

We believe this bill is drastically needed at these troubled times.

Sincerely,

Mr. and Mrs. Frank Klernan and family, including two daughters and one son of voting age, also, Mrs. David Jacobs, grandmother.

OCEAN CITY, N. J., February 21, 1958.

Senator JAMES EASTLAND,
*Chairman of Subcommittee,
Senate Office Building, Washington, D. C.*

DEAR SIR: I am writing you urging you to report S. 2646 favorably. It is a bill introduced by Senator Jenner to limit the appellate jurisdiction of the Supreme Court.

It is high time this was done.

Yours truly,

Mrs. J. L. TURNER.

ST. PETERSBURG, FLA., February 23, 1958.

Senator JAMES O. EASTLAND,
*Senate Judiciary Committee,
Washington, D. C.*

DEAR SIR: Will you please bring out bill No. S. 2646 and work for its passage? We must restrict the United States Supreme Court.

Thank you.

Yours truly,

LORMA D. POTTER
Mrs. James O. Potter.

DETROIT, MICH., February 21, 1958.

Hon. JAMES EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: We would like to urge your strong support of Senate bill 2646, to limit the appellate jurisdiction of the Supreme Court. In fact we would be in favor of impeachment of these men who have done so much to help free the Communists to do their subversive work.

May we express our gratitude for the work you do for our beloved country.

Respectfully yours,

Mr. and Mrs. A. R. HELLWORTH.

DALLAS, TEX., February 28, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: The Jenner bill, No. 2646, is the most important legislation. The Supreme Court must be curbed.

If you will report this bill favorably I shall work among my friends as well as the Texas delegation for its passage.

Yours truly,

WINIFRED E. DILLARD.
Mrs. JOE P. DILLARD.

—
BALTIMORE, Md., February 21, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: I watch your views and how you vote with interest, and now am bold enough to urge you to vote for the Jenner bill, S. 2040, when it comes before your committee, also on the floor of the Senate.

You Southern Senators are the only ones left whom I consider true Americans, and with great humiliation I admit having been a Republican but before the days when that party was taken over by Socialists.

Cordially,

MILDRED MILLER.

—
DALLAS, Tex., February 18, 1958.

Hon. JAMES O. EASTLAND,
Chairman, Committee of Internal Security, United States Senate.

GENTLEMEN: I write you to ask your help; and in support of Senate bill 2040 of Senator William Jenner of Indiana.

I feel that our so-called Supreme Court must be curtailed; if the freedom for which I and countless other Americans have fought for is to be preserved.

The Court's action in declaring State sedition laws unconstitutional was the lowest blow ever struck for communism.

The Court should be made to give back the lawmaking powers to the Congress where it belongs.

The Supreme Court should return to a court of law and make its decisions according to precedents in law; and not according to some leftwing liberal or other pressure groups idea of what the law should be.

Yours for a return to true constitutional government and States rights.

Sincerely,

—
ERNEST ABBOTT.

INDIANA PROPERTY OWNERS ASSOCIATION OF AMERICA, INC.,
Indianapolis, Ind., February 20, 1958.

Hon. WILLIAM E. JENNER,
United States Senate Office Building,
Washington, D. C.

Greetings:

We wish to thank you very much for sending us a copy of the information from the Internal Security Subcommittee offering to permit us to speak before the committee.

We do not wish to appear in person, but we would like to have inserted in the committee's record a resolution by our organization.

We appreciate your efforts in this matter.

Respectfully yours,

HENRY A. WERKING, Sr., President.

RESOLUTION, SUPREME COURT CONSPIRACY

The Supreme Court's duty is to uphold the laws of the land, and to protect the Constitution, and safeguard the United States against all subversive activities and invaders of such acts.

Whereas, recently, rulings by the Judges of the United States Supreme Court have dealt a succession of blows to the key points of legislative structure enacted by Congress for the protection of the internal security of the United States against the world Communists' conspiracy;

Whereas, the Honorable William Jenner has introduced Senate bill 2040 to limit the appellate jurisdiction of the Supreme Court; therefore we, the Indiana Property Owners Association of America, Inc.,

Resolved, That the Senate Internal Security Subcommittee should recommend for passage Senate bill 2040.

ARCADIA, CALIF.,
February 21, 1958.

SENATOR JAMES O. EASTLAND,
*Chairman, Senate Judiciary Committee,
Senate Office Building, Washington, D. C.*

DEAR SENATOR: I am informed that you are now holding hearings on Senator Jenner's bill, S. 2040, which would limit the jurisdiction of the Supreme Court and go far toward overcoming much of the damage done by the Court's "Red Monday" decisions.

I am certainly in favor of the provisions of S. 2040 and hope the hearings will bring out the urgency of its prompt passage.

Yours truly,

Mrs. EDWARD A. HEISS.

SMALL ISLE, ST. PETERSBURG, FLA.,
February 24, 1958.

SENATOR JAMES O. EASTLAND,
*Chairman, Committee on the Judiciary,
United States Senate, Washington, D. C.*

DEAR SENATOR EASTLAND: Being a business consultant (now retired), an active church member, a life member of Masonry, and an active worker against communism, it is my sincere wish to support Senate bill S. 2040 with which I am familiar.

It is my hope that there are enough freedom loving Americans in the Senate and Congress who believe in the motto on our coins, "In God We Trust" to not only pass this bill without delay, but to again have uppermost in all our international as well as interstate laws the foundation of our country—freedom of religion.

Let's not work with thought of political party influence, but of God's guidance for American independence and progress.

Respectfully yours,

HERBERT R. TERRYBERRY.

ST. PETERSBURG, FLA., February 22, 1958.

SENATOR JAMES O. EASTLAND

DEAR SIR: Please pass S. 2040 to limit the jurisdiction of the Supreme Court of United States to prevent them from taking away our State rights.

Thanking you,

Very truly,

CORAL H. VANALLAN.

NORWELL, MASS., February 22, 1958.

HON. JAMES O. EASTLAND,
*Chairman, Judiciary Committee,
Senate Office Building, Washington, D. C.*

DEAR SENATOR EASTLAND: The Queen Anne's Corner Chapter of the Massachusetts Committees of Correspondence, an affiliate of the American Coalition of Patriotic Societies, demand committee approval of Senator Jenner's bill, S. 2040, to limit the appellate jurisdiction of the Supreme Court in certain cases, namely, investigative functions of the Congress, the security program of the executive branch of the Federal Government, State antisubversive legislation, and the admission of persons to the practice of law within the individual States.

We request that you make this letter a part of the testimony supporting approval and enactment of S. 2040 in the Internal Security Committee hearings and the Judiciary Committee considerations which will follow.

The Massachusetts Committees of Correspondence, including this Queen Anne's Corner Chapter, believe that impeachment proceedings against Supreme Court members should be instituted during this session of Congress and we ask for early enactment of S. 2040.

Respectfully yours,

ELIZABETH A. SCHOFIELD,
Mrs. Robert Merrill Schofield,
Chairman, Queen Anne's Corner Chapter, Massachusetts Committees of Correspondence.

DETROIT, MICH., February 24, 1958.

DEAR SENATOR EASTLAND: Believe that you and Senator Jenner are bringing up a bill in hopes of so wording it as to prevent the very near treasonable ruling recently rendered by our Supreme Court.

We regret that Earl Warren seems to lean so tenderly toward socialism and many now feel very great danger lies ahead for the liberties we all hold so dear.

We realize those liberties have been much curtailed since the wicked performances of the Roosevelt and Truman administrations.

Should the present trend continue we should remove the word "liberty" from our college and drape the statue in black.

Please encourage some of your friends to bring up a bill to really make the unions clean and tax their takings as well as the foundations.

Yours sincerely,

H. G. CONOR.

Senator JAMES O. EASTLAND,
Washington, D. C.

SOUTH NORWALK, CONN.

DEAR SIR: The United States Supreme Court has a great tendency to have an open back door policy for all cases involving Communist or subversive cases. How they manage to let so many no good un-Americans get away with so much is beyond a good American's sense of justice. Before you this month is the most welcome and necessary bill that can be enacted by you and your Judiciary Committee. That bill is "S. 2646." For the good of all including those that are too blind to see what is going on today, please vote in favor of enacting into law this most necessary bill. Knowing full well the wonderful work you are doing on this committee, I sincerely wish that other Senators and even Congressmen could follow the pattern of honest and sincere inspiration that you relay to many of us who feel much safer with men like you in office.

I have a copy of the hearing before the Subcommittee to Investigate the Administration of the Internal Security Act and other Internal security laws of the Committee on the Judiciary of United States Senate, 85th Congress first session on S. 2646. I would greatly appreciate it if I could receive more copies of this issue as I have many friends that are very interested in this bill. If you could send me copies I would be more than happy to receive them and pass them on.

Sincerely yours,

ALBERT A. BEERS,
Veterans of Foreign Wars.

GIBSON ISLAND, MD., February 24, 1958.

DEAR SENATOR EASTLAND: I wish to urge you, briefly, to do all in your power to curb the powers of the Supreme Court, by enacting into law Senate Bill S. 2646.

Respectfully yours,

ELIZABETH W. ENGLAR.

BAKERSFIELD, CALIF., February 20, 1958.

DEAR SENATOR EASTLAND: Senator Jenner's bill (S. 2646) to limit the jurisdiction of the Supreme Court is desperately needed.

I shall urge Senators Knowland and Kuchel to work for its passage. I am sure you need no urging.

AHLIDA G. BALLAUGH.

PHILADELPHIA, PA., February 21, 1958.

Hon. JAMES O. EASTLAND,
United States Senate.

DEAR SIR: I trust that your committee will approve S. 2646 and send it to the floor of the Senate as quickly as possible. I consider it most important.

Sincerely,

ELIZABETH S. ABBOT.

LOS ANGELES, CALIF.

DEAR SENATOR EASTLAND: I am deeply concerned over the danger to our freedom being destroyed by recent decisions of the Supreme Court. Please support S. 2646 in an effort to protect us from this danger.

Sincerely,

MARY A. JENKS.

LOS ANGELES, CALIF., February 23, 1958.

Hon. Senator JAMES O. EASTLAND,
Washington, D. C.

DEAR SIR: Am writing you to ask that you please release the Jenner bill S. 2646 so that our Senate may vote on this important bill. While you may not receive the letters of all who feel this way because of limited time but can assure you thousands of us wish to have this bill released and sent to the Senate.

Most sincerely,

MRS. CHAS. SMITH.

BALTIMORE, MD., February 22, 1958.

DEAR SENATOR EASTLAND: Because I feel so strongly that passage of the Jenner bill, S. 2646, must be achieved to safeguard our heritage of constitutional government, I am writing to each member of your Judiciary Committee.

Certainly the liberal Judge Hand has proved both objective and courageous in the attached statement wherein "that each was responsible to that sovereign (the people of the United States) but not to one another."

It is my earnest hope that your committee will adopt a favorable report on this bill.

If Judge Hand has the courage to face facts—surely the members of your committee can do no less.

Sincerely yours,

HELEN WALKER JENKINS.

DETROIT, MICH.,
February 24, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building,
Washington, D. C.

SENATOR EASTLAND: I understand Senator Jenner's bill to curb the jurisdiction of the Supreme Court of the United States is coming before the Legislature this week. The nine men on this Court are definitely not too concerned with the welfare of our country. In fact they are working against it. The passage of this bill is vital to the existence of our land. Its importance cannot be over-emphasized. I do hope this bill passes.

Yours truly,

MRS. ELMA AMBROSSE.

PORT HURON, MICH.,
February 19, 1958.

Senator EASTLAND, Chairman:

I believe S. 2646, now before your Committee on the Judiciary, is essential to the constitutional government of the United States of America.

Please give the bill favorable consideration to be passed as is.

MRS. T. M. WHEELER.

DEWITT, N. Y.,
February 20, 1958.

Senator JAMES O. EASTLAND,
Senate Judiciary Committee,
Senate Office Building,
Washington, D. C.

DEAR SIR: As legislative chairman of the American Legion Auxiliary, Post 1276, 3006 James Street, Syracuse, N. Y., I urge you to support Senator Jenner's bill S. 2646.

The national American Legion has asked support of corrective legislation to prevent judicial violation of the United States Constitution relative to Communist cases by the Supreme Court.

Recent decisions of the Supreme Court have shown that it does not believe in the rights or authority of sovereign States, does not think communism is bad or a threat to America and has rendered ineffective State secession laws. Supreme Court decisions of the last 18 months have given the Communists the go ahead signal.

We urge prompt passage of Senate bill S. 2040 to correct this dangerous threat to our constitutional system of government.

Senator Jenner's bill, S. 2040 would correct this situation because it would withdraw appellate jurisdiction from the Supreme Court in the following cases: (a) the investigative activities of Congress; (b) the security program of the executive branch of the Government; (c) State legislation against subversive activities; (d) home rule over local schools; (e) admission to the bar in individual States.

We urge early passage of this bill to curb the Communist conspiracy right here in America before we spend billions to repel this same conspiracy in other parts of the world.

Yours respectfully,

Mrs. MARJORIE McHALE,
Legislative Chairman, American Legion Auxiliary,
Post 1270, Syracuse, N. Y.

THIRTY-SECOND WOMEN'S PATRIOTIC CONFERENCE
ON NATIONAL DEFENSE, INC.,
Montclair, N. J., February 10, 1958.

Senator JAMES O. EASTLAND,
Chairman, Senate Internal Security Subcommittee,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: As chairman of the 1958 Women's Patriotic Conference on National Defense I wish to send to your committee the resolution adopted at our recent conference in Washington regarding our support of bill, now before your committee, S. 2040.

"Resolved, That the Thirty-Second Women's Patriotic Conference on National Defense pledges active support to the principles of Senator Jenner's bill S. 2040, to limit the appellate jurisdiction of the United States Supreme Court."

The Women's Patriotic Conference on National Defense is composed of 19 patriotic and service organizations whose interest and concern is with the adequate military defense of our country, and with the preservation of our constitutional form of government. The above resolution was unanimously adopted at our final session on February 1, 1958.

Sincerely yours,

ENID H. GRISWOLD
Mrs. FREDERICK GRISWOLD, JR.,
Conference Chairman.
RICHMOND, VA., February 19, 1958.

Senator JAMES O. EASTLAND,
Washington, D. C.

DEAR SENATOR EASTLAND: I wish to register my ardent support to Senator Jenner's bill (S. 2040) to limit the jurisdiction of the Supreme Court.

Yours truly,

HELEN T. HURLEY
Mrs. Daniel J. Hurley.

P. S.—Among other of my strong beliefs. I think that there should be no summit conference with the criminals of the Kremlin; and that our foreign aid program should be limited to helping the people behind the Iron Curtain, not

¹ Participating organizations: Dames of the Loyal Legion of the United States of America; Gold Star Wives of America, Inc.; Ladies of the Grand Army of the Republic; National Service Star Legion, Inc.; National Society for Constitutional Security; National Society, Daughters of the Revolution; National Society, Daughters of the Union 1861-1865, Inc.; National Society, Guardians of Our American Heritage; National Society of New England Women; National Society, Patriotic Women of America, Inc.; National Society, Women Descendants of the Ancient and Honorable Artillery Company; Navy Club, U. S. A. Auxiliary; New York City Colony, National Society of New England Women; New York State Society, National Society Colonial Dames of the XVII Century; The Wheel of Progress; United States Army Mothers; Women of the Army and Navy Legion of Valor of the U. S. A.; Women's National Defense Committee of Philadelphia.

their Communist governments; also, that foreign aid should be sharply supervised.

Perhaps the sputniks are just to divert our attention from the fact that the Russian people, with encouragement, may be near revolt.

RYE, N. Y., February 18, 1958.

UNITED STATES COMMITTEE ON THE JUDICIARY,
Senate Office, Washington, D. C.

GENTLEMEN: I have read the notice of hearing on Senate bill 2040 to limit appellate jurisdiction of the Supreme Court and I am strongly in favor and in support of Senate bill 2040 which was introduced by Senator Jenner of Indiana.

Sincerely,

CICELY C. O'DONOVAN.
Mrs. W. L. O'DONOVAN.

NEW HYDE PARK, LONG ISLAND, N. Y.,
February 17, 1958.

INTERNAL SECURITY SUBCOMMITTEE,
Senate Office Building,
Washington, D. C.

DEAR SIR: In reference to Senate Resolution 2040, I wish to express my admiration of those behind this bill to limit the jurisdiction of the Supreme Court. I hope this bill receives the cooperation it certainly deserves, and I shall pray that it will eventually be passed.

I intend to inform as many of my friends of this resolution as possible, so that they too may support it.

Most Americans are behind all legislation which would protect our national security, but the press does its best to suppress all favorable opinion, and prints only those news items which voice opposition to all that would keep us free.

The New York Journal American, a column or two in other papers, and the Brooklyn Tablet are the only papers which give a true picture of the national situation, or any information regarding proposed legislation. Believe me, a patriotic American really has to dig to find out what's going on.

I am a young mother of five children, expecting another, and I am quite busy, needless to say, but I, and many other housewives like myself, still try to keep informed, and voice our opinions. We are not, as Pearl Buck recently said on a TV program, making our homes our graves, but are trying with God's help to keep our country which we really love, from becoming a slave of the Kremlin.

It is the Communists who are digging our graves for us, while we try, in vain, it seems, to stop them.

I, for one, have no halcyon picture of America's future, and many times, when I look at my little children I wonder what horror is in store for them in the near future.

However, more giveaways, summit conferences, higher taxes, and a breakdown completely in our security system, certainly is not the answer.

I pray for our legislators, and try to make as many little sacrifices as I can, so that we can avoid, with God's help, the disaster that is so near.

Keep up the good work you are trying to do, and know that all real Americans are behind you 100 percent, and grateful for the few who remain steadfast in spite of terrific setbacks.

Mrs. JOSEPH FALLON, Jr.

BALTIMORE, Md., February 18, 1958.

Senator JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
United States Senate.

DEAR SENATOR EASTLAND: As former residents of Mississippi we wish to assure you that we are proud of the part you have taken in the battle for constitutional government. We are dismayed by recent decisions of the United States Supreme Court which have nullified this Nation's efforts to protect its citizens from a worldwide Communist conspiracy. We therefore urge that your Committee of the Judiciary take speedy affirmative action on Senate bill 2040.

We are familiar with article III, section II, 2 of the United States Constitution which reserves to the Congress the power to limit the appellate jurisdiction

tion of the United States Supreme Court. In view of this provision and of the present Court's apparent blindness to the dangers confronting the Nation, we feel that the Congress not only has the power but also the duty and responsibility to regulate by law the Supreme Court's appellate jurisdiction in cases affecting the security of our country. We therefore congratulate you on your efforts in behalf of Senate bill S. 2640.

Very truly yours,

EVA CHISOLM,
J. JULIAN CHISOLM, M. D.

DENTON, TEX., February 18, 1958.

DEAR SIR: I am a graduate college student working on a master's degree in science.

In the name of God, do something about this strange, warped Supreme Court of ours.

Its effect is felt all the way down to each and every individual home and person. It is the general public belief that Justices like Douglas and Earl Warren either have a personality disorder or they are genuinely influenced by leftist and Communist-front movements in the United States, which at a time like this is pure treason.

What is also appalling is the influence that it has had upon those in college circles who are "fellow travelers," pseudosophisticated "pinks," and the lot. They abound in such departments as government, economics, drama, etc. At any rate, the attitude of our sickened Supreme Court has given impetus to this group of emotionally insecure, miserable individuals.

Something must be done—the public is getting tired of the effects produced, and since your committee is staffed with gentlemen whose livelihood is political opinion, for the most part, I trust, I would clear up this situation before "heads roll."

Thank you.

LARRY HAMILTON.

LOS ANGELES, CALIF., February 24, 1958.

JAMES O. EASTLAND,
Chairman, Senate Internal Security Subcommittee,
Senate Office Building, Washington, D. C.:

The Congress is urged to regain its constitutional function as the only legislative power of the United States and to that purpose to make all such laws and to try all such impeachments as may be necessary, including taking from the President and his Supreme Court their self-assumed and arbitrary despotism. Passage of Senate bill 2640 will be one step toward such fundamental objective. Let us return to the type of constitutional government intended by its founders and avoid a totalitarian system. Remember that everything Hitler did was legal.

ANITA PHISTER.

HOLLAND, OHIO, February 19, 1958.

Re action on S. 2640.

GENTLEMEN,
Senate Judiciary Committee.

SIRS: Since I cannot come to Washington to say what I think in connection with you resolution to limit the jurisdiction of the Supreme Court, I take this means of communicating with you on this vital and far-reaching subject.

I am convinced that most of the woes which beset our beloved land stem from distortions and outright divergence from our great United States Constitution in its original form. As such, it was a beacon light to oppressed humanity in that it proved to them what they, too, could do in their various homelands, if they set their hearts and minds and bodies to the task of acquiring freedom. Ours was bought dearly in blood and tears for the price of liberty has never been cheap, at any time, nor in any land. It is much easier to acquire tyranny which will insure you peace—"the peace of the tomb" and the absolute equality of slaves.

Originally, our Constitution was set up for the "general welfare" of United States citizens. It was not meant to cover the general welfare of every nation on the earth. If they so desired, any nation could emulate our form of govern-

ment. For almost a century and a half almost every change in foreign governments followed it—at least in part.

This movement went on until 1917 when communism got control of Russia. Then was born a form of tyranny embracing the minds and souls of men. Fascism and Nazism were but branches of the same tree. These decades since we have not only retreated but some among us helped spread the pall of darkness over America and other lands. This tyranny is spread partly by military means and partly, by propaganda methods which Lenin said was one of their most powerful weapons. The forces of tyranny saved money by using dupes as transmission belts. Even our public-school system served as indoctrination factories. Every facet of American life has been infiltrated and used as a means of enslavement to tyranny. "Worthy causes" have become rackets so that in Toledo—last week—pupils in 50 schools lugged 12,100 sacks of clothing to schools for the Goodwill Industries, where help, I'm told, is paid a mere pittance. Incidentally, I once heard an old man worked 3 days to pay for a suit of underwear. These pupils looked like Russian peasants. Their teachers are little more than collection agencies for heart fund, polio, muscular dystrophy funds, Red Cross, Community Chests, milk funds, poor relief, newspaper collections, stamps for saving bonds (you should count up time involved in lower grades on that last one alone). If teachers can't teach, Johnny can't learn.

There is yet another weapon of tyranny—blackmail and threats of defamation. Men may be "framed" if they refuse to go along. The Constitution of the United States must be protected at all costs, even against Justices of the Supreme Court, some of whom may be victims of blackmail or of infiltrators who write up their decisions.

Their decision of the moment is but the law in case—not the law of the land. They cannot usurp the Constitution itself by assuming the role of legislators. They cannot invade, by some law they make, our social life. To do so is to impose tyranny on a free-born people. In my book, "Disobedience to tyrants is obedience to God."

No government is set up with provisions, built in, for its own dissolution, nor is our Government meant to be a boarding house for unassimilated aliens who pledge allegiance to our flag with "their fingers crossed." If aliens, or citizens, do not like our form of government, they have freedom of choice to select the government of another land, but not to force tyranny on free-born Americans to whom tyranny is worse than death. They must learn a line is drawn between license and liberty; that the people granted "freedom" of the press—not license; that they gave this freedom of the press to get facts in order to enable them to run their business, the United States Government; that when those facts are withheld or willfully distorted then the people have a right to deny publication.

Gentlemen, I saw nothing in Toledo Blade (there's no competitive major press in the area) of this hearing. I learned of it through a purchased news pamphlet. Thus do many Americans have to learn facts vital to their security and freedom. I am in complete agreement with the objectives of S. 2646.

Sincerely yours,

Mrs. EVVA SKELTON TOMB.

ABINGTON, MASS., February 19, 1958.

Chairman JAMES O. EASTLAND,
Judiciary Committee,
Senate Office Building, Washington, D. C.

DEAR CHAIRMAN EASTLAND: The Abington Chapter of the Massachusetts Committees of Correspondence, an affiliate of the American Coalition of Patriotic Societies, demand passage of S. 2646, Senator Jenner's bill "to limit the appellate jurisdiction of the Supreme Court in certain specified cases."

We ask that this statement be made a part of the testimony favoring passage of S. 2646 in the present subcommittee hearings and the full committee hearings which will follow.

We also demand impeachment proceedings against the six members of the Supreme Court as set forth in the February 22, 1957, resolution adopted by the general assembly of Georgia.

Respectfully yours,

GEORGE B. GREENFIELD,
Chairman, Abington Chapter,
Massachusetts Committees of Correspondence.

SCOTTSVILLE, N. Y., *February 18, 1958.*

DEAR SENATOR EASTLAND: I read in Human Events an article re Senator Jenner's bill (S. 2646) to limit the jurisdiction of Supreme Court. My husband, Col. Carey Brown, and I trust that you will do all that you can to see that this bill is passed, so we can still have America the home of the brave and land of the free.

Sincerely,

DEBBY LE LAW BROWN.

DENVER, COLO., *February 21, 1958.*

DEAR SENATOR EASTLAND: I heartily endorse S. 2646 and will speak for it to the women's organization with whom I work.

This bill is needed very badly.

Sincerely,

MARY J. PEMBERTON.

MASON CITY, IOWA, *February 21, 1958.*

Senator JAMES O. EASTLAND, *Chairman:*

DEAR SENATOR EASTLAND: Am glad something is being done about our disgraceful Supreme Court antics. Do hope you do all possible in favor of Senator Jenner's bill S. 2646 to have it become operative. We know these hearings are a long way from a law; but we sure need some real help to undue future destruction to American Government and life by our so called Supreme Court.

L. M. SMAIL.

BROOKSVILLE, FLA., *February 20, 1958.*

DEAR SENATOR EASTLAND: We are very much for Senator Jenner's S. 2646 bill to cut down Supreme Court autocracy. We are very disappointed in Warren's un-American decisions (Red Monday).

Sincerely yours,

W. R. JORDAL.

VAN NUYS, CALIF., *February 22, 1958.*

DEAR SENATOR EASTLAND: We are praying that you and the four Americans on your committee will lend your support to Senator Jenner's bill to curb the usurped powers of the Federal Courts. We have a Congress to make our laws.

Sincerely,

Mrs. R. E. PARKER.

RICHMOND, IND., *February 20, 1958.*

DEAR SENATOR EASTLAND: Favor S. 2646. You must use your power to curb the runaway Supreme Court. It's silly to pretend we're challenged by Russia and waste money on armies, if you don't curb the Supreme Court.

ELTA M. MUFF.

PITTSBURGH, PA., *February 20, 1958.*

Hon. JAMES O. EASTLAND,

Senate Judiciary Committee,

Senate Office Building, Washington, D. C.

DEAR SIR: I am glad to read over again Senator Jenner's bill, S. 2646, which will limit the appellate jurisdiction of the Supreme Court.

It is my firm conviction that the Supreme Court has been deliberately rendering decisions inimical to our best interest, greatly favoring and encouraging sworn enemies of the United States, and that the Supreme Court, if not curbed by congressional legal means, will continue usurping power that does not belong to them.

Congress has the full, unchallengeable power to pass laws immediately which would deprive the Supreme Court of appellate jurisdiction, and I trust you will see the necessity of voting this bill, S. 2646, in law for our protection.

Best wishes.

Sincerely yours,

FLORENCE L. HOOVER.

CHICAGO, ILL., February 20, 1958.

Senator JAMES EASTLAND,

Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: It is imperative that the Jenner bill, S. 2640, be passed if our republican form of government is to be preserved. The passage of this bill would go far to overcome much of the damage that was done by the decisions of the Supreme Court.

It would deprive the Supreme Court of jurisdiction in cases involving legal attempts by the Federal Government, States, and municipalities to curb communism and subversion.

Sincerely yours,

MRS. KEITH CAMPBELL.

CUCAMONGA, CALIF., February 20, 1958.

Hon. JAMES O. EASTLAND,

Senate Office Building, Washington, D. C.

DEAR SIR: This is to urge you to support Senator Jenner's bill, S. 2640.

We want the Supreme Court to be curbed.

Respectfully yours,

EDWARD H. SHOTTHAFER.

STOCKHAM, PITTSBURGH,

Birmingham, Ala., February 20, 1958.

DEAR SENATOR: The hearings of your Committee on the Judiciary with reference to the limitation of the unbridled rulings of the Supreme Court have my strong wishes for effectiveness.

We strongly urge favorable action on the Jenner bill (S. 2640), which will limit the jurisdiction of the Court, and the encroachment brought about by its interpretations, upon the rights of the States and the policing powers of the municipalities.

R. J. STOCKHAM.

LOS ANGELES, CALIF., February 19, 1958.

Hon. JAMES O. EASTLAND,

Senate Office Building, Washington, D. C.

MY DEAR SENATOR: We have been waiting for a bill such as Senate bill 2640.

It is a relief to note that Congress finally realizes it is given the power of regulation of the Supreme Court's jurisdiction.

Ever since June 18, 1957, when the headlines in the Los Angeles Times read, "High Court Frees 5 California Reds" and "Red Leaders in Los Angeles Elated by Decision," we have been waiting for legislation for the control of subversive activities within the State.

We have studied this bill and it meets with our approval.

Very truly yours,

MRS. WILLIAM A. DANIEL.

OSHKOSH, WIS., February 19, 1958.

Hon. JAMES O. EASTLAND,

*Senator from Mississippi, Senate Office Building,
Washington, D. C.*

DEAR SIR: Speaking only as representing a large proportion of lay voters of the United States, while all I know about Senator Jenner's bill, S. 2640, is what I get from the press, it does appear to me to be very good and timely, and necessary. But there is one thing that may have been omitted which I think should be included, and that is that no decision by the United States Supreme Court made during the past 25 years is to be used as a precedent for future decisions. Let's get back to constitutional government and States rights.

Yours very truly,

FRED C. TRACE.

BERRYVILLE, VA., February 21, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building,
Washington, D. C.

DEAR SENATOR EASTLAND: Re Senate bill 2040 to limit appellate jurisdiction of the Supreme Court, I wish to go on record as being in favor of this Jenner bill. I hope you will have printed in the book of hearings all letters pertaining to this bill as I know many of us who wanted to come to testify in favor of it have been unable to come to Washington due to circumstances beyond our control.

Regarding this bill it does well to remember Thomas Jefferson's words, "I repeat that I do not charge the Judges with willful or ill-intentioned error; but honest error must be arrested where its toleration leads to public ruin. As for the safety of society, we commit honest mistakes to Goddam, so Judges should be withdrawn from their bench, whose erroneous blunders are leading us to dissolution. It may indeed injure them in fame or in fortune but it saves the Republic which is the first and supreme law."

Please be sure that I am on the list to receive the printed hearings on this bill.

Yours very truly,

ELIZABETH H. OATH
Mrs. Robert E. Oath.

SANTA MONICA, CALIF., February 20, 1958.

Senator JAMES O. EASTLAND,
Chairman of Judiciary Committee
Washington, D. C.

DEAR MR. SENATOR: We strongly urge support for Senator Jenner's bill (S. 2040). In our opinion, unless the Congress of the United States acts to limit the jurisdiction of the Supreme Court, our Nation will be exposed to peril.

Thanking you, Senator Eastland, for your fine patriotic work on the Judiciary.
Respectfully,

MISS EMILY JENNINGS.

UPLAND, CALIF., February 20, 1958.

Senator JAMES O. EASTLAND.

DEAR SIR: We urge you to support Senator Jenner's bill, No. 2040, to curb the Supreme Court. This is the only way we can undo some of the damage done by it already.

With many thanks,

Mr. and Mrs. LEWIS BLANKENSHIP.

LOS ANGELES, CALIF.,
February 20, 1958.

Hon. JAMES O. EASTLAND,
Chairman, Senate Internal Security Committee,
Washington, D. C.

DEAR SENATOR EASTLAND: This letter is being addressed to you and your committee with respect to Senate bill No. 2040 introduced by Senator Jenner. This bill, we understand, is to be given a hearing, by your committee in the next few days and we wish to state we are very much in favor of its passage. We ask that it be given strong approval by your committee.

Yours truly,

GOLDIE E. LYDT.
F. A. LYDT.

DALLAS, TEX.,
February 21, 1958.

Hon. JAMES O. EASTLAND,
Senate Office Building,
Washington, D. C.

DEAR SENATOR EASTLAND: It is my understanding that a resolution by Hon. William Jenner of Indiana will soon come up for consideration before the Committee on Internal Security of which you are chairman.

May we urge your committee to approve of the Senate Resolution 2010 as we are in a great need of such legislation?

Ever since the present members of the Supreme Court of the United States overstepped the authority of the Constitution of these several States, and handed down decisions which were detrimental to the security of our Government, we have needed such legislation to limit their powers.

My husband and I would like to state that we heartily approve this bill by Senator William Jenner and support it wholeheartedly.

Sincerely,

Mrs. W. O. McMEEN.

HEMET, CALIF., February 20, 1958.

DEAR SENATOR EASTLAND: We urge the Senate Judiciary Committee to approve Senator Jenner's bill (S. 2010). We are very much in favor of limiting the jurisdiction of the Supreme Court. Our Constitution must be protected.

Thank you.

Very sincerely,

Mrs. FRED O. WRIGHT.

LA VERNE, CALIF.

Senator JAMES O. EASTLAND,
Washington, D. C.

DEAR SENATOR: We are strongly in favor of Senator Jenner's bill (S. 2010) limiting the jurisdiction of the Supreme Court. We do hope your committee will recommend this bill to the Senate.

Very sincerely,

Mrs. HANNAH J. GILLETTE.

ST. PETERSBURG, FLA., February 21, 1958.

Senator EASTLAND,

My DEAR SENATOR: Bill S. 2010, with amended new section 1258, limiting the appellate jurisdiction of the Supreme Court, meets with our approval here.

Success to you in its passage.

Very truly yours,

ALICE ELOIS YALE.

TERRE HAUTE, IND., February 19, 1958.

Senator JAMES O. EASTLAND,
Chairman of Judiciary Committee, Washington, D. C.

SIR: I desire to express my approval of the Jenner bill, S. 2010, to limit the jurisdiction of the Supreme Court.

The unlawful growth in power of our Supreme Court judges is of the greatest danger to our constitutional form of government.

Sincerely,

Miss EDYTH MYERS.

TEXAS TECHNOLOGICAL COLLEGE,
Lubbock, Tex., February 20, 1958.

Hon. JAMES O. EASTLAND,
Senate Office Building,
Washington, D. C.

DEAR SENATOR EASTLAND: Reference please is made to Senate bill 2040 introduced by Senator Jenner, of Indiana, on which hearings are being held.

I so fervently hope that this proposed legislation will have adequate support of the Congress. Should the powers of the Supreme Court not be redefined as proposed by the above mentioned resolution, God help this country of ours.

Respectfully,

CLIFFORD B. JONES,
President Emeritus.

CHICAGO, ILL., February 21, 1958.

Jenner's S. 2040, limiting jurisdiction of Supreme Court of United States.

MY DEAR SENATOR: We must do something to prevent the United States Supreme Court from wrecking our Constitution before it is too late.

The subject bill should be advanced by all means and in every way we can to save our freedom.

Yours very truly,

ERLING H. LUNDE.

DALLAS, TEX., February 20, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building,
Washington, D. C.

DEAR SENATOR EASTLAND: It has been called to my attention that the Senate Committee on Internal Security is giving consideration to the Jenner bill, No. S. 2040. I am writing to ask you as chairman of the committee to do everything possible to see that this resolution does not die in the committee.

If possible, I would like to see the resolution amended to include legislation which would void the Supreme Court's Mallory decision.

Thanks for your attention to this letter.

Very truly,

GRACE WOOLLEY
Mrs. B. L. Woolley.

WOODBURY, N. J., February 20, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building,
Washington, D. C.

DEAR SENATOR EASTLAND: As it is not possible for me to come to Washington just now I want to express my full approval of Senator Jenner's bill (S. 2040) to limit the appellate jurisdiction of the Supreme Court.

I hope the subcommittee will report it favorably (and intact) to the Judiciary Committee.

The FBI files must be protected and the congressional investigating committees must be supported and the States must be allowed to make and enforce their own laws regarding subversives, etc.

Yours very truly,

MARION B. S. WEATHERILL.
Mrs. Robert T. Weatherill.

MONTCLAIR, N. J., February 21, 1958.

To Senator JAMES O. EASTLAND.

DEAR SIR: I urge you to give all of your attention and support, as far as you are able, to Senator Jenner's bill S. 2040.

Yours sincerely,

EDITH JOHNSON.

NORMAN, OKLA., February 20, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: My Human Events came this afternoon and at long last I see Senator Jenner has a bill S. 2040 before the Judiciary Committee with hearings starting February 19. Needless to say, I am in favor of this bill. I have read over each point, very carefully, that is given in Human Events, and am thoroughly convinced it will help America to have this bill passed. And I am sure you will use your influence to get it passed. Am pleased you are chairman of the Judiciary Committee for I feel you are a real friend of America.

Thanks.

Sincerely,

Mrs. J. C. CLAPHAM.

ST. PETERSBURG, FLA., February 21, 1958.

Senator JAMES O. EASTLAND,
United States Senate Office Building,
Washington, D. C.

DEAR SIR: In regard to bill S. 2040, restriction of jurisdiction of the United States Supreme Court. Please bring this bill out of committee and vote affirmatively for it immediately.

Yours truly,

MARY WHITE WOLTON
Mrs. Albert A. Wolton.

WARWICK, VA., February 21, 1958.

DEAR SIR: I feel that bill S. 2040 should not be passed. I personally believe that the Supreme Court, vested with its existing powers, has been a regulatory body to the advantage of this country for the entire history of this Government.

ALBERT W. DODD.

WASHINGTON, D. C., February 23, 1958.

CHAIRMAN,
Senate Internal Security Subcommittee,
Senate Office Building, Washington, D. C.

DEAR SENATOR: As a resident of California, but primarily as an American citizen, I am writing you in strong support of Senator Jenner's bill, S. 2040, which your committee is now studying.

The withdrawing of certain appellate jurisdictions from the nine sociologists in black robes, or Supreme Court, is absolutely necessary if we are to preserve our republican form of government.

New Dealers and modern Republicans, through the process of appointing their own kind to the Supreme Court, have finally secured a majority on that Court who now implement their own social and welfare theories by means of Court decisions. This is evidenced by the Court's adherence to the principal that the Constitution should be amended by liberal interpretations or by liberal Court decisions, rather than the customary belief that the power to amend is inherent in the people—and not the ADA or Gunnar Myrdal's robed disciples.

There are many reasons why Congress must support this timely and necessary legislation. For example, let us review the Court's record of the past 10 months as applied to security measures. These 10 cases directly affected our internal security, and in each case the Court found in favor of those who appealed against one or another law or administrative regulation designed to protect the Nation against internal subversion. Insofar as your committee is thoroughly familiar with the details of each case I shall only name them by title. They are:

1. *Communist Party v. Subversive Activities Control Board.*
2. *Commonwealth of Pennsylvania v. Steve Nelson.*
3. *Fourteen California Communists v. United States.*
4. *Cole v. Young.*
5. *Service v. Dulles.*
6. *Stochower v. Board of Higher Education of New York.*
7. *Swecsy v. New Hampshire.*
8. *Konigsberg v. State Bar of California.*
9. *Jencks v. United States.*
10. *Watkins v. United States.*

According to National Review, the accompanying rollcall shows how the Court members voted on the 10 internal security measures. Keep in mind, each decision, each stroke of the pen, destroyed much of States' rights and, equally important, our very survival is threatened by the Court's entry in the field of internal security.

Rollcall votes on internal security measures

	<i>Against</i>	<i>For</i>
Earl Warren.....	10	0
Hugo Black.....	10	0
Felix Frankfurter.....	9	1
William O. Douglas.....	10	0
John M. Harlan.....	8	2
William J. Brennan, Jr.....	5	0
Harold H. Burton.....	0	8
Tom Clark.....	2	7
Charles Evans Whittaker.....	1	0

There is considerable talk, Senator, that the Supreme Court has gone over to the left-wing elements. Some say that it has actually become a "running dog" of the Kremlin.

Passage of Jenner's bill S. 2046 is essential to turn the tide in bringing the control of our country back to the American people under the Constitution.

Sincerely and respectfully yours,

KELVIN W. A. BAILEY.

NORTH HOLLYWOOD, CALIF., *February 21, 1958.*

Hon. JAMES O. EASTLAND,

Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: We deem it imperative that Senate bill, S. 2040 (Jenner bill) be passed immediately in order to curb the usurpation of congressional powers by the Supreme Court. We also feel that this legislation is urgent in order to reestablish a proper balance of power to the three branches of our Government and to return States rights to the States.

May God bless your endeavors and the vallant members of your committee who are giving so much of yourselves for the reinstitution of constitutional government in our beloved country, America.

Very sincerely,

Mrs. FERDINAND L. FRICH.

SAN DIEGO, CALIF. *February 22, 1958.*

In re S. 2046, United States Supreme Court

Senator JAMES O. EASTLAND,

Chairman, Judiciary Committee,

Senate Office Building, Washington, D. C.

DEAR SIR: We have read the report of the Subcommittee to Investigate the Internal Security Act, dated Wednesday, August 7, 1957, and many, many reports, commentaries, and results of the Supreme Court's 4-year attacks on this Nation. There can be no excuse for their conduct and drastic action must be taken before all honest citizens give up hope of saving the Nation from treason. We personally know many sound citizens who now despair.

By all means pass the Jenner bill or similarly drastic versions which will not be used by the executive branch would-be dictators to advance their own disregard of the Constitution.

Justices Frankfurter and Warren, as the worst of the nine, should be impeached, and there is plenty of evidence of high crimes to satisfy any honest American minds. Act before Senators Jenner and Byrd are gone and while there is yet some honesty in Congress.

Yours very truly,

RALPH R. ALLEN.

MAMIE K. ALLEN.

P. S.—We wonder whether or not a term limit and experience as appellate judge before appointment are not advisable.

R. R. A.

UPLAND, CALIF., February 20, 1958.

HON. JAMES O. EASTLAND,
Senate Office Building,
Washington, D. C.

DEAR SIR: We have been greatly disturbed by the recent liberal decisions of the Supreme Court. We sincerely desire that you will vigorously support Senator Jenner's bill, No. 2646, to curb further such decisions.

Thank you so much for your favorable support for this bill.

Yours very truly,

CHAUNCEY B. STORY.
RHUAMAH S. STORY.

WALTER H. BUCK,
Baltimore, Md., February 26, 1958.

DEAR SENATOR EASTLAND: I hope the Jenner bill will be approved by the committee so that it can be brought out for debate. Even those on the committee who may finally vote against it in the Senate should be willing to see it brought out.

The spectacle of the Supreme Court managing schools could never have been envisaged by anyone.

The 14th Amendment distinctly says Congress shall have power to enforce it. Why should any Senator sit idly by and see Congress deprived of its constitutional rights?

Read Hozell's article in the latest number of National Review.

Yours truly,

WALTER H. BUCK.

THE GREENWAY, Baltimore, Md.

Senator JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: I watch your views and how you vote with interest, and now am bold enough to urge you to vote for the Jenner bill, S. 2646, when it comes before your committee, also on the floor of the Senate.

You Southern Senators are the only ones left whom I consider true Americans, and with great humiliation I admit having been a Republican but—before the days when that party was taken over by Socialists.

Cordially,

MILDRED MILLER.

FEBRUARY 21, 1958.

DENTON, TEX., February 18, 1958.

DEAR SIR: I am a graduate college student working on a master's degree in Science.

In the name of God, do something about this strange, warped Supreme Court of ours.

Its effect is felt all the way down to each and every individual home and person.

It is the general public belief that Justices like Douglas and Earl Warren either have a personality disorder or they are genuinely influenced by leftist and Communist front movements in the United States, which at a time like this, is pure treason.

What is also appalling is the influence that it has had upon those in college circles who are "fellow travelers," pseudo-sophisticated "pinks," and the lot. They abound in such departments as government, economics, drama, etc. At any rate, the attitude of our sickened Supreme Court has given impetus to this group of emotionally insecure, miserable individuals.

Something must be done—the public is getting tired of the effects produced, and since your Committee is staffed with gentlemen whose livelihood is political opinion for the most part, I trust, and would clear up this situation before "heads roll."

Thank you.

LARRY HAMILTON.

DALLAS TEX., February 18, 1958.

Hon. JAMES O. EASTLAND,
Chairman, Committee on Internal Security,
United States Senate.

Gentlemen: I write you to ask your help, and in support of Senate Resolution 2046 of Senator William Jenner of Indiana.

I feel that our so-called Supreme Court must be curtailed, if the freedom for which I and countless other Americans have fought for is to be preserved.

The Court's action in declaring State sedition laws unconstitutional was the "lowest blow" ever struck for Communism.

The Court should be made to give back the lawmaking power to the Congress where it belongs.

The Supreme Court should return to a court of law and make its decisions according to precedents in law; and not according to some left wing liberal or other pressure groups idea of what the law should be.

Yours for a return to true constitutional government and States rights.

Sincerely,

ERNEST ABBOTT.

THE AMERICAN INSTITUTE,
 Wollaston, Mass., February 27, 1958.

Hon. JAMES O. EASTLAND,
Chairman, Judiciary Committee,
Senate Office Building, Washington, D. C.

DEAR CHAIRMAN EASTLAND: Our members demand committee approval and the enactment of Senator Jenner's bill "to limit the appellate jurisdiction of the Supreme Court" in five specific areas: "Investigate functions of the Congress, the security program of the executive branch of the Federal Government, State antisubversive legislation, and the admission of persons to the practice of law within individual States."

We request that this letter be offered for the record during present hearings and during Judiciary Committee deliberations which follow.

In our opinion, the present arrogant and ignorant members of the Supreme Court, who now attempt to make the law, should be impeached. Impeachment proceedings should be instituted during this session of Congress.

Respectfully yours,

OSWALD A. BLUMIT, *President.*

SAN ANTONIO, TEX., March 3, 1958.

Senator JAMES O. EASTLAND,
Committee on Internal Security,
Senate Office Building, Washington, D. C.

Our country is surely doomed if something cannot be done to curb adverse decisions of the Supreme Court. Your bill S. 2046 would help overcome mistakes. It is backed by many who fail to tell you so. Use every effort to pass this bill.

Mrs. MARIE McLEAN.

DALLAS, TEX., March 3, 1958.

Senator JAMES O. EASTLAND,
Committee on Internal Security,
Senate Office Building, Washington, D. C.

We are in favor of Senate bill No. 2046 as proposed by Senator Jenner. We deplore the weakening of the Smith Act by the Supreme Court.

Mrs. FRED H. PENN.

CLINTON, N. Y., February 26, 1958.

DEAR SIR: We urge you to act favorably in your committee on S. 2046, to limit appellate jurisdiction of the Supreme Court, which by its recent decisions is destroying our form of government.

We urge that this bill be brought before Congress for action at once.

Respectfully,

P. B. POWELL,
 GLADYS POWELL.

BAKERSFIELD, CALIF., February 26, 1958.

DEAR SENATOR EASTLAND: This is a plea for the passage of the Jenner bill, S. 2040 to curb the renegade Supreme Court.

KIRK RAOLAND,
Kern County Chairman of the Constitution Party.

TROY, N. Y., February 28, 1958.

DEAR SENATOR EASTLAND: I'm writing to let you know how much I'm in favor of proposed bill S. 2040. I feel that the Supreme Court has been exercising unjust power and hope it will finally be curbed. Please support S. 2040.

Sincerely,

THOMAS BALLARD.

DALLAS, TEX., February 26, 1958.

Senator JAMES O. EASTLAND,
Chairman on Internal Security Committee.

SENATOR EASTLAND: I am greatly in favor of bill S. 2040 passing by a whole-sale landslide. It will give everyone a new lease on life and something to look to for future times. I am all for it.

Sincerely,

KATHRYN BICKHAM.

"STRAITHIA,"
COLD SPRING HARBOR,
Long Island, N. Y., March 1, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SIR: Please vote for bill S. 2040 to limit the appellate jurisdiction of the Supreme Court in certain cases. I feel that in certain recent decisions the Supreme Court is usurping the power of the States.

Please use your influence in favor of this bill.

Yours respectfully,

(Mrs.) CONSTANCE BARROW.

DETROIT, MICH.

Senator EASTLAND,
Washington, D. C.

DEAR SIR: I urge you to pass the Senate bill No. 2040 as it is most important to counteract communism.

Yours truly,

MRS. FRED SCHNEIDER.

SHERMAN OAKS, CALIF., February 26, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: Please use your expert ability to favorably report S. 2040, the Jenner bill limiting the appellate jurisdiction of the Supreme Court.

It is of utmost importance to the preservation of our Republic to curtail the trend of the present Supreme Court and return to Congress the rightful role as the sole source of national law.

Thank you for your consideration.

Very truly yours,

DORISS H. LOVE,
Mrs. Sterling T. Love.

FALMOUTH, IND., March 1, 1958.

The SENATE INTERNAL SECURITY SUBCOMMITTEE,
Washington, D. C.

This is to inform you that I approve of the bill Senator Jenner has introduced to limit the Supreme Court. This bill should be made a law for several reasons.

It is foolish to keep on spending billions for "foreign aid" and allow the Supreme Court to continuously make decisions in favor of Communists.

Let the Supreme Court keep within its regular functions and stop aiding Communists and meddling in the public schools.

Incidentally I'm not in favor of billions for "foreign aid."

Very sincerely, an American and a taxpayer.

Mrs. LUTE PARKER.

St. PETERSBURG, FLA., February 26, 1958.

Mr. EASTLAND,
Chief Clerk of the
Committee on Judiciary.

It has come to our attention that the Senate bill No. 2040, introduced by Senator Jenner will come up for consideration. We are very much in favor of this bill and hope and pray that it will be passed. What the Supreme Court has done of late is a disgrace and a shame. We think they are Communist stooges and we need the proposed bill to limit their power. We love our country and do not want it turned of to Communists. Also the fact that the Supreme Court ruled in favor that bill which allows filthy literature to go through the mails, if you have ever seen any of this rotten stuff which comes through the mails, its dreadful. The passage of that bill should be rescinded. Thanking you to vote in favor of Senate bill 2040 we remain

Respectfully,

WILLIAM H. SCHEEL,
LOUISE M. SCHEEL.

NARBERTH, PA., February 25, 1958.

Senator JAMES O. EASTLAND,
CHAIRMAN, JUDICIARY COMMITTEE,
United States Senate, Washington, D. O.

DEAR SENATOR EASTLAND: I do so hope your committee will vote for Senator Jenner's bill (S. 2040).

Surely, something must be done to limit the jurisdiction of the Supreme Court. Here we are asked to give more billions to foreign aid. More billions to enlarge our space program and why?

They tell us "because we are at war (cold) with Russian communism." Yet our Supreme Court doesn't understand this, and they dare to make light of it. That's exactly what they have done.

Also our States better soon regain some voice in their government instead of running to the Federal Government for answers.

And what about repealing the 16th amendment. Anyway, please do something!

Very truly yours,

MARION W. LORD,
(Mrs. K. S.)

P. S.: My husband ages with me.

FERRIDAY, LA., February 28, 1958.

SENATE INTERNAL SECURITY SUBCOMMITTEE,
U. S. Senate, Washington, D. O.

DEAR SENATORS: Having followed recent news concerning the proposed Jenner bill to restrict the powers of the Supreme Court, I would like to take this opportunity to express my support of this bill and my desire that your subcommittee is able to get some action on it. Although I am a young man, aged 26, I can still remember that as a student in school I was taught of the "checks and balances" of our Government. It seems that today a lot of people, including the President and the Justices of our Highest Court, feel that the Court can do no wrong. Needless to say, we all make errors. But our court has made too many here recently and has left our country split on many issues when we need unity. It is time that Congress, as the chosen representatives of the people, resume their rightful place in our Government.

There is no doubt in my mind that the Supreme Court has left its place as interpreter of the law and assumed Congress' place as maker of laws.

My congratulations to Senator Jenner for his courage. I have long admired his honesty and loyalty to our country, and this bill on his part proves to me that my judgment was good.

Thank you for your time. I remain,
Sincerely,

AUSTIN DAVIS.

In re: A proposed Amendment to S. 2040, to include false and incomplete oaths, in Federal Courts:

To: Honorable James O. Eastland, Chairman, and all members of the Senate Judiciary Committee:

I have sent to Hon. William E. Jenner, and am sending to your chairman, legal evidence relating to an actual occurrence in Federal District Court, Brattleboro, Vt., in the Miller cases, before Ernest W. Gibson, District Court Judge, as described in the photostatic copies submitted.

It is my opinion, and I will so testify if subpoenaed before your committee, that the historic opinion of Chief Justice John Marshall, *Marbury v. Madison*, (1 Crauch 137), though correct so far as it goes (correct as to nonjury cases), that it is not the law, and never has been the law, that the Constitution is exclusively for Judges to interpret when defendants are on trial before Juries. (It is the people's Constitution; not the private property of Federal Judges, either of district courts, or the Supreme Court).

Marbury v. Madison says this—and only this: "In some cases, then, the Constitution must be looked into by the Judges." It does not say that "only Federal Judges may look into the Constitution;" and furthermore, Chief Justice Marshall never meant for his great decision to be so misinterpreted and misapplied.

Marbury v. Madison was a nonjury case. So, of course it was proper for Chief Justice Marshall to "look into the Constitution" and to interpret it as he did in that case. His historic decision became the law of that case; but it did not become the law of the land, to be so construed and applied in cases before Juries.

I assert the fundamental law of the land to be, as stated in my letter to editor, (sent to your chairman and Senator Jenner), that "Juries must determine the guilt or innocence of defendants on trial before them, agreeably to the Constitution and laws of the United States." Not merely "agreeably to the laws of the United States," which conceivably may be unconstitutional; but, "agreeably to both the Constitution and laws of the United States; and not repugnant to either the one or the other.

It is my straight-forward claim that neither God, nor his Commandments, nor the Golden Rule, nor the Holy Bible, nor the Declaration of Independence, nor the Constitution, can legally be thrown out of court-rooms, in either Federal or State courts, as is now being done; but that on the contrary, each and every one of these divinely-inspired documents should and must be invoked constantly, wherever applicable, and properly should be invoked in the name of Our Lord and Savior, Jesus Christ.

Therefore, I respectfully state to the Judiciary Committee, before which S. 2040 is now pending, that there should be an appropriate amendment to cover this situation, and I offer my testimony in support of this contention, at any time, when properly subpoenaed.

In this regard, it should be noted that "The sentinel of liberty and justice is the individual," as so clearly stated and emphasized in the Federalist Papers, and in Bills of Rights attached to Constitutions of original States, in which the truism is emphasized, that each of us is "Born equally free and independent." I can supply the name of two witnesses to corroborate my testimony, in addition to the Millers, if you care to have them.

Respectfully,

NED R. HARMAN.

AMITYVILLE, N. Y., February 21, 1958.

GENTLEMEN: After reading President Eisenhower's message to Congress on foreign aid, I note he talks of Communist absorption of whole nations by subversion or economic aid, yet he does nothing to stop Communist subversion in the United States.

These nine unelected Supreme Court officials have run wild with their pro-Red decisions.

I worry about America first and want you to know I am heartily in favor of Sen. Jenner's bill S. 2040 to limit the power of this Court.

Since I cannot testify in person for the S. 2040 bill, I am writing in its favor.

Any violent opposition from Communists and pro-Communists should only serve as a strong warning of the vital necessity for the passage of this bill.

We have seen in Red-dominated lands the results of too much power in the hands of too few.

I have written my Representative of my support of this bill.

If the Supreme Court can't decide who is un-American, then definitely someone else should.

Sincerely,

Mrs. JEAN McMAHON,

FEBRUARY 26, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building,
Washington, D. C.

DEAR SIR: This is to advise you that I am in favor of Senate bill No. 2040 as proposed by Senator Jenner. I would also like to ask you to include S. 2040 provisions for correcting the dangerous decision made by the Supreme Court weakening the Smith Act.

I sincerely hope that you have success in passing these bills.

Yours truly,

(Mrs. Wm. O.) MARIE HELMBRECHT.

DALLAS, TEX., February 27, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SENATOR: I want you to know that the bill, No. 2040, proposed by Senator Wm. Jenner receives much support in our city and State.

The Supreme Court has usurped "all power" in our Government and the Congress should do whatever necessary to return the Justices(?) to the very important function of interpreting the law instead of making it or writing new laws. I have always thought the legislative branches were the lawmakers of this land. We deplore the weakening of the Smith Act by the Supreme Court. Also, we resent the Supreme Court's recent decision in the Mallory case. Please have provisions in the bill for correcting this dangerous power, which may mean the downfall of our great Government without any outside conspiracy.

I have 14 grandchildren, all trying to make good citizens. Please help them and others in school with them. I know you will and I thank God for you and men like you.

Sincerely,

(s) ELLA CHILTON BOREN.

MARCH 1st, 1958.

Senator JAMES O. EASTLAND,
Chairman, Committee on Internal Security,
Washington, D. C.

DEAR SENATOR: When our Supreme Court (which lately has convinced voting American citizens that it no longer deserves the title of "Supreme Court") takes such liberties with the Smith Act that lower courts are now forced to free notorious Communists who have already been convicted of conspiracy to teach and advocate the violent overthrow of our United States Government, it is time for voters to express their indignation and distrust of such a body of men whose "supreme job" is the protection of our democracy. Now that the so-called Supreme Court has tied the hands of the police and our lower courts in combatting "mugging" and the senseless beatings by young thugs, so that the streets are no longer safe for the use of peaceful citizens, in the large cities, I write to urge you to make provisions for correcting the danger manifested in the Mallory decision in that highest court's recent rulings.

With our top-heavy United States Government blundering in so many departments, the time has come when we should depend on the States for handling matters that can best be handled Statewise. Therefore I wish to express myself

In favor of Senate bill No. 2046 proposed by Senator Jenner. I am in favor of each State's right to regulate subversive activities.

Yours truly,

LYDIA KARCHER

—
MRS. DAVID C. BOND,
Radnor, Pa., February 25, 1958.

DEAR SENATOR JAMES O. EASTLAND: I am writing to urge your committee to vote for Senator Jenner's bill (S. 2046) which will limit the appellate jurisdiction of the United States Supreme Court.

It is high time we patriots were heard! I love my country! I am alarmed at the actions of the Supreme Court. I am alarmed at the socialistic tendencies evinced by our Government in the past years. I am alarmed particularly, at the appalling condition of our schools! I know, because I am in the midst of attempting to combat a gang group of "Educationists," who are determined to mold our children's minds! The future citizenry of this United States!

Sincerely,

—
LORRAINE BOND.

—
BELMONT, MASS., February 28, 1958.

Senator JAMES O. EASTLAND,
Chairman, Judiciary Committee,
Washington, D. C.

DEAR SENATOR EASTLAND: May I urge in the strongest terms I can command that your committee approve the bill of Senator Jenner (S. 2046) for curbing the appellate jurisdiction of the Supreme Court.

The Constitution provides that all political powers belong to the legislative and executive branches (Federal and State). The Supreme Court, however, has taken to making political decisions; it has done so in every one of the cases to which the Jenner bill is addressed, in clear violation of the Constitution.

If we are to retain our freedom and our way of life as we have known it, these inexcusable and unconstitutional acts of the Supreme Court must be halted immediately. Moreover, I feel the Supreme Court should be censured for acts they must have known were unconstitutional.

It is high time to restore the respect of the people to those appointed to the Supreme Court. At present the Court has neither my confidence or respect.

Please approve the Jenner Bill.

Respectfully submitted.

—
GEORGE LEE VAN WYCK.

DAMES OF THE LOYAL LEGION OF THE
UNITED STATES OF AMERICA,
Sarasota, Fla., February 24, 1958.

IN SUPPORT OF JENNER BILL (S. 2046)

Whereas, Our unique system of Government by laws, not men, in its division of powers gives great importance to our Federal Supreme Court, and

Whereas, The Supreme Court must give judicial decisions, and

Whereas, These judicial decisions become part of the supreme law of the land, and

Whereas, To permit the Supreme Court to usurp the law-making powers of the Congress, even by writing implementing legislation, injures the basic fabric of our Government, as laws made by a majority of the Court with life tenure in office could reduce this nation to rule by a five-man oligarchy, instead of a nation governed by our own Constitution, and

Whereas, Recent decisions by the present Supreme Court were based on Socialistic treaties, not on Law, and said decisions encroach upon the powers of the Congress and are a menace to the Constitution of the United States, therefore be it

Resolved, That the National Society, Dames of the Loyal Legion of the United States of America, urges the Congress to endorse the principles of S. 2046, known as the Jenner Bill, to limit the appellate jurisdiction of the Supreme Court.

FORT WORTH 4, TEX., Feb. 26, 1958.

Senator JAMES EASTLAND,
Committee on Internal Security
Senate Office Bldg., Washington, D. C.

DEAR SENATOR EASTLAND: In my humble opinion Resolution S. 2646 is excellent and needed. The Supreme Court needs to have their powers curtailed.

Sincerely yours,

Catherine Carlton D. O.
CATHERINE K. CARLTON D. O.

DALLAS, TEX., February 28, 1958.

DEAR SENATOR EASTLAND: As a member of the Public Affairs Luncheon Club here in Dallas, may I urge you to please vote for Senate Bill No. 2646 as proposed by Senator Jenner. This Bill is of vast importance to our country and your support will be greatly appreciated.

Sincerely,

Mrs. I. G. THOMPSON.

WAYNE, PA., February 24, 1958.

Senator JAMES EASTLAND,
Chairman, Judiciary Committee,
United States Senate, Washington, D. C.

DEAR MR. EASTLAND: Please urge your committee to vote for Senator Jenner's bill (S. 2646) which will limit the appellate jurisdiction of the U. S. Supreme Court.

Very truly yours,

PAULINE R. FANUS,
WILLIAM E. FANUS.

PAOLI, PA., February 27, 1957.

Hon. JAMES O. EASTLAND,
Senate Office Building,
Washington, D. C.

DEAR SENATOR EASTLAND: I sincerely trust that you will act favorably on Senator Jenner's bill, S. 2646.

If this Nation is to survive and be free of serious internal troubles it is necessary to preserve the Constitution and live in strict obedience to its provisions.

Very truly yours,

CLAUDE W. JORDAN.

CHARLESTON, W. VA., February 27, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building,
Washington, D. C.

DEAR SENATOR EASTLAND: We are eager to have you know that we are strongly in favor of Senate bill 2646 to control the power of the Supreme Court and to restore traditional sovereignty to the States. We understand that the liberals have been screaming to high heavens against the bill but few conservatives have been heard from. Well there are plenty of conservatives, but we seem to have no pipeline out of Washington to let us know when important issues are coming up. We are just not so well organized as the leftwingers. We will try to let the conservatives know about this bill.

Sincerely,

Mr. and Mrs. ROSS B. JOHNSTON.

GEO. J. GLOVER COMPANY, INC.
New Orleans 12, La., February 26, 1958.

DEAR SENATOR EASTLAND: I understand your committee is supposed to start hearings on Senator Jenner's resolution 2646 around February 12.

I have been watching our local newspapers very carefully for anything about it, and I have as yet to see anything about it. So today I called Mr. Joels Tims of the Times-Picayune, who said he would check into it. I know him personally,

but that does not mean I have his beliefs, too. I feel sure if his two papers publish anything about it, the third paper will be forced to do it.

Senator, I am very worried about our country. I am not a lawyer, so, frankly, I cannot suggest anything to write the Supreme Court, but something has to be done and now. I trust you and your colleagues will be able to do something about it. I am trying to get people down here to write our Congressmen to get on the ball. Thomas Jefferson said if this country were to fall, it probably would be because of the judiciary.

God bless you Senator.

I am,

Sincerely,

JOHN A. GLOVER.

MARSHALL, TEX., February 27, 1958.

Senator JAMES O. EASTLAND,

Senate Office Building, Washington, D. C.

DEAR SENATOR: We are interested in the hearings the Senate committee on internal security is holding on resolution S. 2646.

We thank you for your efforts. States need to have the right to regulate subversive activities.

I favor resolution S. 2646.

Sincerely,

Mrs. MILLARD COPE.

VAN NUYS, CALIF., February 28, 1958.

DEAR SENATOR: Today being the anniversary of Washington's birth, we want to thank you for your patriotism—one of the few Senators fighting for our constitutional government. We are anxious that the resolution or bill Senator Jenner is introducing to curb the Supreme Court—the 9 black robed rascals of the Court. We look for you to do your part. You are chairman of the Judiciary. Our country is in mortal danger. It is disturbing that both our Secretary of State and our President have expressed an affinity for the super state. Foreign aid and our troops in 73 countries a manifestation of one worldism rather than for our defense. No foreign aid.

Thanks.

O. WILLIAMS.

KANSAS CITY, MO., February 25, 1958.

Senator JAMES O. EASTLAND,

Washington, D. C.

DEAR SENATOR EASTLAND: We endorse the Jenner bill, S. 2646, and want to see it adopted.

Sincerely,

Dr. and Mrs. H. E. SCHOEN.

DALLAS, TEX., February 28, 1958.

Senator JAMES O. EASTLAND,

Committee on Internal Security,

Washington, D. C.

Dr. Anson L. Clark and Col. Wann E. Hill, of the Cornell Oil Co., 4616 Greenville Ave., Dallas 6, Tex., are in favor of Senate bill No. 2646, as proposed by Senator Jenner.

WANN E. HILL.

SPokane, WASH., February 28, 1958.

Senator JAMES O. EASTLAND,

Washington, D. C.

Please be advised there are 150 members of Pro America here in Spokane who are in accordance with the Jenner bill S. 2646 now in hearing.

Mrs. R. W. CASTLIO.

President of Spokane Unit Pro America.

DALLAS, TEX., February 28, 1958.

HON. JAMES O. EASTLAND,
*United States Senator,
 Washington, D. C.*

Urge all possible action to pass the proposed bill No. 2646. Also urge opposition to Supreme Court's Mallory decision and weakening of the Smith Act.

Mrs. HENRY R. DAVIS.

PITTSBURGH, PA., February 25, 1958.

HON. JAMES O. EASTLAND,
*Senate Office Building,
 Washington, D. C.*

HONORABLE SIR: It is to be hoped there will be favorable action on Senator Jenner's bill to curb the Supreme Court, especially since we have a President that says the rulings of the Supreme Court is the law of the land.

About 60 years ago when I studied history and the Constitution, I thought it was very plain that only Congress was the legislative body so the only part of government that could legislate law.

Of late that former seems to have been usurped by the Supreme Court with disastrous results as in cases against Communists, the tying the hands of congressional investigating committees and the segregation decision.

Most decisions have, in my estimation, violated the Constitution as they have denied the rights reserved to the States. We need a law to curb the Supreme Court and any President who may try to enforce their mandates by use of the Armed Forces. We face greater peril from within than we do from without.

Sincerely,

SAM H. COLLINS.

DALLAS, TEX., February 27, 1958.

HON. JAMES O. EASTLAND,
*Chairman, Committee on Internal Security,
 Washington, D. C.*

DEAR SENATOR EASTLAND: My attention has been called to a hearing on resolution S. 2646 and I want to indicate to you as strongly as I know how my full approval and endorsement of each of the issues presented by resolution S. 2646.

The powers of the Supreme Court must be curbed or we shall lose our liberties and the ideal of States rights will have vanished.

The recent decisions of the Supreme Court have encouraged the Communists, the subversives, and every red element of this country to violate the law with impunity.

The juries of our country have done their full duty and have convicted the Communists and the subversives and the lower courts have sent these enemies of our country to be confined in penitentiaries. The Supreme Court has turned them loose. This must be stopped. The power to preserve law and order and protect the people of the several and separate States must be returned and vested in the courts of our separate and respective States.

The influence and the usefulness of the Federal Bureau of Investigation must be protected and preserved. The committees in the Senate and the House on un-American activities must be continued. Thorough and exhausting investigations must be carried on through the Senate and the House committees to protect our country from our enemies.

In my humble opinion resolution S. 2646 is just as necessary to protect the welfare of our country as is the missile program. What would it profit America if we gained supremacy in the air—in space—and lost our liberties through the operation of the enemies of this country protected by the decisions of the Supreme Court?

The members of the Senate may not know it, but the citizens—the common people—are way ahead of their demand for something to be done immediately to curb the power of the Supreme Court to destroy this Republic.

With every good wish for your success in your patriotic endeavor and with warmest personal regards.

Sincerely,

ALVIN M. OWSLEY.

DALLAS, TEX., *February 28 1958.*

DEAR SENATOR EASTLAND: Please give all your support to passing Senate Bill No. 2646. We are wholehearted in favor of it.

Sincerely,

Mrs. ROBERT L. MOORE.

DALLAS, TEX., *February 27, 1958.*

HON. JAMES O. EASTLAND,
*Chairman, Senate Committee on Internal Security,
Washington, D. C.*

MY DEAR SENATOR: May I urgently request that you do everything in your power to successfully guide Senate bill 2646—to limit appellate jurisdiction of the Supreme Court in specific areas—through the hearings now in progress before the Internal Security Subcommittee of which you are chairman.

Unless this session of the 85th Congress is able to place some restraint upon the Supreme Court, it is improbable our Nation can survive. A favorable report from your subcommittee is the first step. I endorse this resolution and request your fullest support of it.

Respectfully,

JAMES N. LANDRUM.

NEW YORK 17, N. Y., *February 27, 1958.*

HON. JAMES O. EASTLAND,
*Chairman, Senate Judiciary Committee,
Washington, D. C.*

DEAR SENATOR EASTLAND: Just a note to say that I am 100 percent in favor of the bill prepared by Senator Jenner to curb the dictatorial power assumed by the Supreme Court.

Very respectfully yours,

JOHN T. BALFE.

DAVENPORT, IOWA, *February 17, 1958.*

Senator SPESSARD L. HOLLAND,
Senate Office Building, Washington, D. C.

DEAR SENATOR HOLLAND: I request that this statement be filed in the records of the Internal Security Subcommittee.

The Iowa State Society, National Society of the U. S. Daughters of 1812, strongly urges passage of Senate Resolution 2646, introduced by Senator William Jenner, a resolution to clarify the Supreme Court's power.

Our Government, under the U. S. Constitution, is based on a system of checks and balances of power of the executive, legislative, and judicial branches. In recent years, the Supreme Court has overstepped its authority in many ways, changing our Government by reinterpretation and misinterpretation, handing down decisions completely without legal reason and backing, taking over and negating the rights of the States guaranteed by the Constitution, giving aid and comfort to the enemy by denying to the States their proper power to control subversive activities within their jurisdiction, and, in general, demonstrating the utter impracticality of giving such unearned and undeserved position and respect to men, now in the Supreme Court, who averaged only about 2 years of judicial experience before they were ill-advisedly thrust into this position of importance.

If our Government is to continue as a Republic, it is essential that our laws be made by legislators elected by the people—not subject to misinterpretation and veto by the Supreme Court, who are appointed by one man, thereby giving to one man the potential power of a dictator.

Sincerely yours,

Mrs. GERALD O. INMAN,
*State President, National Society,
United States Daughters of 1812.*

DEAR SENATOR EASTLAND: I wish that you and Senator Jenner would run for Vice President and President; I believe that people are ready to vote "American" if given a chance.

This is a copy of a letter sent to several Senators, by me.

Sincerely,

GWEN INMAN.

LA CRESCENTA, CALIF., February 24, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building,
Washington 25, D. C.

DEAR SENATOR EASTLAND AND ALL OTHER MEMBERS OF THE JUDICIARY COMMITTEE: Please uphold Senator Jenner's bill S. 2640, to limit the jurisdiction of the Supreme Court.

Let's place our Government back in the hands of, for, and by the people!

Jenner's bill would withdraw appellate jurisdiction from the Court in the following areas:

- (a) The investigative activities of Congress.
- (b) The security program of the executive branch of the Government.
- (c) State legislation against subversive activities.
- (d) Home rule over local schools.
- (e) Admission to the bar in individual States.

This is an excellent bill and may it have the solid support of all members of the Judiciary Committee.

Sincerely,

GERRY STONE.

RESEDA, CALIF., February 24, 1958.

Senator J. O. EASTLAND,
Room 424, Senate Office Building,
Washington, D. C.

DEAR SIR: I am in favor of your bill 2640 and urge you to do everything in your power to put it through.

Very truly yours,

P. O. DWYER.

HEDRICK, IOWA, February 24, 1958.

Senator JAMES O. EASTLAND,
Washington, D. C.

DEAR SENATOR: I have written Chief Justice Warren several times my objections to his handling of the Court.

I sincerely hope that proper consideration will be given Senator Jenner's bill, S. 2640, with a view of correcting these injustices.

I am strongly opposed to a number of decisions rendered by this Court, especially when dealing with Communists and labor racketeers.

Respectfully yours,

D. E. BECK.

IRVING, TEX., February 26, 1958.

Senator JAMES O. EASTLAND,
Committee on Internal Security,
Washington, D. C.

DEAR SENATOR EASTLAND: It is my understanding that hearings on Senate bill 2640 are now in progress and I wish to express my support of the bill of Senator Jenner's, which proposes to return to the States the right to regulate subversive activities.

I urge that you make provisions in this bill to correct the dangerous decision rendered recently by the Supreme Court in the Mallory decision, which ties the hands of the police and courts in combating "muggings" and beatings.

Very truly yours,

EDITH T. STARBETT
(Mrs.) Donald O. Starrett.

WHEATON, ILL., February 20, 1958.

This is to urge continued strong support of S. 2040 to limit powers of Supreme Court. These usurpers must be brought back to their place in government designated by the Constitution. They have neither legislative or executive powers and must be curbed. Congress has the power to do this. Congress is the general manager of the Government.

BERTHA H. PALMER.

CHARLOTTESVILLE, VA., February 27, 1958.

Senator JAMES O. EASTLAND,
Committee on Internal Security,
Washington, D. C.

DEAR SIR: I wish to place myself on record as favoring S. 2040.
Very truly yours,

HELEN P. GLEASON.
(Mrs. J. Emmett Gleason)

SAN FERNANDO, CALIF., February 20, 1958.

Senator JAMES O. EASTLAND,
Washington, D. C.

I am a California voter, and am writing in favor of bill S. 2040 which will limit the appellate jurisdiction of the United States Supreme Court.

MRS. WALTER A. RUKFF.

NIAGARA, WIS., February 20, 1958.

Senator JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee,
Washington, D. C.

DEAR SENATOR EASTLAND: I wish to urge you to support the Jenner bill which is designed to curb the wild excesses of the Supreme Court. The Court's recent decisions reversing lower court convictions of Communists and throwing open FBI and police files to almost anyone who wants to see them seem to be little short of insanity or worse. The best proof I know in support of the fact that those decisions were inimical to the best interests of the United States is the fact that they were praised by Communist papers and by the "liberals" and leftwingers and fellowtravelers.

Let us have an end to this subversion and lawmaking by judicial decision.

Yours truly,

O. D. Darne, O. D.

NORTH HOLLYWOOD, CALIF., February 25, 1958.

As a voter, I urge support of Senator Jenner's bill S. 2040.

RISIE BERNABUCCI.

LOS ANGELES, CALIF., February 24, 1958.

Senator JAMES O. EASTLAND,
Washington, D. C.

DEAR SIR: I understand that the Senate Judiciary Committee, of which you are chairman, has under consideration Senator Jenner's bill S. 2040 limiting the powers of the Supreme Court.

We are deeply concerned over many recent decisions by the Court which are giving aid and comfort to the enemy in our midst and are jeopardizing our security. Some action to counteract this danger is desperately needed and we would urge that this bill may be brought to the floor for action by the Senate as a whole, at the earliest possible date.

Thanking you.

Sincerely,

Mr. VICTOR L. BOECK.
Mrs. PEARL H. BOECK.

OLENDALE, Mo., February 28, 1958.

CHAIRMAN, SENATE JUDICIARY COMMITTEE,

Senate Office Building, Washington, D. C.

We strongly urge passage of bill S. 2040 limiting jurisdiction Supreme Court if Nation survives present confusion.

Mrs. J. O. BROOKSHIRE.

DALLAS, Tex., February 27, 1958.

Hon. JOHN L. MCCLELLAN,

Senate Subcommittee on Internal Security,
Senate Office Building, Washington, D. C.

MY DEAR SENATOR: Unless this session of the 85th Congress is able to place some restraint upon the Supreme Court, it is improbable our constitutional form of Government can survive; therefore, I urgently request that you support Senate bill 2040 to the fullest in the hearings now in progress before subcommittee of which you are a member. A favorable report by your subcommittee is a necessary first step toward congressional approval this year.

Respectfully,

JAMES N. LANDRUM.

FEBRUARY 27, 1958.

DEAR SENATOR EASTLAND: I am in favor of bill 2040, and I deplore the weakening of the Smith Act by the Supreme Court so that the lower courts are now forced to free notorious Communists who already have been convicted of conspiracy to teach and advocate the overthrow of the United States Government. I also resent the Supreme Court's recent Mallory decision which by tying the hands of the police and the courts in combing "muggings" and senseless beatings by young thugs, already has made it dangerous for peaceful citizens to walk the streets in some of our larger cities. Please include in bill 2040 provisions for correcting this dangerous decision.

Sincerely,

Mrs. C. F. HAWN.

DALLAS, Tex., February 25, 1958.

DEAR SENATOR EASTLAND: Just a note to say that I am definitely in favor of Senate bill 2040 as proposed by Senator Jenner concerning subversives.

I wish that in the bill you would do something about the Mallory decision and see if you can correct this situation.

Though I live in Texas and cannot vote for you, I am a great admirer of yours.

Sincerely,

Mrs. ROSS MADOLE.

BALTIMORE, Md., February 25, 1958.

SENATOR EASTLAND: I strongly urge the enactment into law of the Jenner Bill, S. 2040 being currently heard in committee. Through a series of decisions of the Supreme Court Americans are shocked to find such decisions strongly helpful to Communists and fellow-travelers. This dangerous trend must be stopped. I wish you Godspeed.

Very truly yours,

(Mrs.) FLOYD SAXTON.

KIMBERLY, IDAHO, February 23, 1958.

Senator JAMES O. EASTLAND,

Washington, D. C.

DEAR MR. EASTLAND: I wish to state that I am in complete favor of Senator Jenner's bill S. 2040 to limit the Supreme Court's power of dealing out communistic rulings against loyal Americans.

Please use all your influence to get it passed.

Most of my neighbors here want it passed but it's hard to get people to write for needed legislation until things get so bad they can hardly be corrected.

Yours for America,

M. R. BRANT.

NATIONAL SOCIETY, DAUGHTERS OF THE REVOLUTION,
February 27, 1958.

Senator JAMES O. EASTLAND,
Washington, D. C.

We, the undersigned, familiar with Senate Bill S. 2040 calling for restriction of the appellate jurisdiction of the Supreme Court in respect to State legislatures, local school bodies, the State bar associations, the Executive Branch of our Government, and the United States Congress; and thoroughly dismayed by the extent to which the Supreme Court in the past 3 years has destroyed the structures built by the people to protect themselves against the worldwide conspiracy of atheistic communism and by the chaos resulting therefrom in the Executive Branch, in Congress, in the Judiciary, and among our citizens; and aware that our Constitution gives to Congress, not only the full and unchallengeable power, but also the responsibility to regulate, by law, the appellate jurisdiction of the Supreme Court; hereby petition your committee on the Judiciary to take speedy affirmative action upon S. 2040.

DORIS B. KENT,
(Mrs.) FRANK D. KENT.
Edgewood, R. I.

SYLMAR, CALIF., February 26, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: I sincerely urge your committee's favorable action on Senate bill 2040, introduced by Senator William Jenner.

This bill is needed to protect the rights of patriotic American citizens.

Let's put a stop to a further succession of "Red Mondays."

Most sincerely,

MARY S. STONNEGER.

INDEPENDENT FARMERS OF INDIANA, INC.,
Albion, Ind., February 24, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

DEAR MR. EASTLAND: We would like to ask the Members of Congress to support Senate bill 2040. It is indeed tragic that we have allowed ourselves to drift into a position which makes this bill necessary.

Under the Constitution, Congress is given the duty of making the laws, and it is of vital importance that it retain these powers, and it has the right and duty to check the Supreme Court from assuming runaway authority. In view of the recent decisions of the Supreme Court on the issue of Communist subversion, the Congress must act to forbid the Court to review the validity of any congressional committee action, any executive security measures, the anti-subversive measures of any State or education body, and any State regulations on admission to the bar.

The bloated civil service is a fertile field for subversion. These subversives have been protected by the action of the Supreme Court. The sovereignty of the States is in jeopardy. If the States lose their power to deal with subversive actions, the very foundations of the Republic will be sacrificed. To deny the States the authority to control subversive activities within its teaching body will eventually and most surely destroy America as set forth in the Declaration of Independence and the Constitution.

Let us abide by the Constitution, first, last, and always.

Sincerely yours,

ETHAN STANGLAND.

ST. PETERSBURG, FLA.

Senator JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SIR: Re S. bill 2040. Please get it out of committee and vote for it immediately. Let's try to stop the "bad things" that are happening.

Sincerely,

AGNES DUGGAN.

ST. PETERSBURG, FLA., February 24, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: It would be very fine if you would pass bill S. 2040 and get it out on the floor of the Senate.

Something must be done to limit the appellate jurisdiction of the United States Supreme Court, in respect to State legislatures, local school bodies, State bar associations, the executive branch of our Government, and the United States Congress.

Most respectfully,

CATHERINE M. BYRNES.

BELLPORT, N. Y., February 24, 1958.

Hon. JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee,
Washington, D. C.

DEAR MR. CHAIRMAN: We wish to express our sincere and considered approval of Senator Jenner's bill (S. 2040) to limit the jurisdiction of the Supreme Court. Truly patriotic Americans decry many of the recent Supreme Court decisions, many of which serve to strip our country of the ability to protect itself against subversives.

We understand that Senator Jenner's bill would take away from the Supreme Court appeal power concerning: Congressional investigations, the Security program of the Executive Branch, State laws against subversive activities, home rule over local schools, admission to the bar in individual States.

We must have such a bill to protect our democracy.

Yours truly,

(Mrs. W. A.) IDA H. TILLINGHAUST.
W. A. TILLINGHAUST.

WESTFIELD, MASS., February 24, 1958.

DEAR SENATOR EASTLAND: I consider the bill S. 2040, now before your Committee, as the most important bill to come before the Congress this year.

If it passes, Congress can once more proceed to act under the Constitution, knowing that the Supreme Court can never again enact so-called laws and make them stick.

I have sent copies of this letter to five papers, that I know will print an anti-Communist letter, not including the New York Times.

Sincerely,

B. A. PRINCE.

FEBRUARY 24, 1958.

To the Editor of the ———

SIR: There soon begins a battle in the Senate as important as any that our country has faced since its existence as a Republic.

In it every Senator will have to stand up and be counted. He will have to fly his true colors—the flag of the United States, the Hammer and Sickle, the flag of the United Nations, or just plain rubber-stampers and me-tooers.

It is a fight to determine whether we as a people, with a cherished heritage, and occupying a proud position before the world, will continue to exist, or whether the Declaration of Independence and our Constitution will be scrapped.

I refer to Senator Jenner's bill (S. 2040) intended to take back from the Supreme Court the power it has so brazenly usurped, with no hindrance from the President, and return the Constitution and the Congress to the rightful position they once occupied.

If there are enough traitors and cowards in the Senate to defeat this bill, then the Supreme Court can reign unhindered, aided and abetted by the Communists and those hidden traitors in the Government.

If you care enough, write your two Senators and tell them to vote for this bill.

B. H. PRINCE.

UPLAND, CALIF.

Senator JAMES EASTLAND,
United States Senate, Washington, D. C.

DEAR SIR: My husband and I urge your approval of Senator Jenner's bill, S. 2040, limiting the power of the Supreme Court.

MR. AND MRS. J. DAVID PRICE.

EVER-DRY CORP.,
Los Angeles 65, Calif., February 22, 1958.

Hon. JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: If it will serve any purpose, I will undertake to get you any stipulated number of signatures of registered voters of all parties, endorsing the sentiments as expressed herein by this writer.

The revulsion against the Supreme Court, as it tears apart one bulwark after another of our defense against communism is universal here in this State which bows its head in shame over Warren and his open defiance of ethics, law and patriotism.

This man had no business upon any bench, let alone that of the Supreme Court, and this fact was well known to the legal fraternity of California when it feared and finally was shocked by the shameless appointment. In that one act, the realization came to many of us that Eisenhower, regardless of the grin and the platitudes, was woefully miscast as President of the United States.

Senator Jenner's S. 2040 is earnestly approved, and our surging hope is that your committee will do its utmost to secure presentation and quick passage.

Respectfully,

W. R. FAWCETT.

SANTA BARBARA, CALIF., February 25, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

Santa Barbara Unit, California Chapter of National Association of Pro-America heartily endorses Senator Jenner's bill S. 2040. Urge your committee recommend passage. This bill falls within our resolution passed October 1957.

Mrs. D. G. REYNOLDS,
Legislative Chairman.

LA JOLLA, CALIF., February 25, 1958

Senator JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee,
United States Senate, Washington, D. C.

Urge strong support of Jenner bill limiting the appellate jurisdiction of the Supreme Court in certain cases. Best regards.

Mrs. ELIZABETH G. EARLE.

PLYMOUTH MEETING, PA.

DEAR SENATOR EASTLAND: Below is copy of a letter I am mailing to the editors of at least three local newspapers, the Philadelphia Evening Bulletin and the Inquirer and the Norristown Times Herald.

FEBRUARY 25, 1958.

The Judiciary Committee of the United States Senate is now holding hearings on Senate bill 2040.

The committee chairman has stated that "Senate bill 2040 will go far to overcome much of the damage done by recent Supreme Court decisions—decisions (I might add) which have made a shambles of our defenses against subversion in these five fields:

(1) The investigative activities of Congress; (2) the security program of the executive branch; (3) State legislation against subversive activities; (4) home rule over local schools; (5) admission to the bar in individual States.

Since the hearings will end early in March, it is essential that everyone who wishes to help to protect the United States against subversion should write im-

mediately to the Judiciary Committee of the United States Senate and ask its members to recommend to the full Senate that Senate bill 2040 be passed.

The committee's address is Senate Office Building, Washington 25, D. C.

Sincerely yours,

HELEN PAYSON CORSON.

BALTIMORE, MD., February 20, 1958.

Hon. JAMES O. EASTLAND, Chairman,
Senate Judiciary Committee,
Senate Office Building,
Washington, D. C.

DEAR SENATOR EASTLAND: Being unable to attend the hearings on Senate bill S. 2040, I hereby request you and your Committee to take speedy action calling for restriction of the appellate jurisdiction of the Supreme Court with respect to the Executive Branch of our Government, the United States Congress, State legislatures, local school bodies and State bar associations.

Respectfully yours,

CAMILLA S. COOLAHAN.

WAYNE, PA.

Senator JAMES O. EASTLAND,
Chairman, Judiciary Committee,
United States Senate,
Washington, D. C.

DEAR SIR: I urge you to vote for Senator Jenner's bill (S. 2040) which would withdraw appellate jurisdiction from the court in the following areas:

1. Investigative activities of Congress; 2. Security program of the Executive branch of the Government; 3. State legislation against subversive activities; 4. Home rule over local schools; 5. Admission to the bar in individual States.

Our Supreme Court is getting out of hand.

Sincerely,

RENEE T. NORRIS.

FORT WORTH, TEX., February 23, 1958.

Senator JAMES O. EASTLAND,
Washington, D. C.

DEAR SENATOR EASTLAND: We sincerely approve the Senate resolution designed to redefine the duties of the Supreme Court.

Recent decisions of the Supreme Court have greatly endangered the safety and security of our Nation, and we surely hope you can restrict their authority.

We would also like to see the term of office of the Justices be either reduced or that they be subject to reconfirmation every 4 to 6 years. They have gone hog wild.

Yours truly,

Mrs. T. B. HART.
T. B. HART.

SANTA MONICA, CALIF., February 23, 1958.

Senator JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee,
Washington, D. C.

HONORABLE SIR: Please count our names in support of Senator Jenner's bill, S. 2040, limiting the powers of the Supreme Court. It is a good bill and one that is badly needed now that we seem to have a packed Court.

Many of us in the coming elections are thinking of voting out of office every one that is running for re-election no matter what party they belong to.

Perhaps in this way we can in time go back to the wise law of "minding our own business and stop meddling in other countries' and peoples' business." Until the first World War and our meddling we were a strong Nation and an honorable one. The change has resulted in just the opposite since then.

No nations can be divided all over the world and remain strong or honorable.

Yours for a strong America.

Sincerely yours,

SHEILA MARTIN,
MAUDE E. MARTIN.

DETROIT, MICH., *February 24, 1958.*

Senator JAMES EASTLAND,
Washington, D. C.

DEAR SIR: We would like to see a return to Constitutional Government in Washington.

The following should be acted upon favorably: Senate bill No. 2040; H. J. Res. 355.

We hope you will give these bills your whole-hearted support.

Very truly yours,

PAUL V. FUNK.

WEST ORANGE, N. J., *February 25, 1958.*

Senator JAMES O. EASTLAND.

HONORABLE SIR: Please get the Jenner bill out of committee, on floor of the Senate, and vote for it affirmatively, immediately. Be sure to pass S. 2040.

Thank you.

Respectfully yours,

JANE BARTON.

AMARILLO, TEX., *February 25, 1958.*

Senator JAMES O. EASTLAND,
Washington, D. C.

DEAR SENATOR EASTLAND: We understand that the Senate Committee on Internal Security, of which you are Chairman, is holding hearings on the Jenner Resolution, S. 2040. We earnestly urge you not to let this resolution die in the committee.

Also, we believe that recent decisions of the Supreme Court have vitally endangered our internal security, and, in this connection, would like to suggest an amendment to the resolution to include legislation that would nullify the Mallory decision.

We hope and trust your committee may be able to place the Jenner resolution before the Congress.

Very sincerely,

MR. AND MRS. C. V. WOOLLEY.

PHOENIX, ARIZ., *February 21, 1958.*

Hon. JAMES O. EASTLAND,
Washington, D. C.

DEAR SENATOR EASTLAND: It has been brought to our attention that S. 2040 is to be considered by your committee in the near future.

We very much hope that you will do your utmost to have it favorably reported and use your powerful influence to assist in its passage on the floor of the Senate.

Respectfully yours,

ANNA P. KOPTA
Mrs. Emry Kopta.

FLORAL PARK POST No. 834,
Floral Park, N. Y., *February 25, 1958.*

Re Senate Bill 2040, To Limit Appellate Jurisdiction of the Supreme Court
Hon. JAMES O. EASTLAND,
Chairman, Internal Security Subcommittee,
Washington, D. C.

DEAR SENATOR EASTLAND: In connection with the hearings on the above numbered bill, we are enclosing herewith copy of letters addressed to Senators Jenner, Ives, and Javits and Congressman Derounian concerning same.

Respectfully yours,

DONAL A. DONOVAN,
Americanism Officer.

FLORAL PARK POST No. 334,
Floral Park, N. Y., February 24, 1958.

Re Senate Bill 2646, To Limit Appellate Jurisdiction of the Supreme Court.

HON. WILLIAM E. JENNER,
Washington, D. C.

DEAR SENATOR JENNER: At the last regular meeting of our post, a motion was unanimously adopted authorizing me to write you and the Senators and Congressman of our area concerning the above numbered bill.

We should like to record our congratulations to you personally and our approval of the bill you have introduced. Like you, we have been increasingly shocked and dismayed by the decisions rendered by the Supreme Court concerning our national security. We feel the trial courts are in the best position to see, hear, and evaluate the evidence in such cases and believe that their findings should not be tossed aside by modernistic and tortured interpretations of the first and fifth amendments or by other novel legalistic conclusions, which evidence a total disregard for the safety of our country and, at the same time, an irrational interest in safeguarding the Communist enemy within our borders.

We enclose a copy of letters which we have mailed to Senators Ives and Javits and Congressman Derounian urging the support of your bill.

Respectfully yours,

DONAL A. DONOVAN,
Americanism Officer.

FLORAL PARK POST No. 334,
Floral Park, N. Y., February 24, 1958.

Re Senate bill 2646, To Limit Appellate Jurisdiction of the Supreme Court.

HON. STEVEN B. DEROUNIAN,
Washington, D. C.

DEAR CONGRESSMAN DEROUNIAN: I have been authorized by our post to write you and our other representatives expressing our approval of the above-numbered bill.

We enclose a copy of a letter addressed to Hon. William E. Jenner, sponsor of this bill, and believe it adequately indicates our regard for it.

We understand that hearings on this bill are now taking place. We urge your support in putting the same into law. We should like to have your comments on the proposed legislation.

Respectfully yours,

DONAL A. DONOVAN,
Americanism Officer.

RAY-O-VAC CO.,
Madison 10, Wis., February 25, 1958.

HON. JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee,
Washington 25, D. C.

DEAR SENATOR EASTLAND: John Gates, the last editor of the Communist Party organ, the Daily Worker, in addressing some 500 students at the University of Wisconsin on February 23, said that the House Un-American Activities Committee is a "greater threat" to America than is the Communist Party.

It is needless for me to add that this Nation is desperately in need of the legislation contained in S. 2646. I am very much concerned about the future of our country when reasonable precautions cannot be taken to protect it from saboteurs and subversive organizations. If the citizens of this Nation understood the importance of S. 2646, I am sure that your committee and the entire Congress would be swamped with requests to support and enact this bill into law.

Sincerely yours,

L. K. POLLARD,
Assistant to the President.

KANSAS CITY, Mo., *February 24, 1958.*

DEAR SENATOR: Hereabouts we are much opposed to recent Supreme Court decisions. How can we displace the Justices who would annul States rights? We favor passage of the Jenner resolution, S. 2040.

Very truly,

JAY H. WOOLDRIDGE.

RANDALLSTOWN, Md., *February 25, 1958.*

DEAR SENATOR EASTLAND: We are very much in favor of the Jenner bill, S. 2040. Please do everything in your power to bring it into effect.

Sincerely yours,

Mrs. N. F. GORSUCH.

DALLAS, TEX., *February 25, 1958.*

HON. JAMES O. EASTLAND,
*Chairman, Senate Committee on Internal Security,
Washington, D. C.*

MY DEAR SENATOR: Urgent local business prevented my requesting the opportunity to appear before the Senate Internal Security Subcommittee presently holding hearings on Senate bill 2040—to limit appellate jurisdiction of the Supreme Court in specified areas, but I respectfully request that you support this resolution to the fullest.

It is imperative for Congress to enact legislation that will redefine the powers and limitations of the Supreme Court and to return to the States their sovereign rights.

Respectfully,

NEELY G. LANDRUM.

DALLAS 2, TEX., *February 24, 1958.*

SENATOR JAMES O. EASTLAND,
*Committee on Internal Security,
Senate Office Building, Washington, D. C.*

DEAR SENATOR: We are heartily in favor of resolution S. 2040.

We feel that the Supreme Court has been ill advised on many of their recent decisions which have prevented departments of the Government and the States from protecting themselves against subversion and common criminals.

We feel that the will of the people should not be thwarted by any small judicial group who seem unable to interpret the Constitution as it was written for the best interest of the country.

Thank you for the great work you are doing in preserving our way of life.

Sincerely,

JOHN W. MAYO.
Mrs. JOHN W. MAYO.

DORCHESTER, MASS., *February 22, 1958.*

DEAR SENATOR EASTLAND: I am very much interested in the Jenner bill (S. 2040) to limit the jurisdiction of the Supreme Court. I sincerely pray that it will be passed.

Sincerely yours,

M. MARIE BARBER.

McKEAN, PA., *February 18, 1958.*

HON. JAMES EASTLAND,
Washington, D. C.

MY DEAR SENATOR EASTLAND: So many of us are very much concerned about recent decisions of the Supreme Court which will destroy our constitutional Government by depriving the individual States of their sovereign rights, and which will also destroy the legal means set up by the Congress of the United States for our internal security against the Communist conspiracy.

We agree with Hon. James F. Byrnes, of South Carolina, who has made the public statement, "The Supreme Court must be curbed."

Therefore, we beg that you, as chairman of the Judiciary Committee of the Senate, hasten the release of Senator Jenner's bill for debate and passage (we hope), as the best measure so far begun for the purpose of curbing the Supreme Court's seizure of lawmaking powers which belong to the Congress and to the individual States.

My family and my friends join me in this petition.

Very respectfully yours,

Mrs. EDWIN P. VOGL.

MONTEBELLO, CALIF., February 23, 1958.

SENATOR JAMES O. EASTLAND,
Internal Security Subcommittee,
United States Senate, Washington, D. C.

HONORABLE SIR: I wish to recommend to you that all consideration be given for the passage of Senate bill 2040 to limit the jurisdiction of the Supreme Court by the withdrawal of its appellate jurisdiction.

It is not in accord with the American way of life for our local and daily activities to be upset by the decisions of the Supreme Court.

When a high body as the Supreme Court abuses its power and rights, it should be curtailed.

Sincerely,

RUTH M. SNYDER.

VAN NUYS, CALIF., February 26, 1958.

DEAR SENATOR: It is imperative that the Jenner bill S. 2040 be passed in order to protect our constitutional rights from the evils of the Supreme Court.

The United States Supreme Court has emasculated the power of the United States to protect itself from Communist subversion. The curtain is indeed closing; it will have closed entirely upon the freedom of this country if this judicial license to communism is not promptly canceled. I hope that Congress will not take this judicial challenge "lying down" we are praying hard, looking to you for help.

J. C. WILLIAMS.

SOUTH MIDDLEBORO, MASS., February 20, 1958.

HON. JAMES O. EASTLAND,
Chairman, Judiciary Committee,
Washington, D. C.

DEAR SENATOR EASTLAND: The Cape Cod branch of the Massachusetts Committee of Correspondence, an affiliate of the American Coalition of Patriotic Societies, asks that this statement be made a part of the hearings on S. 2040.

Our members demand that S. 2040, "to limit the appellate jurisdiction of the Supreme Court in certain cases" by amending "chapter 81 of title 28 of the United States Code" by adding a new section 8. 1258, be approved by the Judiciary and enacted by the Congress of the United States.

We also support the resolution which requests impeachment of six members of the United States Supreme Court as adopted by the General Assembly of Georgia, February 22, 1957.

Respectfully yours,

LUCY BRALEY SIBSON,
Chairman, Cape Cod Branch,
Massachusetts Committee of Correspondence.

NORRISTOWN, PA.

Senate Judiciary Committee.

DEAR SIR: Will you please act promptly to pass Senate bill 2040. This bill is very important to we citizens and future appeals.

Respectfully,

ETHEL M. TEMPLETON.

DALLAS, TEX., February 27, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

We urge passage of S. 2040 proposed by Senator Jenner. We deplore weakening of the Smith Act, please include provisions in S. 2040 to correct recent dangerous decisions of Supreme Court.

MR. AND MRS. CHRIS R. BRIGHT.

ARCADIA, CALIF., February 27, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

Foothill towns null of pro American endorses S. 2040 and urges quick passage.

MRS. D. A. HEISS.

St. LOUIS, Mo., February 24, 1958.

Senator JAMES O. EASTLAND,
Senate Committee on Internal Security,
United States Senate, Washington, D. C.

DEAR SENATOR: I am heartily in favor of Resolution S. 2040. I am greatly concerned with some of the recent decisions of the Supreme Court.

The decision weakening the Smith Act. The decision of segregation (which should be called the decision authorizing mongrelization, and mongrelization is far more dangerous to the future welfare of the United States than Communism), and the Mallory decision which weakens the power of the police to protect us from thugs.

These decisions must be reversed and Resolution S. 2040 should include curbs on all three of the above-named decisions. Congress is to make our laws, not the Supreme Court.

More publicity should be given this resolution and its importance to the American people should be stressed.

We are sick and tired of the tondles in the Supreme Court and the Congress who constantly blent the necessity of playing up to the Negro, the European and some God forsaken outfit in God knows where. There is nothing to win against Communism if we lose our integrity in the process.

Let us get Resolution S. 2040 on the books and end the reign of the tondles.
Sincerely yours,

G. A. GANTZ.

NORTHRIDGE, CALIF., February 27, 1958.

Senator J. O. EASTLAND,
Senate Office Building, Washington, D. C.

Strongly urge favorable action on S. 2040. We have long felt the Supreme Court has far outstripped intent of its constitutional authority. The destruction of congressional and states rights by judicial action is a matter of the deepest concern to us and all other patriotic Americans.

MR. AND MRS. ROBERT FAUVRE.

DALLAS, TEX., February 27, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

Let us hope that Senate bill No. 2040 can be passed. We are astounded at the happenings in our capital.

Sincerely,

OREIL K. BOATWRIGHT.
C. RENE BOATWRIGHT.

HOUSTON 25, Tex., February 22, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building,
Washington 25, D. C.

DEAR SENATOR EASTLAND: I am writing to ask you to encourage the passage of Senator William B. Jenner's Bill H. 2440. The bill which would curb the power of the Supreme Court.

Faithfully yours,

Mrs. J. W. TEAGUE.

DALLAS 5, Tex., February 25, 1958.

Resolution 82940

Senator JAMES O. EASTLAND,
Committee on Internal Security,
Senate Office Building, Washington, D. C.

DEAR MR. EASTLAND: I definitely am in support of Resolution 82940 and would deeply appreciate your support of this bill now in committee.

It is time that someone redefine the power of the Supreme Court.

Yours very truly,

A. C. HAMILTON, Jr.

DALLAS, TEX., February 21, 1958.

DEAR SENATOR EASTLAND: Please add my name to the list of those interested in the Jenner bill, Resolution 82940. I hope the resolution is reported favorably from your committee.

Sincerely yours,

(Mrs.) LORRAINE C. OAKES.

DEARBORN, MICH., February 23, 1958.

Senator JAMES EASTLAND,
Senate Office Building,
Washington, D. C.

DEAR SENATOR EASTLAND: I understand the Internal Security Subcommittee is holding hearings on H. 2640. Will you please convey to the committee my desire that this bill be reported on favorably to the Senate? I have been enraged at the rulings being handed down by the Supreme Court. H. 2640, to limit the appellate jurisdiction of the Supreme Court in certain cases, would overcome some of the damage done by the "Red Monday" decisions.

Senator, the propaganda program being foisted on the American public, in favor of Foreign Aid, OATF, and trade with Red China is an outrage. It is coming from the infamous Foreign Policy Association, Dept. of State, Dept. of Commerce and the White House. I have never seen a program so well organized from the top down to my little local library. The discussion leader of the Foreign Policy Great Decisions program at our library had a State Dept. briefing sheet in her hand. We are on the brink of World Government and disaster. Can nothing be done, or do people like myself just pray for a martyr's grave?

Very sincerely yours,

Mrs. J. W. MASON.

ASHLAND, VA., February 26, 1958.

Hon. JAMES EASTLAND,
United States Senate,
Washington, D. C.

DEAR SENATOR EASTLAND: I believe my respected friend Judge William Old spoke before your committee today in approbation of Senator Jenner's bill to curb the Supreme Court and it is certainly to be hoped that brakes of some fashion may be put on this department of our Government, for unless the present composition of this Court can be curbed we shall arrive at the end of constitutional government ahead of schedule.

I know that you are doing everything possible to hold the line and our Virginia people are very grateful to you and your colleagues of like thought and mind. I am sorry I did not have the pleasure of seeing more of you when I was in Jackson in December and hope before too long to have the opportunity to know you better.

Again thanking you for what you have done and are doing for the real Americans and with every good wish, I am,

Ever sincerely,

LANCE PHILLIPS.

WHEATON, ILL., February 28, 1958.

This is to urge support of S. 2040 to limit the activities of the Supreme Court—and bind them to their constitutional duties. These usurpers must be brought back to the duties included in their oath of office. They should be impeached for the aid and comfort they give to the Nation's enemies.

BERTHA R. PALMER.

Dr. C. D. DARNE,

Niagara, W. Va., February 28, 1958.

SENATE SUBCOMMITTEE ON INTERNAL SECURITY,
Washington, D. C.

DEAR MR. CHAIRMAN: I understand you are now considering the Jenner bill which would curb the Supreme Court. The Supreme Court in its recent decisions has clearly shown that such curbs are desperately needed. Their decisions reversing lower court convictions of Communists and making the Nation safe for Communist subversion can only be good for the Communists. Best evidence in support of that statement is that the Communist papers and the left-wing "liberals" praised the court for its actions.

Please, I beg you, act favorably on the Jenner bill.

Yours truly,

C. D. DARNE, O. D.

ST. PETERSBURG, FLA., February 26, 1958.

HON. JAMES O. EASTLAND, *Chairman,*
Senate Judiciary Committee,
Senate Office Building,
Washington, D. C.

DEAR SIR: Am very anxious for you to pass bill No. S. 2040, limiting the appellate jurisdiction of the United States Supreme Court in respect to State legislatures, local school bodies, State bar associations, the Executive branch of our Government, and the United States Congress, and get it out on the floor of the Senate. Will you please do all in your power to accomplish this?

Very truly yours,

MARVIN A. JACKSON.

REDWOOD CITY, CALIF., February 26, 1958.

HON. JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee,
Washington, D. C.

DEAR SIR: My wife and I have been alarmed through many months by the decisions of the Supreme Court, which by blocking the proper prosecution of Communist offenders, give aid and support to the enemies of our laws and institutions.

Second, a long series of decisions gives a force and meaning to certain amendments to the constitution contrary to the intent of their authors and the Congressmen who voted for their enactment.

Third, some of these decisions constitute, not judicial interpretation, but rather judicial legislation, therefore invasions of the legislative field. I believe that these decisions require action by the Congress.

For the correction of these matters we wish to commend the Jenner bill now under consideration by your committee.—(S2040).

Yours truly,

HENRY S. DAVIDSON.
IVA B. DAVIDSON.

QUINCY, MASS., February 21, 1958.

Chairman JAMES O. EASTLAND,
Judiciary Committee,
Senate Office Building, Washington, D. C.

DEAR CHAIRMAN EASTLAND: The Quincy Chapter of the Massachusetts Committee of Correspondence, an affiliate of the American Coalition of Patriotic Societies, demand approval and enactment of S. 2040, Senator Jenner's bill "to limit the appellate jurisdiction of the Supreme Court" in regard to the "investigative functions of the Congress, the security program of the executive branch of the Federal Government, State antisubversive legislation, and the admission of persons to the practice of law within individual States."

Since we cannot be present at the hearings, we request that you make this statement a part of the record favoring enactment of S. 2040 in the subcommittee and Judiciary Committee hearings.

We further demand that impeachment proceedings be instituted against Supreme Court members for their un-American decisions--as George Washington said: "Let only Americans stand guard" over our beloved Republic.

Respectfully yours,

CATHERINE BUEHLER,
Chairman, Quincy Chapter, Massachusetts Committee of Correspondence.

ST. DAVID, PA., February 28, 1958.

Senator JAMES O. EASTLAND,
Chairman, Judiciary Committee,
United States Senate, Washington, D. C.

We urge your committee to vote in favor of Senator Jenner's bill (S. 2040) limiting the appellate jurisdiction of the United States Supreme Court.

Passage of this bill would give a big lift to millions of Americans, particularly those who no longer have any confidence in the United States Supreme Court.

Very truly yours,

EMERSON H. HARRICK.
MARIANNA K. HARRICK.

MERCED, CALIF.

Senator JAMES O. EASTLAND,
Chairman, Judiciary Committee,
Washington, D. C.

DEAR SENATOR EASTLAND: We are in favor of Senator Jenner's bill (S. 2040) to limit the jurisdiction of the Supreme Court. It is an insult to our Congressmen to permit the Supreme Court to review and nullify their investigations. The FBI has been rendered useless by the Supreme Court. States should be allowed to prosecute their subversives as that power was not given to the Federal Government by our Constitution. We wish to control our own schools. We do not want the 6 cents passed back from each tax dollar as Federal aid to our schools.

Please don't water this bill down so that the final law will have no power.

Yours truly,

H. LURENA SISCHO,
President, East Side Republican Women.

DALLAS, TEX.

Senator JAMES O. EASTLAND,
Committee on Internal Security,
Senate Office Building, Washington, D. C.

DEAR SIR: I trust that the hearings now being held on Senate bill 2040, proposed by Senator Jenner, will be much more successful than others that have gotten nowhere. State Government can often do things more quickly and more effectively than the Federal Government if they are given a chance to do so.

The Supreme Court has made some dangerous decisions and I hope Senator Jenner's bill can be taken care of.

Respectfully yours,

Mrs. R. S. McFarland.

NORMAN, OKLA., February 27, 1958.

HON. SENATOR JAMES O. EASTLAND,
Washington, D. C.

DEAR SENATOR EASTLAND: This is to cast my vote as a grass-root American for the Jenner bill, S. 2046, which I believe is in the Senate Judiciary Committee at present. I feel you will use your influence to get a favorable action on it. If something isn't done to stop the Supreme Court our States rights will fall, and that means the fall of our freedoms and rights as American citizens. Thanks.

Sincerely,

Mrs. J. O. CLAPHAM.

CHEROKEE, TEX., February 27, 1958.

Senator JAMES O. EASTLAND,
Washington, D. C.

DEAR SENATOR EASTLAND: Those of us who believe in redefining the powers of the Supreme Court are encouraged that hearings are being held on Resolution S. 2046. Many, many people with whom I come in contact feel strongly that this resolution is needed. We hope that provisions will be included to correct the evils of the Mallory decision and also to combat the weakening of the Smith Act by the Supreme Court.

Sincerely,

VIRGINIA H. GRAY.

DALLAS 9, TEX., February 27, 1958.

Senator JAMES O. EASTLAND,
Committee on Internal Security,
Senate Office Building, Washington, D. C.

DEAR SIR: Senate Bill S. 2046 redefining the powers of the Supreme Court must be passed if our country and its Constitution are to be saved. I hope you will do all you can to have this bill passed.

Sincerely yours,

J. C. CURRAN.

DEAR SENATOR EASTLAND: As Chairman of the Senate Judiciary Committee, we urge you to support Senator Jenner's bill, S. 2046, limiting the powers of the Supreme Court.

Sincerely,

Mrs. DOUGLAS R. McFEN,
La Verne, Calif.

February 28, 1958.

DEAR SENATOR EASTLAND: I deplore the encroachments of the Supreme Court on the civil rights of the American people. I beg that your committee will act favorably on Senate Bill 2046 as proposed by Senator Jenner.

There are thousands of American citizens who are outraged by recent decisions of this Court and by its complete disregard of the Constitution of our United States such as the Mallory decision, the weakening of the Smith Act, the so-called Civil Rights decision, and on and on.

For the sake of my children and grandchildren and all the future citizens of our Nation, something must be done to protect the people and the States—so please put some teeth into this bill so that the Tenth Amendment to our Constitution can be restored to a revered dignity of fact, rather than fiction.

Sincerely yours,

Mrs. A. STARKE TAYLOR.

DALLAS, TEX., February 28, 1958.

HON. JAMES O. EASTLAND,
Chairman, Committee on Internal Security,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: I want to let you know that I am strongly in favor of S. 2046 on which the Senate Committee on Internal Security is now holding

hearings. By virtue of this bill, we can return to the States and to the people the right to regulate subversive activities.

It is pitiful that the Smith Act has been weakened by the Supreme Court in such a manner that the lower courts are now forced to free notorious Communists who have already been convicted of conspiracy to teach and to advocate the violent overthrow of the United States Government. I am also shocked at the recent Mallory decision of the Supreme Court which, by tying the hands of the police and the courts in combating rowdiness, muggings, and senseless beatings by young thugs, has made it perilous for peaceful citizens to be on the streets, especially at night, in some of our larger cities.

I would, therefore, like to suggest that you include in S. 2040 some provision for correcting this intolerable situation.

Yours very truly,

O. O. DAHM.

DALLAS, TEX., March 1, 1958.

SEN. JAMES O. EASTLAND,
*Committee on Internal Security,
Senate Office Building,
Washington, D. C.*

DEAR SENATOR: I should like to strongly support S. 2040 proposed by Senator Jenner. I should further like to see the provisions included in S. 2040 correcting the recent Mallory decision.

It is certainly a crime and a shame for the Supreme Court to pass decisions which enable notorious Communists to go free even though they have been convicted of conspiracy to teach and advocate the violent overthrow of our Government.

Yours very truly,

JAMES W. SIMMONS, Jr.

ST. PETERSBURG, FLA., March 1, 1958.

THE HONORABLE JAMES O. EASTLAND,
*Chairman, Senate Judiciary Committee,
Washington, D. C.*

DEAR SENATOR EASTLAND: I earnestly urge you to vote for the Jenner bill. Sincerely,

IRMA E. BOSWORTH.

DALLAS, TEX., February 26, 1958.

SENATOR EASTLAND OF MISSISSIPPI,
Washington, D. C.

SIR: May we tell you that we consider the passage of the Jenner bill 2040 is vital to the safety of our country.

Respectfully,

JAMES W. COLVIN.
BLANCHE B. COLVIN.

FEBRUARY 28, 1958.

HON. JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

MY DEAR SENATOR: The people of this country are thoroughly disgusted with the dictatorial powers of the Supreme Court, calculated to aid and abet world communism, and destroy the Government of the United States.

The past record, shows conclusively, that Godless communism, "within or without, has not lost one single case submitted to the Supreme Court."

Therefore, I urge that every possible effort be exerted by the Congress—at this session—to take from them the power to make laws, "only to interpret the law."

In conclusion, if the Congress do not take from the Supreme Court the powers to make destructive laws, we will not have a "United States of America" at the end of 10 more years.

Sincerely yours,

W. W. WEBB.

DALLAS 1, TEX., February 27, 1958.

Senator JAMES O. EASTLAND,
Committee on Internal Security,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: It is my understanding that the Senate Committee on Internal Security, of which you are chairman, is now holding hearings on resolution S. 2040 proposed by Senator Jenner.

It is my understanding that this resolution is based on the fact that Congress can redefine the power of the Supreme Court and proposes to return to the States the right to regulate subversive activities.

In view of existing conditions, I strongly urge your support of this resolution and hope you will do everything in your power to have it favorably reported.

Yours very truly,

A. A. BURRELL.

PHILADELPHIA 20, PA., February 28, 1958.

DEAR SENATOR EASTLAND: My husband and I ask that you urge your committee to vote for Senator Jenner's bill, S. 2040.

Sincerely,

HELEN L. HOLMES.

BAKERSFIELD, CALIF., February 27, 1958.

Hon. JAMES O. EASTLAND,
Washington, D. C.

DEAR SENATOR EASTLAND: I urge the passage of S. 2040, limiting the power of the Supreme Court (Senator Jenner). This is a very vital and necessary bill for the preservation of our freedom.

Yours truly,

Mrs. EDNA F. RAGLAND.

INDIANAPOLIS, IND., February 22, 1958.

INTERNAL SECURITY SUBCOMMITTEE,
United States Senate Office Building,
Washington, D. C.

Re the Jenner bill.

MR. CHAIRMAN AND COMMITTEE MEMBERS: It is common knowledge the Communist activity is a threat to our Nation and our form of government, and has been such threat for these past several years.

The committee has made extensive investigations into the said matters, too, and at great expense to the taxpayers; thus Communists and their activity "in part" have been exposed to the general public, and yet, the half of it has not yet come out and been exposed. This fact also is of common knowledge.

Amid it all, the Supreme Court Judges have stooped to satisfy their individual whims by using their official powers to construe or misconstrue the Constitution at will and, to their desire; thus to "make" laws and bypass Congress; yes, and in flagrant, willful contempt of Congress and the duty and responsibility of Congress to make law. The so-called Yates and Jencks cases freeing Communists and virtually making Communists free from prosecution, are clear pictures and example of the Supreme Court Judges' contempt for Congress and their contempt for the general welfare of our Nation.

It would seem the Supreme Court Judges are getting far too big for their breeches and, attempting to "take over" all three branches of government and without even allowing the public to "vote" on the matter, thus willfully violating the Constitution, their oath of office, States rights, and the rights of every American citizen.

For these reasons, and in the best interest of our Nation, and with the full support of the public: The Congress should, while it still has the power, clobber the Supreme Court with a damper in the form of the Jenner bill to limit the powers of the Supreme Court.

Yours,

Vergil D. McMillan,
VERGIL D. McMILLAN,
2030 N. Delaware St.,
Indianapolis 2, Indiana.

DALLAS, TEX., February 28, 1958.

HON. JAMES O. EASTLAND,
Committee on Internal Security,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: The Senate bill No. 2040, as proposed or as might be amended, is undoubtedly a constructive move, which could not be harmful to our country, and in all likelihood would prove very helpful.

I sincerely hope that such action will receive favorable consideration.

Yours very truly,

CHES E. MILLER.

DALLAS, TEX.

DEAR SIR: I have just learned that the Senate Committee on Internal Security, of which you are chairman, is now holding hearings on Senate bill 2040 proposed by Senator Jenner. I would like you to know that I and many of my friends are in favor of this bill.

We also deplore the weakening of the Smith Act by the Supreme Court, and also resent the Supreme Court's recent Mallory decision, which has made it dangerous for peaceful citizens to walk the streets in some of our larger cities. Would it be possible to include in S. 2040 provisions for correcting this dangerous decision?

Sincerely,

JULIA O'CONNOR.

FEBRUARY 28, 1958.

SENATE INTERNAL SECURITY COMMITTEE:

Gentlemen, I am for the Jenner bill limiting powers of Supreme Court, and down on the "left leaning" Supreme Court.

R. O. OWENS.

FEBRUARY 24, 1958.

Senator JAMES O. EASTLAND,
Committee on Internal Security,
Senate Office Building, Washington, D. C.

DEAR SENATOR: We are heartily in favor of resolution S. 2040.

We feel that the Supreme Court has been ill advised on many of their recent decisions which have prevented departments of the Government and the States from protecting themselves against subversion and common criminals.

We feel that the will of the people should not be thwarted by any small judicial group who seem unable to interpret the Constitution as it was written for the best interest of the country.

Thank you for the great work you are doing in preserving our way of life.

Sincerely,

H. J. SHANDS, Jr.,
 Mrs. H. J. SHANDS, Jr.,
Lufkin, Tex.

DALLAS, TEX., February 26, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SIR: My husband and I are greatly in favor of Senate bill 2040, as proposed by Senator Jenner.

We deplore the weakening of the Smith Act by the Supreme Court. Also, we resent the Supreme Court's recent Mallory decision.

Yours very sincerely,

CORREALE B. NAVIETT.
 Mrs. EDWIN N. NAVIETT.

FEBRUARY 27, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: I am most apprehensive of communistic boasts and intentions to kill the Jenner resolution S. 2040.

To allow this bill to die in Committee would only bolster the anti-American, lawless and communistic thoughts and actions in this country and assist in destroying the morale of decent, loyal and liberty-loving Americans.

I further urge you to amend this resolution to include legislation to nullify the Supreme Court's recent Mallory decision.

Your actions in pressing this resolution through the Committee should prove a boon and a great satisfaction to every loyal American.

Yours very truly,

PERRY G. JEFFERSON.

DALLAS 8, TEX., February 25, 1958.

DEAR SENATOR EASTLAND: I hope the Senate will pass bill 2040, thus curbing our arrogant and socialist Supreme Court.

Sincerely,

(Mrs. B. B.) VERNICE W. REPERT.

DALLAS, TEX., February 26, 1958.

SENATOR JAMES O. EASTLAND,
Washington, D. C.

DEAR SIR: After the Supreme Court decisions last year which scuttled the Smith Act, under which the Justice Department had been prosecuting communist activities, and the laws by which States could deal with subversives, there was quite a bit in the daily press to the effect that legislation would be enacted this year to plug such holes in our national defense. If anything has been done in such connection, however, I have failed to observe it and I have been somewhat on the alert.

With efforts being made to hamstring Congress in its right to investigate, to do away with our Committee on Un-American Activities, and to discredit and cripple Mr. Hoover of the FBI in every way possible, it seems to me that such legislation is far more important than foreign aid, health insurance, or statehood for either Alaska or Hawaii. It seems to me also that it might not be amiss to institute an investigation of our sacrosanct Supreme Court and not omit the Chief Justice.

Although I am not one of your constituents, Mr. Eastland, I hope you will not consider it out of line for me to urge that you use your great influence to see that strong legislation along the lines above mentioned be underway at once, if it is not in the making at the present time. I am sure it is a matter in which you also are vitally concerned.

Very truly yours,

B. T. LEFFLER.

LA MESA, CALIF., February 25, 1958.

SENATOR JAMES O. EASTLAND,
Chairman, Judiciary Committee,
Washington 25, D. C.

DEAR SENATOR EASTLAND: We are very much concerned at the long continued destructive decisions of the U. S. Supreme Court and the misinterpretation of the English language in cases usurping the powers never given to it in the Constitution.

The Court has attempted to legislate for Congress and for the various States, and has favored the Communists and the lawbreakers while the individual rights of law-abiding conservative citizens are continually restricted.

We ask your aid in putting an end to this dangerous and reckless usurpation of power and that the Court be challenged firmly by statute, by impeachment, or by constitutional amendment, as may seem best.

Thanking you for your attention to this subject, we are,

Very truly yours,

Mrs. OLIVE V. HICKS.

DALLAS TEX.

SENATOR JAMES O. EASTLAND,
Committee on Internal Security.

DEAR SIR: We want to tell you we are heartily in favor of resolution S. 2040.

Mr. and Mrs. J. CLAUDE BURTON.

MESQUITE, TEX., February 26, 1958.

SENATOR JAMES O. EASTLAND,

HONORABLE SIR: I am writing to let you know I am in favor of Senate bill No. 2040 and hope you will do all you can to support it and ask that you include in S. 2040 provisions to correct the dangerous decisions of the Supreme Court's recent Mallory decision.

Very sincerely,

MRS. ROY RUFARD.

DALLAS, TEX., Feb. 26, 1958.

SENATOR JAMES O. EASTLAND,
Washington, D. C.

DEAR SENATOR: I am definitely in favor of Senate bill No. 2040, as proposed by Senator Jenner. Thanks for doing your best.

Sincerely,

MRS. G. C. RADFORD.

DALLAS, TEX., February 28, 1958.

DEAR SIR: I am in favor of Senate bill No. 2040 as proposed by Senator Jenner. I hope Senator Jenner will reconsider his decision not to be a candidate for the Senate as we need more men like him in our Government.

MRS. RUSSELL ROGERS.

TACOMA, WASH., February 28, 1958.

HONORABLE SENATOR: Whole groups of patriotic Americans are watching for your "Yes" vote on the Jenner bill No. 2040.

Very sincerely,

MRS. LAURA E. HOFFMAN.

DALLAS, TEX., February 28, 1958.

THE HONORABLE JAMES O. EASTLAND,
United States Senate,
Washington 25, D. C.

DEAR SENATOR: Referring to Resolution S. 2040 proposed by Senator Jenner. The writer is very much in favor of this bill, and sincerely trusts same will receive overwhelming endorsement.

The writer's former home was Mississippi and, although Texas is now my home, I have noted with interest your progress in serving our country and I wish to commend you for the fine service you have rendered our Nation.

Respectfully yours,

STANLEY D. BOWLES.

ST. PETERSBURG 3, FLA., February 27, 1958.

HON. JAMES EASTLAND,
Senator's Office Building, Washington, D. C.

DEAR SENATOR: I understand that your committee of the Judiciary Committee are now holding hearings on the Jenner bill, to limit the power of the Supreme Court to further encroach on the State's authority and to limit the function to the intended power to interpret the laws and not to make laws as they have been doing.

This bill might even be strengthened and it has been my conviction that there should be a constitutional amendment passed, to make the selection of the Justices of the Supreme Court by popular election and for a limited term, say 10 years. It is most likely to secure a good competent group of Justices and to keep up the efficiency of the Court.

The selection by appointment has very often made this a method of paying political debts, as witness the appointment of our present Chief Justice. It seems more likely that the public would elect Justices on basis of the records and qualifications and not a President who feels obliged to pay his political debts by such appointments.

Trusting to hear that your committee has reported out favorably, the Jenner bill, I am,

Yours truly,

B. L. FRISBIE.

CINCINNATI, OHIO, February 28, 1938.

HON. JAMES EASTLAND,
Washington, D. C.

DEAR SENATOR EASTLAND: My husband and I would like to be on record as favoring Senator Jenner's Senate resolution S. 2040 on regulating the power of the Supreme Court.

State's rights are dwindling away, and we feel that the Supreme Court must be deprived of power to destroy State laws on subversion. Too, the crime situation in this country today is such that the Mallory decision, restricting the time that police can hold suspects, is almost a crime itself.

Sincerely,

EVE AND PAUL CONOLLEY.

ST. PETERSBURG, FLA., February 28, 1938.

JAMES O. EASTLAND,
Washington, D. C.

DEAR SIR: I am willing to tell you, as well as my friends and neighbors, that we are hoping you will take speedy action in the affirmative upon bill S. 2040.

Sincerely yours,

(Mrs.) ANN B. GRANT.

PHILADELPHIA 20, PA., February 27, 1938.

Senator JAMES O. EASTLAND,
Chairman, Judiciary Committee,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: I wish to express my approval of Senator Jenner's bill (S. 2040) which I understand is being studied now by your committee.

It's about time we put the Supreme Court back where the Constitution intended it to be.

I am tired of hearing that the Supreme Court makes the "law of the land." Senator Jenner's bill would give the States, Congress, executive and local branches at least some of the proper jurisdiction which they should have.

Sincerely yours,

DEBORAH C. McLAUGHLIN.

DALLAS, TEX.

Senator JAMES O. EASTLAND,
Committee on Internal Security.

DEAR SENATOR EASTLAND: I am writing you to say that I am in favor of Senate Bill 2040 as proposed by Senator Jenner. This bill is one of the most vital yet proposed in favor of States rights.

Yours very sincerely,

Mrs. HARRY C. SMITH.

NEW ROCHELLE, N. Y., February 26, 1938.

Senator JAMES O. EASTLAND,
Chairman, Judiciary Committee,
United States Senate, Washington, D. C.

DEAR SENATOR EASTLAND: It is encouraging that the members of the Judiciary Committee have consented to public hearings on the Jenner Bill, S. 2040. Give this bill your support.

This action is necessary in view of recent performance of the Supreme Court. You are our elected representative to safeguard the Constitution from this usurpation of power by this Court. Do not fail us.

Yours very truly,

MARTHA M. FUHRER
Mrs. Raymond A. Fuhrer.

TERRELL, Tex., February 27, 1958.

Hon. JAMES O. EASTLAND,
United States Senate,
Washington, D. C.

MY DEAR SENATOR: I am in favor of the Senate Bill No. 2646 as proposed by Senator Jenner and urge you to support it.

Very truly yours,

EMILY R. CARTWRIGHT
 Mrs. M. Cartwright.

ST. PETERSBURG, FLA., March 1, 1958.

Hon. JAMES O. EASTLAND,
United States Senate,
Washington, D. C.

DEAR SENATOR: We hope your Judiciary Committee will report favorably on the Jenner bill concerning the Supreme Court.

In our humble opinion, the Court no longer interprets the law according to the Constitution; but has, in many cases, usurped the power of Congress to legislate laws.

Respectfully yours,

Mr. and Mrs. J. L. CHENEY.

ST. PETERSBURG, FLA., February 27, 1958.

Hon. JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee,
Washington, D. C.

DEAR SENATOR EASTLAND: May I strongly urge you to pass the Jenner bill. If this bill is not passed the unhealthy decisions of the Supreme Court will go on and on.

Let the Supreme Court administer the laws, not make them. That power belongs with the States and with Congress.

I, for one (and, believe we, there are millions of Americans who feel as I do) deeply resent and am most alarmed at the attitude the Supreme Court is taking towards communism and States rights. After all, are they Communists or are they not, actively plotting to overthrow this Government?

Sincerely yours,

Senator JAMES O. EASTLAND,

ELIZABETH C. MARSHALL.

HOUSTON, TEX., March 1, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building,
Washington, D. C.

Please help any way you can to get bill S. 2646 out of Judiciary Committee, so that Congress can have chance to curb power of renegade Supreme Court. You can perform great service now and to future generations by throwing your power behind this bill. Article 3, section 2, states clearly Congress has this right.

Mr. and Mrs. BERT R. COATS.

TACOMA, WASH., March 1, 1958.

DEAR SENATOR EASTLAND: May we count on you to help get Senate bill 2646 (Jenner bill) to the floor of the Senate for a vote?

We need this bill—we need your help.

Thank you.

Mrs. F. W. SCHWAN.

DALLAS, TEX., February 27, 1958.

DEAR SENATOR: I am in favor of Senate bill 2646, introduced by Senator William Jenner, and also the provisions of S. 2646 of this bill, and do hope your committee will act favorably.

Most sincerely,

Mrs. L. W. LUNT.

Please pass the Jenner bill, S. 2040.

TACOMA, WASH., *February 28, 1958.*

Mrs. FRANK L. POOLK.

JAMAICA, N. Y., *February 28, 1958.*

DEAR SIR: I trust you will feel it your duty to enact bill S. 2040 into law. To many of us it seems imperative.
Respectfully yours,

HOWARD J. SHANNON.

DALLAS, TEX., *February 27, 1958.*

I am in favor of Senate bill 2040 as proposed by Senator Jenner and to correct the dangerous Mallory decision.

Mrs. LYMAN DAVID ROGERS.

BERWYN, PA., *February 28, 1958.*

DEAR MR. SENATOR:
I am very much in favor of bill S. 2040 and trust it will soon be brought to the floor. Please incorporate this note in the hearings on S. 2040.
Sincerely,

FRANCIS S. ROWLAND.

DAYTON, OHIO, *February 27, 1958.*

DEAR SENATOR: I am most interested in the present Supreme Court situation and am behind you. Congratulations on your work as a real American.
Respectfully,

FRANK J. WOBBER.

DALLAS, TEX., *February 27, 1958.*

I am in favor of Senate bill 2040 as proposed by Senator Jenner and to correct the dangerous Mallory decision.

Mrs. CHAS E. TURNER.

DALLAS, TEX., *February 27, 1958.*

DEAR SENATOR EASTLAND:
I am in favor of Senate bill 2040 and anything else you can do to curb the Supreme Court. Thank you for your invaluable service already to our country.
EDITH JONES O'DONNELL.

DETROIT 21, MICH., *February 27, 1958.*

Senator JAMES O. EASTLAND,
Washington, D. C.

DEAR SENATOR EASTLAND: It is imperative that you vote in favor of Senator Jenner's bill, S. 2040, to limit the jurisdiction of the Supreme Court. It seems to me that the latest Supreme Court decisions have been based on the United Nations Charter instead of the Constitution of the United States of America. Let's preserve our freedom and restore to Congress the duties of our legislators.

Very sincerely yours,

GERTRUDE GOODWIN.
Mrs. O. Guel Goodwin.

BERRYVILLE, VA., *February 27, 1958.*

Senator JAMES EASTLAND,
Washington, D. C.

DEAR SENATOR EASTLAND: I want to go on record as favoring bill S. 2040.
Very truly yours,

Mrs. CHARLES E. HARRISON.

DALLAS 25, TEX., February 28, 1958.

SENATOR JAMES O. EASTLAND,
Committee on Internal Security,
Washington, D. C.

DEAR SENATOR EASTLAND: My husband and I wish to express ourselves as being in favor of Senate bill S. 2040 as proposed by Senator William Jenner, on which hearings are now being held by the Internal Security Committee.

We deplore the weakening of the Smith Act by the Supreme Court, and ask that you include in S. 2040 provisions for correcting this dangerous decision.

Yours very truly,

ELIZABETH M. THOMPSON.

OAK PARK, ILL., February 20, 1958.

SENATOR JAMES O. EASTLAND.

HONORABLE SIR: We support Senator Jenner's bill, S. 2040, to limit the jurisdiction of the Supreme Court in five areas, namely: A, B, C, D, E.

Very truly yours,

Mr. and Mrs. JAMES D. McJOWALL,

DALLAS 5, TEX., February 28, 1958.

DEAR SENATOR EASTLAND: I deplore the encroachment of the Supreme Court on the civil rights of the American people. I beg that your committee will act favorably on Senate bill 2040 as proposed by Senator Jenner.

There are thousands of American citizens who are outraged by recent decisions of this Court and by its complete disregard of the Constitution of our United States such as the Mallory decision, the weakening of the Smith Act, the so called Civil Rights decision, and on.

For the sake of my children and all the future citizens of our Nation, something must be done to protect the people and the States—so please put some teeth into this bill so that the Tenth Amendment to our constitution can be restored to a revered dignity of fact, rather than fiction.

Most sincerely yours,

Mrs. EVELYN TAYLOR.

RIDGECREST, CALIF., February 26, 1958.

Referring to S. 2040, wish to express approval of your efforts to limit the power of the Supreme Court.

DARWIN ELDER,
Ridgecrest, Calif.

WEST LAFAYETTE, IND.
February 27, 1958.

SENATE JUDICIARY COMMITTEE,
Washington, D. C.

DEAR SIR: By all means pass the Jenner bill relative to the Supreme Court. Also we want no Summit Conference. I recommend that the Senate pass a bill prohibiting the President from attending such meeting.

Work for disarmament with inspection.

Truly yours,

CECILE MAE JORDAN.

FEBRUARY 26, 1958.

SENATOR EASTLAND: We write to ask you to please support Senator Jenner's bill to limit the powers of the Supreme Court.

We are sure many of their decisions recently have been procommunistic, so please put our note for Senator Jenner's bill.

Mrs. DAVID GILLETTE,
La Verne, Calif.

SAN FERNANDO, CALIF., *February 25, 1958.*

SENATOR JAMES O. EASTLAND,
Washington, D. C.

DEAR SENATOR: I urge you and your committee to act favorably on Senate bill S. 2040. It is absolutely essential that we honest loyal Americans have our rights and those of our children protected against the socialistic whims of the present members of the Supreme Court.

Sincerely,

MASON H. SLONNIGIN.

EL DORADO CHAMBER OF COMMERCE,
El Dorado, Ark., *February 27, 1958.*

HON. JOHN L. MCCLELLAN,
Washington, D. C.

DEAR SENATOR MCCLELLAN: I have just read with much interest the report of the hearing on S. 2040 which contains a statement by Senator Jenner of Indiana. It is certainly true that some action was started to curb the arbitrary and ill-considered decisions of the Supreme Court, especially as they nullify the efforts of our States to regulate their own internal affairs.

It is my hope that the hearings now being conducted by Senator Eastland will produce some concrete results. It was never the intention of our Constitution that the Supreme Court usurp the functions of the legislative branch of our Government or interfere with the Government of our 48 sovereign States. If you do nothing else during this session of the Congress, please try to restore the traditional democratic policy of our Government. Otherwise Federal bureaucratic control will soon be extended to every phase of our social, political, and economic life.

With kindest regards, I remain,

Sincerely yours,

CLAUDE M. HASWELL,
Chairman, Public Affairs Division.

DALLAS, TEX., *February 26, 1958.*

HON. JAMES O. EASTLAND,
Committee on Internal Security,
Washington, D. C.

DEAR SENATOR EASTLAND: I am very much in favor of S. 2040 and hope you will exert all effort possible toward its ultimate success.

Yours very truly,

Mrs. E. L. YORK.

PLYMOUTH MEETING, PA., *February 27, 1958.*

JUDICIARY COMMITTEE OF U. S. SENATE:

GENTLEMEN: Will you please recommend to the full Senate that the Senate bill 2040 be passed.

It is very important to us in this community. We have subversives in our midst.

Very truly yours,

EDITH S. SAWYER.
FRED S. SAWYER.

PLYMOUTH MEETING, PA., *February 26, 1958.*

JUDICIARY COMMITTEE,
United States Senate,
Senate Office Building,
Washington 25, D. C.

GENTLEMEN: We urgently request that you recommend to the full Senate that the following bill be passed: Senate bill 2040.

Thanks for your support.

Very truly yours,

Mr. and Mrs. IRVING RAPHAEL.

PLAINFIELD, IND., February 28, 1958.

SENATE INTERNAL SECURITY SUBCOMMITTEE,
Washington, D. C.

GENTLEMEN: The Supreme Court has gone too far, its time that their wings were clipped, I don't like it one bit, in their decisions on these lousy "Reds" they have caused the leaders to be turned loose, giving them another chance to try and overthrow our form of government. Get behind the Honorable William E. Jenner's bill, and then we can get back once again to the Constitution.

Some day in the near future, these wise men of the Supreme Court will be elected by the people, instead of being appointed by the President. This way, the Court will not be jammed, like it has been in the past.

I am an American, I was born in this country, I believe in the Constitution, and I for one will fight to the last ditch to preserve it. So in closing, I say, push this bill of Senator Jenner, get it over, make it a law, then the Supreme Court will have to abide by the Constitution.

Thanks.

GEORGE A. TIPPS.

I am a citizen, a voter, a taxpayer, a conservative Republican, a patriot, and a veteran of World War I and World War II.

INDIANAPOLIS 2, IND., February 28, 1958.

SENATE INTERNAL SECURITY COMMITTEE,
The Senate, Washington, D. C.

GENTLEMEN: Let me register my request that the powers of the Supreme Court be limited. I am in favor of the Jenner bill.

It appears to me very obvious that the State of Arkansas does not have enough schools; they never were known to have anything, so to send the United States Army down there to force the State to educate the Negroes simply makes more obvious their physical impossibility of performance position.

The impossibility of performance in this matter for them is just as obvious to me as is this segregation and integration question expressed today as education of the blacks in the same classrooms with the whites is just a twisted way of expressing the old ultimatum of the Berber pirates and vandals on their intended victims that the whites should be forced to go to school with the blacks.

It gets down to where I think the Supreme Court must have been under duress when they handed down this decision. They certainly have inadequate protection against this sort of thing. These Berber pirates may have been driven off the high seas by the United States Navy, but they appear to have started operations as the controlling force known as the Cominform that controls the Communist Party.

I certainly am in favor of limitations on the Supreme Court as a means of rescuing the country from the terrorist influence of the Communist Party.

Cordially yours,

JOHN P. DONNELLY.

JAMESTOWN, N. Y., March 1, 1958.

SENATE INTERNAL SECURITY SUBCOMMITTEE,
Washington, D. C.

GENTLEMEN: Since the Warren brand of Supreme Court now based decisions vitally affecting American rights upon communistic manifestos instead of law. It is essential that immediate passage of the Jenner bill become effective to protect American rights and national stability from Ike's Modern Republicanism.

Kindly take steps for immediate passage of the bill.

Sincerely,

EARLE W. GAGE.

CUCAMONGA, CALIF., February 27, 1958.

DEAR MR. EASTLAND: I heartily endorse the Jenner bill limiting the appellate jurisdiction of the Supreme Court—S. 2646. The time has come that these important hearings be held.

I wish your committee the success you need.

Yours sincerely,

Mrs. C. NORMAN ABBOTT.

A. M. KIDDER & Co.,
Tampa, Fla., February 28, 1958.

Senator EASTLAND,
Chairman, Internal Security Subcommittee,
Senate Office Building, Washington, D. C.

DEAR SENATOR: I have read Mr. Arthur H. Dean's statement as well as the statement of Mr. Thomas N. Harris, general counsel of the AFL-CIO, with reference to the bill introduced by Senator Jenner.

I hope and trust that this will have no effect on the thinking of your committee. Our United States Supreme Court (or call it our United States "Extreme" Court, if you prefer) has already caused a great deal of chaos, so much so, that it will take, I'm afraid, many years to repair.

Here is hoping the Jenner bill will be voted on favorably.

Sincerely yours,

O. W. KUHN.

DALLAS 6, TEX., February 27, 1958.

SIR: My husband and I approve Senate bill No. 2040. Please include in S. 2040 provisions for correcting the Mallory decision.

Yours truly,

LELAEEL (Mrs. E. D.) SHERIDAN.

DALLAS, TEX., February 28, 1958.

MY DEAR SENATOR EASTLAND: I am heartily in favor of Senate bill 2040 as proposed by Senator Jenner and urge you to exert every effort to have it passed.

Sincerely,

Mrs. ALLAN M. GRAYSON.

DALLAS 6, TEX., February 27, 1958.

Senator JAMES O. EASTLAND,
Chairman, Subcommittee on Internal Security,
Washington, D. C.

DEAR SIR: The security of our Nation is in such danger from the power usurped by the branch of our Government that should be most trustworthy.

For this reason I respectfully ask that you use your best efforts to get the Jenner bill limiting the power of the Supreme Court onto the floor as early as possible.

Sincerely,

DAISY M. REEDY.

DALLAS, TEX., February 27, 1958.

Senator JAMES O. EASTLAND,
Chairman Internal Security Committee

DEAR SIR: I am in favor of Senate bill S. 2040 as proposed by Senator Jenner which is before your Committee for study. Everyone I talk to deplores the weakening of the Smith Act by the Supreme Court.

Sincerely,

VIVIAN R. HARNING.
(Mrs. Ronald B.)

DALLAS, TEX., February 27, 1958.

Senator JAMES O. EASTLAND,
Committee on Internal Security
Senate Office Bldg., Washington, D. C.

DEAR SENATOR EASTLAND: I am heartily in favor of S. 2040. Also, I deplore the weakening of the Smith Act by the Supreme Court. Please add provisions to S. 2040 to correct this dangerous decision.

Sincerely,

ELLEN C. FERGUSON.
(Mrs. Ted B.)

INDIANAPOLIS, IND., *February 28, 1958.*

SENATE INTERNAL SECURITY SUBCOMMITTEE,
Washington, D. C.

GENTLEMEN: Just another letter from Indiana in favor of the bill introduced by Senator Jenner. Surely, there must be some way to stop the subversive actions of men like Warren and others in the Supreme Court of the United States.

Respectfully yours,

RICHARD F. HONERO.

FORT WORTH, TEX., *February 28, 1958.*

GENTLEMEN: Please give due consideration to Senator Jenner's bill S. 2040 curbing the powers of the Supreme Court, as I am sympathetic with the general purposes of this bill.

I also believe that a proposal to appoint these Justices for a term such as 2 or 4 years, rather than the "lifetime" position they now hold, would meet with favor of the people—great favor I should say.

Yours truly,

B. V. BARTOW.

TULSA OKLA., *March 1, 1958.*

SENATE INTERNAL SECURITY SUBCOMMITTEE
Washington, D. C.

GENTLEMEN: I am very much in favor of impeaching the Supreme Court Justices—that is if you have the courage to do so. If not, pass the Jenner bill. We have had enough of their Communist decisions.

Respectfully,

MRS. GEORGE W. HALL.

FORT WORTH, TEX.

We sincerely endorse the Jenner bill, S. 2040.

MRS. JUD PERRY AND FAMILY.

MICHIGANTOWN, IND., *February 28, 1958.*

DEAR SIR: We strongly favor the Jenner bill that would curb the Supreme Court.

Sincerely,

MR. AND MRS. C. HOLLENBACK.

DALLAS, TEX., *February 28, 1958.*

Senator JAMES O. EASTLAND,
Committee on Internal Security,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: I attach a great deal of importance to S. 2040, and I fully appreciate your effective work in this respect. I would urge you to continue until a satisfactory bill has been passed.

Very truly,

ELLEN RAY COOK.

DALLAS, TEX., *February 27, 1958.*

DEAR SENATOR EASTLAND: We are in favor of Senate bill 2040 as proposed by the Hon. Senator Jenner.

We deplore the weakening of the Smith Act by the Supreme Court and we greatly resent the Supreme Court's recent Mallory decision. Please include in Senate bill 2040 provisions for correcting this dangerous decision.

Sincerely yours,

Mr. and Mrs. J. W. HICKMAN.

LIVINGSTON, MONT., *February 20, 1958.*

SENATE INTERNAL SECURITY COMMITTEE,
Washington, D. C.

GENTLEMEN: I wish to express my approval of bill S. 2040, presented by Senator Jenner, and most earnestly pray that it will become a law.

It is encouraging to know that an effort is being made to keep at least one department of our Government within the bounds of the Constitution.

May all of the fine parts of the amendment be made a law and put into operation and so give back to the people, confidence and hope that constitutional government may eventually be restored to America.

Sincerely yours,

Mrs. GEORGE B. WRIGHT.

DALLAS, TEX., February 28, 1958.

Senator JAMES O. EASTLAND,
Committee on Internal Security,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: May I urge you to use your good offices to do everything possible for the passage of Senate bill 2646, proposed by Senator Jenner. I do not believe it is necessary to urge you personally to do all you can, but it may be helpful to you to know how wide a segment of the public wants this bill passed.

Sincerely,

JOHN WILLIAM ROGERS.

ST. PETERSBURG, FLA, March 3, 1958

Hon. JAMES EASTLAND,
Chairman, Committee on Judiciary,
Senate Building, Washington, D. C.

Sentiment of all our friends is favorable towards speedy affirmative action upon S. 2646 returning thereby to constitutional Government.

Dr. and Mrs. ALVIN L. MILLS.

DALLAS, TEX., March 3, 1958.

SENATOR JAMES O. EASTLAND,
Subcommittee on Internal Security,
Senate Office Building, Washington, D. C.

Heartily in favor Resolution S. 2646, thank you for your support.

Mrs. WM. A. BLAKLEY.

ST. PETERSBURG, FLA., March 2, 1958.

Senator JAMES O. EASTLAND,
Chairman of Committee of the Judiciary,
Senate Office Building, Washington, D. C.

Our Constitution gives to Congress the full unchallengeable power and responsibility to regulate by law the appellate jurisdiction of the Supreme Court. I ask your Committee on the Judiciary to take affirmative action upon Senate bill S. 2646.

Mrs. MARGARET G. ROYALS.

SLAY & Co.
DALLAS, TEX., February 27, 1958.

Hon. JAMES O. EASTLAND,
Committee on Internal Security,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: I am heartily in favor of the passage of Senate bill No. 2646 as proposed by Senator Jenner redefining the power of the Supreme Court.

Instead of interpreting our laws which is the fundamentals of the Supreme Court, it has been strictly an enforcement body.

This change has been needed for a long time. In fact we need a definite whittling down of Federal power and spending, and the return of more and more power and jurisdiction to the States. This, as you know, was the purpose of our Constitution and our Bill of Rights, both of which for the last few years have been delegated to the background.

Yours very truly,

FRANK C. SLAY.

DALLAS, TEX., February 27, 1958.

HON. JAMES O. EASTLAND,
Washington, D. C.

DEAR SENATOR EASTLAND: As chairman of the Internal Security Committee, it is my understanding that you are now holding hearings on Senate bill S. 2040 as proposed by Senator Jenner.

It is my fervent hope, as well as that of all of my friends with whom I have discussed this matter, that this bill will be passed on favorably. In the light of past events it is certainly hoped that you will do everything in your power to see that this bill is passed.

Thanking you very much, I am,

Yours sincerely,

HARRY H. LACEY, Jr.

DALLAS, TEX., March 2, 1958.

HON. JAMES O. EASTLAND,
Committee on Internal Security, Washington, D. C.

DEAR SENATOR EASTLAND: I am definitely in favor of Senate bill S. 2040 as proposed by Senator Jenner. I greatly resent the weakening of the Smith Act by the Supreme Court so that Communists are permitted their freedom to overtake this country and I greatly deplore the decision of the Supreme Court known as the Mallory decision, which ties the hands of police in combating the beatings and "muggings" of peaceful citizens. Please include provisions to correct these dangerous decisions.

If there is to be freedom for Communists, then there must be freedom for non-Communists to walk our streets without fear of their lives. Let's restrict the Supreme Court so that our country is again free and is a government "of the people, by the people, and for the people."

Sincerely,

LUCILE DRAGERT.

ACTON, IND.

To the counsel of the Internal Security Subcommittee:

DEAR SIRS: I wish to register my most emphatic support of Senate bill 2040.

Sincerely,

C. S. HUTCHINSON.

WALTON, N. Y., March 3, 1958.

HON. JAMES O. EASTLAND,
Chairman, Committee on Internal Security,
Washington, D. C.

DEAR SENATORS I am wholeheartedly in favor of Senate bill No. 2040, as proposed by Senator Jenner and I respectfully ask you to do all you can to have it passed. I also respectfully ask you to include in that bill, provisions to correct the very dangerous decision of the Supreme Court, known as the Mallory decision. This is of vital importance to our people and to our Nation.

I thank you for your attention to this vital matter.

Yours respectfully,

CHARLES O. TITTLE.

DALLAS, TEX., March 3, 1958.

SENATOR JAMES O. EASTLAND:

DEAR SIR: I am in favor of S. 2040 and hope you will lend it your support.

As chairman of the Senate Committee on Internal Security, you are in a position to help a great deal with this very important bill proposed by Senator Jenner.

Thank you.

Sincerely,

FLORENCE N. MERRILL.

NEW ORLEANS, LA., March 3, 1958.

SENATOR JAMES O. EASTLAND,

SIR: I am in favor of the "Jenner Bill" due to be taken up by your committee this month.

I feel the appellate jurisdiction of the supreme court should be limited in certain respects now, to avoid a slow but sure avalanche of questionable decisions in the future.

Sincerely,

IVERSON MYSING.

Hon. JAMES O. EASTLAND,
Washington, D. C.

TERRELL, TEX., March 1, 1958.

DEAR SIR: Please use every means at your command to curb the powers of our present Supreme Court.

I heartily favor passage of the Bill S. 2646.

Sincerely yours,

MARY V. MCCLUNG.

Senator JAMES O. EASTLAND,
*Committee on Internal Security,
Senate Office Bldg., Washington, D. C.*

DALLAS, TEX., March 1, 1958.

Please also include in S. 2646 provisions for correcting the Smith Act. I am, we both are, in favor of Senate bill No. 2646 as proposed by Senator Jenner.

MR. & MRS. V. T. DRAPER.

SAN MARINO 9, CALIF., March 3, 1958.

Senator JAMES O. EASTLAND,
Senate Office Bldg., Washington, D. C.

DEAR SENATOR: Senator Jenner's bill 2646 to limit the powers of the Supreme Court is surely what we need until we have a Supreme Court loyal to our Constitution.

I am sure that you are for it and will do your best to get it passed.

Success to you!

Sincerely,

ETHEL ROSTERMAN,

N. ADAMS, MASS., March 2, 1958.

Re: S. 2646 (Supreme Court)
Hon. LEVERETT SALTONSTALL,
*Senate of the United States,
Washington, D. C.*

DEAR SENATOR SALTONSTALL: This letter is written with reference to the above named bill, S. 2646, introduced by Senator Jenner and now up for hearings before the Judiciary Committee. In behalf of the members of this family, may I just tell you we believe every member of Congress should get back of this legislation, in the public interest. There is nothing more needed at this moment than legislation to repair the damage done to our judicial structure and to the national security by a whole series of recent Supreme Court decisions which strike directly at the Constitution itself. I shall name only a few—one of which the Congress has already been forced to do something about, (Jencks—FBI Files). They are the Watkins, Slochower, Nelson, Sweezy, Konigsberg, and several Smith Act decisions. There are many more, covering many fields of law.

The public has been left without protection in the fact of subversion and general criminality, the rights of the states have been trampled upon—in a manner that is so shocking as to be almost unbelievable. One can only conclude that the present membership of the Supreme Court is so obviously ignorant of the nature, techniques and method of operation of the Communist conspiracy as to require direct congressional action to provide the constitutional protection due the people. And certainly, unless the Congress does something, its own prerogatives and functioning will remain so impaired in the field of investigation as to be practically worthless.

Under these circumstances, the Jenner Bill provides the only effective solution to this particular kind of problem. It may seem drastic, but it certainly is not unconstitutional, and it is no more drastic than some of the unconscionable Supreme Court actions that gave it birth.

No matter what we may do in the way of defense, foreign aid, etc., if we leave ourselves naked to Communist subversion, as the Court has done by these decisions—we will quite surely go the way that other nations have gone before us—nations free like us—free but foolish.

All that is necessary is a short look at recent history. A perfect cast study is provided in the remarkable book "Soviet Russia in China" by one who should know—Chiáng Kai Shek.

(Signed) KATHERINE H. JOSLIN.

DALLAS, TEX., February 28, 1958.

DEAR SENATOR EASTLAND: As a member of the Public Affairs Luncheon Club of Dallas, I am very much interested in the successful passage of Senate bill No. 2646 as proposed by Senator Jenner.

The weakening of the Smith Act by the Supreme Court is another cause for anxiety. We hope you will include relief from this situation in S. 2646.

Gratefully,

(Mrs.) BURDAH M. ADAMS.

PHOENIX, ARIZ., March 1, 1958.

HON. JAMES O. EASTLAND,
United States Senator,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: Many of us in the Southwest urge you to support legislation to regulate by law the appellate jurisdiction the Supreme Court. I am enclosing a petition which is far from complete, because I know your committee is already holding hearings. It would be possible to secure many many more signatures if time permitted.

I have received for several years copies of hearings concerning the scope of Soviet activity in the United States. I find this material of great interest and they have deepened my concern in regard the spread of communism in our country. I give these hearings to others to read and a number of these people see the problem much clearer. Thank you for the material.

Sincerely yours,

ANNE P. KOPTA.

(The petition referred to contains signatures of 27 Phoenix residents.)

WEST HARTFORD, CONN., March 4, 1958.

HON. JAMES O. EASTLAND,
Senate Judiciary Committee,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: This is to let you know that I earnestly hope that you will support and vote for the Jenner bill.

Sincerely

(Mrs.) O. E. MARSHALL.

DALLAS, TEX., February 28, 1958.

SENATOR JAMES O. EASTLAND,
Committee on Internal Security,
Senate Office Building, Washington, D. C.

DEAR SIR: I am heartily in favor of Senate bill No. 2646, as proposed by Senator William Jenner.

The Supreme Court, with its present members, must be curbed for the good of the United States of America.

Yours very truly,

NEOMA PENNY.

WEST HARTFORD, CONN., March 4, 1958.

HON. JAMES O. EASTLAND,
*Chairman, Senate Judiciary Committee,
 Senate Office Building, Washington, D. O.*

DEAR SIR: I urge you to vote for the Jenner bill.
 Respectfully yours,

CHARLOTTE L. ALLING.

NORTH AMINGTON, MASE., February 28, 1958.

HON. JAMES O. EASTLAND,
*Chairman, Judiciary Committee,
 Senate Office Building, Washington, D. O.*

DEAR CHAIRMAN EASTLAND: The Manamooskeaglin Chapter of the Massachusetts Committees of Correspondence, an affiliate of the American Coalition of Patriotic Societies, demand approval and passage of Senator Jenner's S. 2040—a bill to "limit the appellate jurisdiction of the Supreme Court in certain cases: investigative functions of the Congress, the security program of the executive branch of the Federal Government, State antisubversive legislation, and the admission of persons to the practice of law within individual States."

We request you to make this written statement a part of the testimony supporting S. 2040 and we ask for early passage by the United States Congress.

Our country must be protected from the "hooligan rulings" of the present Supreme Court. We demand impeachment proceedings be instituted against the members for their usurpation of the power to make laws. Only the Congress of the United States has power to write and enact our laws and that authority must be reclaimed.

Yours truly,

A. RICHARD MERRILL,
*Chairman, Manamooskeaglin Chapter,
 Massachusetts Committees of Correspondence.*

SAN GABRIEL, CALIF., March 3, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building, Washington, D. O.

DEAR SENATOR J. EASTLAND: Please see that Senator Jenner's bill S. 2040 gets to the Senate floor immediately.

This bill is most important in limiting the encroachment of the Supreme Court in the rights of the States.

Sincerely,

ELSIE JO DRISCOLL.

MARCH 3, 1958.

Senator JAMES O. EASTLAND,
*Senate Office Building,
 Washington, D. O.*

DEAR SENATOR EASTLAND: I respectively urge that you support Jenner bill S. 2040, both in committee and also after it gets out on the Senate floor for action.

Unless we curb the actions of the Supreme Court, we will continue to lose our freedoms one by one!

Sincerely,

CHARLOTTE E. MARTINALICH.
 EDWARD H. MARINALICH.

SANDBORO, IND., March 1, 1958.

DEAR SENATOR EASTLAND: It is our hopes and prayers that Congress will act without fail to pass the Senate bill S. 2040, as we are much concerned and alarmed at the actions of the members of the Supreme Court.

We consider these men in the Supreme Court the greatest threat to our freedoms. We feel it is the duty of the men in Congress to act immediately in the way the Constitution gives you power, to prevent further damage from this court so favorable to Communists.

It is time for patriotic leadership in Washington and men who will serve the interests of this country.

Sincerely,

Mr. and Mrs. NELSON MYERS.

MARCH 3, 1958.

DEAR SENATOR EASTLAND: You are at the present time conducting hearings on Senate bill 2046 which would limit the Supreme Court's jurisdiction in considering certain appeals. There are eight of you and I have the same thing to say to each of you. Since I do not type, do you mind if I use carbon copies?

American traditions are deep rooted. I believe, and I am sure you do: (1) Man owes his allegiance first to God, his Creator; (2) God has given man certain inalienable rights, your rights to you as an individual, my rights to me as one; (3) the operation of Government which is man-made, is to preserve and protect these rights—your rights in freedom to think, act and speak as an individual so long as you do not violate my equal rights.

In communism there is no God, therefore no moral law as we know it; therefore no recognition of individual rights and no sense of wrong when these rights are violated. Economic production and exchange, with man subservient to the State is the basis of communism. Now we have (1) fifth amendements reinstated through the ruling of the Supreme Court of the United States; (2) FBI unable to move when saboteurs talk about overthrowing the Government. They can only be touched if they plan and attempt to put the plan into action—Supreme Court ruling; (3) a Communist cannot be kept from taking the bar examination to practice law in any State—Supreme Court ruling; (4) your investigating committee of Congress must know exactly what they are going to do in investigating and how, in the right to question witnesses and explain it all explicitly to the witness first, as I understand it—Supreme Court ruling.

With all the above in mind won't you please give S. 2046 your individual attention, with the idea of preserving your rights and mine.

Thank you.

Respectfully,

Mrs. C. F. AUMANN.

MILFORD, OHIO, February 28, 1958.

HON. JAMES O. EASTLAND,
*Senate Judiciary Committee,
Senate Office Bldg., Washington, D. C.*

DEAR SENATOR EASTLAND: I understand that you are now having hearings on S. 2046, the bill introduced by Senator Jenner to limit the Appellate Jurisdiction of the Supreme Court. I wish that I could go to Washington to give testimony before the committee, but am a housewife with heavy responsibilities at home, and with limited income. If I were opposed to the bill, the Fund for the Republic (so-called) would probably be glad to pay my way.

Everyone I know is expressing alarm about the many recent decisions of the court, based on socialism and sociology rather than on law, which have torn our web of security to tatters. People who have not been seriously concerned with national matters heretofore, are up in arms about it. If you could hold hearings in other parts of the country, I am sure that you would see how alarmed people are becoming.

Please report this bill favorably from the committee, and please urge that it be even stronger, so that it will cover such decisions as the Mallory decision, which senselessly released a confessed rapist to strike again.

Thank you for the stalwart stand you have been taking.

Sincerely,

Mrs. CARL W. KIETZMAN.

CHESTNUT HILL, PA., March 3, 1958.

HON. JAMES O. EASTLAND,
*Office of the Senate,
Washington, D. C.*

MY DEAR SENATOR EASTLAND: I am writing to urge you to see that bill S. 2046 gets on the floor and is passed.

Very truly,

U. E. ALISON.

HOUSTON, TEX., *March 3, 1958.*

HON. JAMES O. EASTLAND,
*Senate Office Building,
 Washington, D. C.*

HONORABLE SIR: Please support bill S. 2040, the Jenner bill, designed to curb Supreme Court appellate power. You are in a fine position to lend assistance to this bill, and is needed by all of us who believe in constitutional principles. It is stagnating at present, but the bill must be acted on soon.

Thanks.

LANE M. POWELL.

ELIZABETH, N. J., *March 5, 1958.*

SENATOR McCLELLAN,
*Senate Office Building,
 Washington, D. C.*

DEAR SENATOR McCLELLAN: Your vote for the Jenner bill would be appreciated.
 Yours truly,

DAVID DEARDORN.

INDIANAPOLIS, IND., *March 1, 1958.*

THE SENATE INTERNAL SECURITY COMMITTEE,
*United States Senate,
 Washington, D. C.*

GENTLEMEN: Curb the Supreme Court! Support Senator Jenner's bill to limit the powers of the Supreme Court. Make the United States safe for Americans, not Communists. Save our children from Communism.

A mother,

Mrs. L. J. WILLIAMSON.

SHELBY, IND., *March 6, 1958.*

SENATE INTERNAL SECURITY SUBCOMMITTEE,
*United States Senate,
 Washington, D. C.*

DEAR SIR: Last year, this administration tried to propagandize a Supreme Court decision as the law of our land; sent troops to a State in direct violation of our Constitution—all for votes, and at a time when we needed loss of faith in our Government less. These acts border on treason but the fearful part is the fact they cannot vindicate their deed, nor do they try, nor retract.

We need more bills like Senator Jenner's and more southern statesmen, who are willing to defy political suicide, to defend right, and ostracism, in combating the left-wing elements.

ORLANDO FRANKLIN.

ST. PETERSBURG, FLA., *March 1, 1958.*

SENATOR EASTLAND,
Washington, D. C.

DEAR SIR: Please use all your power to help pass the Jenner bill S. 2040. It is about time the Supreme Court was told how far they can go in making laws of the land.

Please place me on your mailing list telling me how you feel about this bill and how you voted. I see that E. Roosevelt is writing in our St. Pete paper telling people not to support this bill. Our papers have played up big the fact that Justice Warren attended school on Talmudism instructed by Rabbi. We can expect more harmful decisions as a result of that knowledge.

I wish we had more people working for America as worthy as you. May Lord Jesus protect and guide you.

MURIEL BARSACHS.

PASADENA, CALIF., March 3, 1958.

Senator JAMES O. EASTLAND,
Chairman, Washington, D. C.

DEAR SENATOR EASTLAND: This is to urge you to get the Jenner bill S. 2040 to the floor and passed as soon as possible. We cannot let the Supreme Court take over the rights of the States any longer.

Mrs. A. J. BADE.

PASADENA, CALIF., March 3, 1958.

Senator JAMES O. EASTLAND,
Chairman, Washington, D. C.

DEAR SENATOR EASTLAND: We deem it of the utmost importance that Senator Jenner's bill, attempting to curb the unlimited powers of the Supreme Court, be passed as quickly as possible.

We urge you to get behind this movement and support it with all your power and means. Thank you.

Mr. and Mrs. W. W. KOENIG.

SAN MARINO, CALIF., March 3, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: Congratulations on your wonderful article, Symposium Over Our Supreme Court. Please support Senator Jenner's bill, S. 2040. Thank you. Let's place our Government back in the hands of "for and by the people."

A voter and taxpayer.

VIRIA M. GRUFFE.

HOLLYWOOD, CALIF., March 3, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

MY DEAR SENATOR EASTLAND: I am sure you are strongly supporting the Jenner bill, S. 2040, which will do something to protect our fast-vanishing States' rights.

Sincerely,

P. M. SELDON.

LOS ANGELES, CALIF., March 3, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building, Washington D. C.

DEAR SENATOR EASTLAND: We're so proud of your stand in the many bills you've voted to hold on behalf of constitutional government. And so we are confident you'll vote S. 2040, the Jenner bill, to help protect us against our unpredictable Supreme Court. They've done us more damage than any enemy outside our country could do!

Gratefully yours,

MARQUERITE MCFARLANE.

PASADENA, CALIF., March 3, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: I urge you to vote to have S. 2040 brought to the floor of the Senate for a vote. I am not an apathetic American and I am very disturbed by the decisions of the Supreme Court, which is consistently freeing convicted Communists. I do not understand how any Senator, who swears to uphold the Constitution, can be complacent in the face of such decisions. The power of the Supreme Court to give aid and comfort to our enemies must be curbed.

Sincerely yours,

RAMON B. CHURCH.

PASADENA, CALIF., March 3, 1958.

SENATOR JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: May I urge you to help bring the Jenner bill, S. 2040, to the floor of the Senate and urge you to fight for its passage? America is in grave danger and needs to get back to a constitutional form of government.

Mrs. V. P. JENSEN.

SOUTH PASADENA, CALIF., March 3, 1958.

SENATOR JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: Please see that Senator Jenner's bill S. 2040 gets to the Senate floor immediately.

This bill is most important in limiting the encroachment of the Supreme Court on the rights of the States.

Sincerely,

JANE CROSBY.

LONG BEACH 3, CALIF., March 3, 1958.

SENATOR JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: California Americans appreciate your good work and hope you will be successful in getting the Jenner bill (S. 2040) passed to curb the pinko Supreme Court.

Good luck! We're with you!

DIANA G. VAN DEN BERG.

LONG BEACH 3, CALIF., March 3, 1958.

SENATOR JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SIR: Please do all you can to support the Jenner bill, S. 2040, limiting that Supreme Court. We must go back to constitutional government. Thank you.

Sincerely yours,

ANNE FICKES.

CHARLESTON, W. VA., March 3, 1958.

SENATOR EASTLAND,
U. S. Congress,
Washington, D. C.

As an active member of the Republican Club of Charleston, W. Va., I am in favor of the passage of bill S. 2040.

Sincerely,

(Mrs.) R. L. WILDMAN.

PASADENA, CALIF., March 3, 1958.

SENATOR JAMES O. EASTLAND,
Senate Office Building,
Washington, D. C.

DEAR SENATOR EASTLAND: We count on your support of S. 2040, for we know your understanding and respect for the Constitution of the United States and the genius of it's checks and balances. Thank you for your unwavering principles in the face of the shilly-shallying in our Court and State Department. Talk loud—stand strong and vote aye on Senator Jenner's bill. Our applause here on the coast will be audible to you, back there.

Sincerely yours,

BETTE F. ROADWAY.

PASADENA, CALIF., March 3, 1958.

SENATOR JAMES O. EASTLAND,
Senate Office Building,
Washington, D. C.

DEAR SENATOR EASTLAND: Please uphold Senator Jenner's bill, S. 2040, to limit the jurisdiction of the Supreme Court.

Let's place our Government back in the hands of, for, and by the people.

Sincerely,

(MRS. E. H.) MILDICENT V. GUILLIS.

PIEDMONT, CALIF., March 1, 1958.

MY DEAR SENATOR EASTLAND AND MEMBERS OF YOUR COMMITTEE:

In reading and studying Senator Jenner's resolution limiting the appellate jurisdiction of the Supreme Court, I and our study group thoroughly approve of the proposed limitations.

Yours sincerely,

ELVA E. DINSMORE.

DALLAS, TEX., March 3, 1958.

HON. JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: As chairman of the Internal Security Committee, it is my understanding that you are now holding hearings on Senate bill 2040 as proposed by Senator Jenner.

It is my fervent hope, as well as that of all my friends with whom I have discussed this matter, that this bill will be passed on favorably. I hope you will do everything in your power to see that it is passed.

Thanking you very much, I am

Yours sincerely,

(MRS.) HARRY H. LACEY, Jr.

WHEELING, W. VA., March 3, 1958.

HON. JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: It is my fervent hope that bill S. 2040 to limit the appellate jurisdiction of the Supreme Court in certain cases will be reported favorably out of the Committee on Judiciary.

This bill is a must if we are to preserve the Constitution which has been circumvented in many of the recent decisions of the Supreme Court.

Sincerely,

DOROTHY B. FRANKSTON.

BALTIMORE, MD., March 3, 1958.

SENATOR JAMES O. EASTLAND,
Senate Office Building, Washington D. C.

DEAR SENATOR: All those signing the enclosed petition including myself, are most anxious that Senate bill 2040 be passed as soon as possible realizing its great importance to the preservation of our constitutional form of Government.

With every good wish for your continued good health, and success in your dedicated work for your country, I am,

Sincerely yours,

MADELINE DOUGHERTY.

The petition contained names of twelve residents of Baltimore and nearby areas.

BELOIT, WIS., March 3, 1958.

HON. JAMES O. EASTLAND,
Chairman, Senate Committee on the Judiciary,
Senate Office Building, Washington 25, D. C.

DEAR MR. EASTLAND: Please register by hearty support for Senate bill 2040, to limit the appellate jurisdiction of the Supreme Court.

I would invite your attention to the Constitution which, in Article III, provides that the Supreme Court "shall have appellate Jurisdiction both as to law and as to fact, with such exceptions, and under such regulations as the Congress shall make." This wording fairly demands that this bill be passed, particularly in view of the apparent inability of the present Court to read either the statutes or the Constitution.

My compliments to Senator Jenner for his stand in defense of the Congress. The current penchant of the Court for rewriting the laws opposite to the expressed will of Congress, its reliance on such "authority" as Gunnar Myrdal must be checked.

Yours very truly,

R. H. WASHBURN.

DALLAS, TEX., March 4, 1958.

Hon. BRUCE ALDER,

Congress of the United States, Washington, D. C.

SIR: I respectfully request that you give your full support to use your influence in whatever way possible to convince Senator James O. Eastland and Senator William Jenner that Dallas is well aware of dangers ahead if Senate bill 2040, proposed by Senator Jenner, is not passed to redefine the power of the Supreme Court and to return to the States the right to regulate subversive activities.

It is our desire to call the attention of you right-thinking representatives of the people that additional provisions to correct the recent Mallory decision be incorporated in S. 2040. We greatly deplore the weakening of the Smith Act by the Supreme Court.

Yours very truly,

ELEANOR S. WILSON.
(Mrs.) Eleanor S. Wilson.

CORPUS CHRISTI, TEX., February 28, 1958.

Senator JAMES O. EASTLAND,

Committee on Internal Security,

Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: This letter is in regard to Senate bill No. 2040, as proposed by the very wonderful Senator Jenner. I am very definitely in favor of bill 2040; and wonder if it would be possible to include in it a provision for correcting the Supreme Court's Mallory decisions.

I wish you every success with your Committee. We need more men like you and Senator Jenner in Washington, especially (most especially) on the Supreme Court.

Very sincerely,

Mrs. ALAN T. NICHOLSON.

DALLAS, TEX., March 3, 1958.

Senator JAMES O. EASTLAND,

Committee on Internal Security,

Washington, D. C.

Hon. JAMES O. EASTLAND: This is to inform you of my approval of Senate bill No. 2040 as proposed by Senator Jenner.

I deplore the weakening of the Smith Act by the Supreme Court. I, too, resent the Supreme Court's recent decision—Mallory decision.

I trust that Congress will redefine the power of the Supreme Court, as stressed in bill No. 2040, since it has by its many decisions shown that it is not the guardian of the United States Constitution.

Sincerely,

MISS ELIZABETH V. COOK.

DALLAS, TEX., March 3, 1958.

Senator JAMES O. EASTLAND.

DEAR SIR: I sincerely approve of the Jenner bill No. 2040, and hope its passage will not in any way be hindered.

Many of us realize that we have few conservative men in our Congress and regret we haven't more men to represent us like you and Senator Wm. Jenner.

Most sincerely,

(Mrs. W. C.) OCTARENE PADGITT.

NEW YORK, N. Y., March 3, 1958.

SENATOR JAMES O. EASTLAND,
Senate Office Building,
Washington, D. C.

DEAR SENATOR EASTLAND: The recent Supreme Court rulings on subversive cases have made it almost impossible for America to defend itself against the Communist conspiracy.

Senator Jenner has introduced a bill to correct this.

I hope that you will give this bill careful consideration and I also hope that you will support it.

Sincerely,

FRED S. DUNN.

DALLAS, TEX., March 4, 1958.

DEAR SENATOR: I want to add my name to thousands of others endorsing Senate bill S. 2040 as proposed by Senator Jenner, and please include in it provisions to correct the Supreme Court's recent Mallory decision.

There is no need for me to elaborate on how most of the South feels about many Supreme Court decisions. More power to you and others who are trying to correct at least some of the disgraceful decisions.

Very sincerely,

Mrs. P. B. KELLER.

BRIDGE, TEX., March 4, 1958.

SENATOR JAMES O. EASTLAND,
Chairman, Committee on Internal Security,
Washington, D. C.

DEAR SIR: I wish to express hearty approval of Senate bill S. 2040, to redefine the power of the Supreme Court.

Sincerely,

VELMA POOL CAPPS.

CINCINNATI, OHIO, March 4, 1958.

HON. JAMES EASTLAND,
Head of the Senate Judiciary Committee,
Washington, D. C.

DEAR SENATOR EASTLAND: I have received complete information regarding bill S. 2040, introduced by Senator Jenner, and it is my sincere belief that the entire bill should be passed.

How our Supreme Court ever became vested with power to release people convicted after a fair trial, and especially convicted in connection with Communist activity, is too much for me to understand. I am an old woman with not too many more years to live, but for the sake of the coming generations I should like to have some small voice in saving our Constitution from being scrapped bit by bit.

Your people have sent you to Washington to look after the welfare of our country and the good of the American people. Regardless of partisan politics, for God's sake have the courage to vote for your own convictions, and save what there is left to be saved.

Sincerely yours,

GERTRUDE DE PINAL

SANTA BARBARA, CALIF., March 3, 1958.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
United States Senate, Washington, D. C.

MY DEAR SENATOR: I have followed with dismay many of the rulings of the Supreme Court for the past few years, and in the interest of preventing a continuity of such decisions not properly the affair of the Court as intended by our forebears, and in the best interest of our country I want you to know that I am in full agreement with Senator Jenner's efforts through his Senate bill 2040, to withdraw appellate jurisdiction from the Court in the fields of:

(a) The investigative activities of the Congress.

(b) The security programs of the executive branch of the Government.
 (c) State legislation against subversive activities.
 (d) Home rule over local schools.
 (e) Admission to the bar in individual States.
 and I strongly urge your committee to favorably report S. 2640 back to the full committee for action.

I further hope you will then exert every effort to secure passage of the bill at this session of Congress.

With all good wishes,

Sincerely,

WILLIAM H. DERNEILL.

DALLAS, TEX., March 5, 1958.

Senator JAMES O. EASTLAND,
*Committee on Internal Security,
 Senate Office Building, Washington, D. C.*

I urge that your committee report favorably on Senate 2640 proposed by Senator Jenner which is now under consideration. Our constitutional form of government, rights of the individual States and the internal security of the nation needs protection which this bill will give.

A. G. HILL.

PASADENA, CALIF., March 3, 1958.

Senator JAMES O. EASTLAND,
*Chairman, Senate Office Building,
 Washington, D. C.*

DEAR SENATOR EASTLAND: Please get Senator Jenner's bill, S. 2640, to the floor of the Senate immediately.

This bill is most important to limiting the encroachment of the Supreme Court on the rights of the States.

Sincerely,

GERTRUDE D. BALE.

SAN MARINO, CALIF., March 3, 1958.

SENATOR JAMES O. EASTLAND, *Chairman,
 Senate Office Building, Washington, D. C.*

DEAR SENATOR EASTLAND: We urge you to support S. 2640, the Jenner bill. Our freedoms are not safe under the present Supreme Court. They must be curbed.

Yours very truly,

Mr. and Mrs. M. N. THACKABERRY.

GRIFFITH LUMBER COMPANY,
 HUNTINGTON, W. VA., March 4, 1958.

HON. JAMES O. EASTLAND,
*Chairman, Judiciary Committee,
 Senate Office Building, Washington, D. C.*

DEAR SENATOR EASTLAND: We, the undersigned, respectfully request that your committee report favorably Senate bill 2640, known as the Jenner bill.

This should be done as quickly as possible, as our country is in grave danger. Prompt enactment of this bill into law is necessary if we are to preserve our Republic.

Yours very truly,

GUY WEST,
Route 2, Proctorville, Ohio.
 ENID W. OSWALD,
Huntington, W. Va.
 HERMA S. COPEN,
Huntington, W. Va.
 LUTHER O. GRIFFITH,
Huntington, W. Va.

CINCINNATI, OHIO, March 1, 1958.

Senator JAMES O. EASTLAND,
Senate Judiciary Committee,
Senate Office Building, Washington, D. C.

DEAR SIR: A member of the Senate Judiciary Committee will you please give favorable consideration to Senate bill 2646? Something must be done to stop the Supreme Court's intervention in subversive matters, and the Jenner bill will help to do this.

I am sure you are for America first, as our forefathers planned and established it.

Thank you for your support.

Sincerely,

Mrs. A. O. BYER.

INDIANAPOLIS, IND., March 3, 1958.

Senator JAMES O. EASTLAND,
Committee on the Judiciary,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: S. 2646 is before your subcommittee now. Please give this bill your support for the sake of your rights and mine. It is a start in the right direction.

Mrs. C. E. AUMANN.

GLENDALE, CALIF., March 3, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SIR: Because of your conservative viewpoint and support of constitutional government this is a thank you for your support of the Jenner bill (S. 2646). You have been such a good American.

Mrs. CLEMMIA GALLOWAY.

PASADENA, CALIF., March 3, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SENATOR: Will you please support S. 2646, the Jenner bill. Our freedoms are not safe so long as Supreme Court is uncurbed.

Yours truly,

Mrs. IRENE HECKERT.

HUMBLE, TEX., March 2, 1958.

Senator JAMES O. EASTLAND,
Senate Committee on Internal Security,
Senate Office Building,
Washington 25, D. C.

DEAR SIR: May I please have a copy of S. 2646. I understand you are now holding hearings on this resolution.

Ever since I first heard the saying that the "law is what the Supreme Court says it is." I have felt that we should have a better understanding of the courts' limitations.

Thank you for any kindness.

Sincerely,

EDWIN C. MOORE.

DALLAM, TEX., March 3, 1958.

Senator JAMES O. EASTLAND,
Committee on Internal Security.

DEAR SENATOR EASTLAND: I am writing to endorse Senate bill 2040, as proposed by Senator Jenner and encourage continued hearings.

I also deplore the weakening of the Smith Act and the Mullory decision by the Supreme Court and suggest S. 2040 include provision to correct this dangerous procedure.

Your efforts along this line will be greatly appreciated.

Sincerely,

MRS. R. L. OWENS.

INDIANAPOLIS, IND., March 3, 1958.

Senator JAMES O. EASTLAND,
Subcommittee on Internal Security,
Washington, D. C.

DEAR SENATOR: We think it is high time, Senator, that something be done immediately to curtail the unconstitutional power of our un-American Supreme Court. Senator Jenner's bill before you should be acted upon without delay.

Editorial of Indianapolis Star is enclosed which very ably refutes the critics of Senator Jenner's bill.

Sincerely yours,

Mr. and Mrs. J. R. MORGAN.

(The editorial referred to follows:)

MARCH 2, 1958.

THE INDIANAPOLIS STAR

SOME ACTION NEEDED

The American Bar Association's House of Delegates, in opposing Senator William E. Jenner's bill to limit authority of the U. S. Supreme Court, has demonstrated something considerably less than wholehearted support for the Supreme Court. This is understandable in a group of men who have had a large part of their professional knowledge rendered worthless by a court which often disregards written and traditional law entirely in favor of its own ideological whims. But in being content with mere mental reservations, the attorneys shirked their duty.

As far as it went, the House of Delegates' action was more a slap at the Supreme Court than support of it. The resolution recommended against approval of the Jenner bill, it is true, but the attorneys were not satisfied with that action alone. They insisted upon amendments specifically stating that the right to criticize court decisions is reserved. Actually the right is inherent; it does not have to be stated. The act of putting it in the record was, in itself, critical. Its significance is in no way lessened by the declaration that the House of Delegates officially does not either approve or disapprove of the court's decisions.

What the Bar Association group seemed to be saying between the lines is that something is wrong with the Supreme Court, but the Jenner bill is not the cure. Potent arguments can be advanced in support of such a position. The Jenner bill would take away from the Supreme Court the right to hear appeals in cases dealing with congressional committees, government security programs, school board actions or state rules respecting admission to the bar. By attempting to be precisely specific, the bill in its legal implications may in fact be too vague.

The Jenner bill's virtue is that it proposes to do something in a situation where something needs to be done, and that if the measure does not work, it could be immediately repealed. Its fault is that it makes no provision for the possible vast area of conflict in constitutional issues between cases withdrawn from High Court jurisdiction and those which remain subject to it. Suppose a school board for example, made an illegal seizure of private property. Would the private individual's right to take his case to the Supreme Court be paramount, or would the school board's exemption be decisive?

These and similar considerations undoubtedly moved the house of delegates to oppose the Jenner bill. The attorneys made it unmistakably plain that they believe Senator Jenner has not devised the right remedy. At the same time they seem to imply that a proper remedy would not be unwelcome. Yet they offer no

suggestions. They do not propose an alternative to the Jenner bill. Here they failed.

For ourselves, we prefer the Jenner bill to nothing at all. We recognize its shortcomings. We realize the legal confusion it might create. We understand the professional attitude of the attorneys, whose prime concern is with the immediate orderliness of the law. We do not believe that the Jenner bill, if enacted, would remain an effective law for more than a few months, or a few years at most. But it would immediately serve notice on the Supreme Court that it will only destroy itself by ignoring Constitution and Congress, and that it will not be permitted to destroy the American form of government in the process.

The Supreme Court has created its own crisis by overriding sacred State sovereignty, by tampering with the obvious intent of Congress in perfectly constitutional legislation, by constituting itself a pressure group dedicated, to promoting authoritarian Central Government contrary to every American tradition. If the Jenner bill offered the only means of meeting the crisis, it ought by all means to be adopted. Fortunately, there is an alternative.

The alternative is the proposal by Representative George Huddleston, Jr., of Alabama, that State and Federal courts need not be bound by Supreme Court decisions which violate legal precedent and are based on considerations other than the law. We believe Congress should choose this course. If the Bar Association's House of Delegates knows a better solution, it should be offered. The problem has become too acute to be erased by criticism alone.

SANTA BARBARA, CALIF., March 4, 1958.

HON. JAMES EASTLAND,
Chairman of Judiciary Committee.

DEAR SENATOR: I am imploring you to use all of your influence to get Senator Jenner's bill S. 2646, passed at this term of Congress. That will, I believe, stem some of this trend toward completely abolishing our Constitution.

Sincerely,

MRS. M. J. DE VOIN.

SHERMAN, TEX., March 4, 1958.

SENATOR JAMES O. EASTLAND,
*Committee on Internal Security,
Washington, D. C.*

DEAR SIR: I am in favor of bill S. 2646 because we must return to the States the right to regulate subversive activities.

Provisions should be made for correcting the dangerous Mallory decision as soon as possible.

Very truly yours,

MRS. C. H. FREARER.

DALLAS, TEX., March 5, 1958.

SENATOR JAMES O. EASTLAND,
*Committee on Internal Security,
Washington, D. C.*

I am in favor of Senate bill S. 2646 as proposed by Senator Jenner.

MRS. B. H. HILBURN.

SANTA BARBARA, CALIF., March 4, 1958.

SENATOR EASTLAND,
*Senate Office Building,
Washington, D. C.*

SENATOR EASTLAND: It is imperative that the Jenner bill—S. 2646 be enacted to curb the autocratic power of the Supreme Court. We earnestly urge that you vote "Yes" on this bill—also H. R. 9362—National Security Act.

F. M. GREENWOOD.

DALLAS 4, TEX., March 3, 1958.

Senator JAMES EASTLAND,
Committee on Internal Security,
Senate Building, Washington, D. C.

DEAR SENATOR EASTLAND: May I voice my approval of Senate bill 2040-- the Jenner bill. I know you will work for its passage.

Sincerely,

ORALEE C. SCHIEDEL.

CLAREMONT, CALIF., March 3, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building,
Washington, D. C.

DEAR SENATOR EASTLAND: I wish to express my strong desire for the successful passage of the Jenner bill, S. 2040, limiting appellate jurisdiction of the Supreme Court.

I think the present trend of the Supreme Court is highly dangerous and should be reversed before it brings any further decisions favoring communism into being.

Also let us have hearings on H. J. Resolution 355.

(Mrs.) LAURA SCOTT LETTS.

PHILADELPHIA, PA., March 3, 1958.

JUDICIARY COMMITTEE,
United States Senate.

GENTLEMEN: I wish to ask this committee to recommend to the full Senate, that S. 2040 be passed.

Yours truly,

ANNA R. KETTERER.
 S. G. KETTERER.

OJAI, CALIF., February 28, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SENATOR: Will you do all in your power to support S. 2040, Senator Jenner's bill, limiting jurisdiction of the Supreme Court? Thanks for attention.

Sincerely yours,

M. L. RUSSELL.

BIOWELLS, TEX., March 3, 1958.

Senator JAMES EASTLAND,
Senate Office Building, Washington, D. C.

Bill S. 2040 certainly of drastic importance to this Nation. Hope you will do everything you can.

JACK BOWMAN.

LOS ANGELES, CALIF., March 3, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

I am in favor of S. 2040 as proposed by Senator William Jenner.

A. R. PUMPELLY.

NORTH ABINGTON, MASS., February 28, 1958.

Chairman JAMES O. EASTLAND,
Judiciary Committee,
Senate Office Building, Washington, D. C.

DEAR CHAIRMAN EASTLAND: The Oldtown chapter of the Massachusetts Committees of Correspondence, an affiliate of the American Coalition of Patriotic Societies, demand that Senator Jenner's S. 2040, to limit the appellate jurisdiction of the Supreme Court in certain cases, investigative functions of the Congress, the security program of the executive branch of the Federal Government,

State antislavery legislation, and the admission of persons to the practice of law within the individual States, be reported favorably by the Internal Security Subcommittee and the Judiciary Committee.

We further demand that H. 2646 be enacted into law at an early date. Congress must restore its legislative authority to write the laws of this country, as set forth in the United States Constitution, and defend us, as a people, from the machinations of the present un-American Supreme Court. Our members believe there should be impeachment proceedings during the present session of Congress.

Will you please offer this letter for the record in the hearings now in progress and in the following considerations of the Judiciary Committee? We regret that we cannot give testimony in person.

Sincerely,

JEAN E. DONAGHEY
(Mrs. George Donaghey),
Chairman, Oldtown Chapter,
Massachusetts Committee of Correspondence.

RYE, N. Y., March 5, 1958.

Senator JAMES O. EASTLAND,

DEAR SENATOR: I am in favor of Senate bill 2646 as proposed by Senator Jenner. Please do your utmost to save our Nation.

Thanking you, I remain,

Yours sincerely,

MARY RAFFERTY.

CHICAGO, ILL., March 4, 1958.

Senator JAMES O. EASTLAND,

Committee on Internal Security,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: I am very much in favor of Senate bill 2646, proposed by Senator Jenner.

The efforts of your committee in behalf of this bill will be very much appreciated.

Very truly yours,

HERMINE H. DRAPER.

EULESS, TEX., March 2, 1958.

Hon. JAMES O. EASTLAND,

United States Senate, Washington, D. C.:

I have read with great interest your splendid article in February 1958 issue of American Mercury Magazine under title "An Alien's Ideology Is Not the Law of the Land."

Sir, I can't describe the feelings I have when I think of the rantings of the Supreme Court under its so-called "law of the land" mandates. Sir, to say the least, we are sickened. Even though the Court stinks, it is only doing what a complacent people have allowed it to do.

If the people don't arise from its lethargic state we are going to face a national catastrophe.

Though not being your constituent, I would offer you my encouragement.

I also read Senator Jenner's article in March issue of Mercury. It was splendid. I understand Senator Jenner has introduced a bill to deprive the Supreme of its appellate powers. Have you been advised of this legislation?

I have written my own Senators, Johnson and Yarborough, as well as Representative Jim Wright, asking them to support the Jenner bill. May God bless you in your great job of representing the people of your State.

Sincerely yours,

J. CARL STAPLETON.

THE AMERICAN LEGION, DEPARTMENT OF WISCONSIN,
Milwaukee, Wis., March 3, 1958.

Mr. J. G. SOURWINE,
Associate Counsel, Senate Internal Security Subcommittee,
Senate Office Building, Washington 25, D. C.

DEAR Mr. SOURWINE: In accordance with your suggestion when Woody Bouaman called you while I was in Washington on February 21, I am enclosing a letter to Senator Eastland in support of Senate bill 2046 as well as a suggested amendment to Item 4 of paragraph 1258 as introduced by Senator Jenner.

In our State an educational governing body has always maintained it could not legally take any action to keep subversive influences and propaganda from using the facilities under its control.

I have contacted two past judge advocates of our department who are conversant with this problem, asking their advice with the suggestion that Item 4 might be amended following the words "activities in its teaching body" by adding the words, "and/or its campus or physical facilities."

Charles P. Curran, of Mauston, Wis., has suggested the following wording: "or the use of any property, buildings or facilities under the jurisdiction of such body by known Communists or subversive persons, groups, clubs and organizations."

William E. McEwen of River Falls, Wis., suggested the wording, "or otherwise to the full extent of the body's authority and jurisdiction."

It is this last suggestion that I am using in my letter to Senator Eastland. I have given you this background so that you may know what we are hoping to achieve and will appreciate your suggestions, or anything you may do to help us achieve our objective.

Because it has been my privilege to have received some of the publications of the hearings conducted by your committee, I am well aware of the great work you are doing. Keep up the fine work. We must not let up.

Sincerely yours,

G. E. SIPLE.

SANTA BARBARA, CALIF., March 2, 1958.

Senator JAMES O. EASTLAND,
Washington, D. C.

DEAR SIR: I hope very much that you will show an interest in the bill to curb the power of the Supreme Court, introduced by Senator William Jenner.

Sincerely yours,

(Mrs.) FLINT H. JONES.

WOODBURY, N. J., March 3, 1958.

HON. JAMES O. EASTLAND,
United States Senate,
Washington, D. C.

MY DEAR SENATOR: I hope that the internal subcommittee will report S. 2046 favorably, without amendment, to the full Committee of the Judiciary and I trust that the above bill will receive your full support.

Very sincerely yours,

JOYCE F. LAMBERT.

DALLAS, TEX., March 3, 1958.

Senator JAMES O. EASTLAND: I am heartily in favor of Senate Bill No. 2046 as proposed by Senator Jenner.

Respectfully,

HETEEREE UNDERWOOD.
Mrs. L. O. UNDERWOOD.

MARYSVILLE, CALIF., March 4, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building,
Washington, D. C.

DEAR SENATOR EASTLAND: Personally, I am in favor of impeaching the present Supreme Court. But Senate bill 2040 would keep the court within constitutional bounds to some extent. As a security measure in this time of crisis, I feel that Senate bill 2040 should be passed without fail.

Sincerely,

IMOGEN McMURTRY.

BALTIMORE, MD., March 5, 1958.

Honorable WILLIAM P. ROGERS,
United States Attorney General, Washington, D. C.

SIR: Why misinterpret the bill which bears the name of the distinguished Senator from Indiana—why create a wrong impression?

The Jenner bill vibrates a current of opinion of thinking people in both affiliations. They have been outraged by the Warren decisions. Fortunately, only the Congress can enact laws.

It is incredible that you sanction the tempo of the Warren decisions which places the judicial smile of approval on all who would destroy our sovereignty. Great legal minds in this Nation are not in accord with your position.

Very truly yours,

B. M. MILLER.

OAKLAND, CALIF.,
February 27, 1958.

SENATE INTERNAL SECURITY SUBCOMMITTEE,
Senate Office Building, Washington, D. C.

GENTLEMEN: In my opinion there is no more important bill up for enactment than the Jenner bill which would prevent the Supreme Court from giving the Reds freedom to destroy utterly our constitutional guarantees.

To spend billions fighting Communists all over the world and give them asylum here seems to border on the ridiculous.

Earl Warren should by all means be impeached and sent out to pasture.

Very truly,

J. S. JOSIASSEN.

SWEETWATER, TEX.,
March 3, 1958.

Senator JAMES O. EASTLAND,
Committee on Internal Security,
Senate Office Building, Washington 25, D. C.

DEAR SENATOR: I would like for you to know that I am certainly in favor of Resolution S. 2040. It seems to me definitely that the State should have the right to regulate subversive activities. The Supreme Court has recently handed down decisions that are, it certainly seems to me, foreign to our way of life.

The weakening of the Smith Act and the recent Mallory decision are two glaring examples of this. I am heartily in favor of S. 2040.

Sincerely yours,

PETER FOX.

DALLAS, TEX., March 3, 1958.

Honorable JAMES O. EASTLAND,
Committee on Internal Security,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: I understand that the Senate Committee on Internal Security is now holding hearings on Senate Bill No. 2040, and wish to express my approval of this bill as proposed by Senator Jenner.

Respectfully yours,

SARAH MILLER.

THE FIRST STATE BANK & TRUST CO.,
Lufkin, Tex., February 28, 1958.

Senator JAMES O. EASTLAND,
Committee on Internal Security,
Senate Office Building, Washington, D. C.

Re S. 2040, proposed by Senator Jenner.

DEAR SENATOR: I want to commend you on the work you are doing in support of Senate Resolution S. 2040.

I am heartily in agreement with the purpose of this bill and sincerely hope that it will become the law of our land.

Sincerely yours,

H. J. SHANDS,
Executive Vice President.

LOS ANGELES, CALIF., March 10, 1958.

Hon. JAMES O. EASTLAND,
Washington, D. C.

DEAR SENATOR: It is with sincere desire that I appeal to you to support Senator Jenner's bill S. 2040 to withdraw appellate jurisdiction from the Supreme Court act.

Mrs. ADA L. CAMPBELL.

BALTIMORE, MD., March 2, 1958.

Senator JAMES O. EASTLAND,
Chairman of Committee on the Judiciary,
United States Senate, Washington, D. C.

DEAR SENATOR EASTLAND: Please add my name to the thousands of others, in approval of the passage of bill S. 2040, which is now before the committee of which you are chairman.

To me, it seems a very dangerous thing to have a handful of politically appointed men, as the Supreme Court, as our maker of laws, when our constitution so clearly points out that the laws are to be made by the United States Senate, the members of which have been elected by the people as their choice for that very purpose.

I am really greatly heartened to find that there are certain Senators willing to fight for both their rightful powers and for the constitutional rights of the people to choose by election their own lawmakers.

Sincerely yours,

G. RUTH RUDISILL.

ST. LOUIS, MO., March 3, 1958.

Hon. JAMES O. EASTLAND,
Senate Office Building,
Washington, D. C.

DEAR SENATOR EASTLAND: Senator Jenner's bill to deny the Supreme Court jurisdiction in cases arising out of contempt of Congress for sedition and the like is proper and timely and should be passed at the earliest possible date. Also the Congress should limit the Court in its law-making authority as it did in the Jencks and Watson cases and in the reversal of many criminal cases which had been affirmed in the Supreme Courts of the several States, only to be reversed in the Supreme Court of the United States.

This was clearly in the mind of such men as James Madison and George Mason, who were largely responsible for our Federal judiciary and who had in mind the limitation of appellate jurisdiction when they passed paragraph 2 of section 2 of Article III of our Federal Constitution.

The Court has set itself up as a super legislative body and will continue to usurp the powers of Congress if permitted to do so. Support from men like Attorney General Rogers, who never tried a case in court during his career, want to preserve the existing practice to have the Supreme Court do the political tricks that he could not have Congress do. Furthermore, his statement about the court packing plan of Roosevelt is not analogous at all. Most bar associations like the American Bar Association in the country today give little or no support to our form of government and many of the members are concerned only

in their own popularity with the judges and judiciary for their own selfish interests.

On election day the citizens are urged to vote; but many are disgusted with the administrations of Roosevelt, Truman, and Eisenhower and the many political fakirs appointed to influential offices. The Supreme Court in the days of the three administrations just mentioned have done more to injure our form of government than any other cause. As I said, the only support I find is among the political fakirs and intellectuals and I make it my business to talk with people of all walks of life such as one finds in a city of this size.

Very truly yours,

JOHN J. JARVIS.

PHILADELPHIA, PA., March 3, 1958.

DEAR SENATOR: Having read Senator Jenner's bill, S. 2040, I wish to state I am very much in favor of it—I hope you will vote to bring it out on the floor as soon as possible.

Very truly yours,

FRANCES R. FINN.
(Mrs. Clarence Finn.)

DALLAS, TEX., March 3, 1958.

Senator JAMES O. EASTLAND,
Washington, D. C.

DEAR SENATOR: For your information, I am in favor of Senate bill 2040 as proposed by Senator Jenner.

Please include in S. 2040 provisions for correcting the recent dangerous Mallory decision.

Yours truly,

GERTRUDE M. GARRETT.
(Mrs. Melvin M. Garrett.)

LOS ALTOS, CALIF., March 5, 1958.

Hon. JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee,
Washington, D. C.

DEAR SENATOR EASTLAND: A few days ago a brief news item regarding the Jenner bill (S. 2040) set me to wondering what the average citizen thinks of the recent Supreme Court decisions that have been so favorable to communism. I decided to find out by constituting myself as a sort of local, one-man Gallup poll. The enclosed petition is the result of several hours' effort I spent interviewing individuals and couples—not more than two at a time—and discussing with them the issues involved.

There are 50 signatures, each signer an adult citizen of the United States. The petition was read by each one before signing and each signed without the slightest persuasion. Only one person interviewed declined to sign.

These people are from various walks of life and from several different places, scattered in an area over 50 miles. Many of them I did not know before. A few knew absolutely nothing about these Supreme Court decisions. Several knew only a little. When informed of some of the decisions by being shown newspaper clippings and editorials from the San Francisco Examiner (covering about a year), they were incredulous at first and then indignant.

I realize fully that the small number of signatures on this petition is of little import. However, the unanimity of opinion I observed and the intensity of indignation on the part of many toward these decisions were, to me, highly significant. I have no doubt that among those citizens who have even a modicum of information on the subject there is a preponderant sentiment for this bill.

This letter, with accompanying petition, is offered respectfully for consideration by your committee.

Sincerely yours,

MURRAY M. MONTGOMERY.

(The petition referred to is as follows:)

CHAIRMAN OF THE SENATE JUDICIARY COMMITTEE,
United States Senate,
Washington, D. C.:

We, the undersigned, deeply concerned for the welfare of our country, believe that its internal security has been weakened materially by several of the recent decisions of the Supreme Court. Therefore we respectfully urge your committee to give favorable consideration to S. 2046, the so-called Jenner bill, and bring it to the floor of the Senate, recommending its passage.

Murray M. Montgomery, 875 Riverside Drive, Los Altos, Calif.; Anne D. Montgomery, 875 Riverside Drive, Los Altos, Calif.; Sidney R. Braumann, 450 W. Charleston Road, Palo Alto, Calif.; C. C. Barber, 892 Riverside Drive, Los Altos, Calif.; Lorraine M. Barber, 892 Riverside Drive, Los Altos, Calif.; John N. Weiner, 1117 Riverside Drive, Los Altos, Calif.; Clara Scott, 350 Arballo Drive, San Francisco; Frances W. Myers, 125 Camden Drive, San Francisco; Edward A. Thompson, 889 Riverside Drive, Los Altos; Helen L. Thompson, 889 Riverside Drive, Los Altos; Ernest D. Habeger, 881 Riverside Drive, Los Altos; Phyllis V. Habeger, 801 Riverside Drive, Los Altos; George W. Graham, 904 Riverside Drive, Los Altos; Doris D. Graham, 904 Riverside Drive, Los Altos; Arthur E. Eriksen, 1849 Spencer Road, Mountain View, Calif.; Louise E. Eriksen, 1849 Spencer Drive, Mountain View, Calif.; Edith M. Wilder, 878 Riverside Drive, Los Altos, Calif.; Harry Wilder, 878 Riverside Drive, Los Altos, Calif.; James G. O'Rourke, 22826 Aspen Drive, Los Altos, Calif.; Annette P. O'Rourke, 22826 Aspen Drive, Los Altos, Calif.; H. P. Melhouse, 821 Riverside Drive, Los Altos, Calif.; Cora R. Melhouse, 821 Riverside Drive, Los Altos, Calif.

James P. Milton, 449 15th Avenue, San Francisco, Calif.; Anne M. Milton, 449 15th Avenue, San Francisco, Calif.; Ralph O. Moller, 847 Riverside Drive, Los Altos, Calif.; Josephine F. Moller, 847 Riverside Dr., Los Altos, Calif.; Frederick J. Bernerman, 229 South I Street, Lompoc, Calif.; Margaret P. Winchet, 373 Hawthorne, Los Altos, Calif.; W. Winchet, 373 Hawthorne, Los Altos, Calif.; Dorothy G. White, 965 Riverside Drive, Los Altos, Calif.; Leslie W. Harrison, 713 Terrace Court, Los Altos, Calif.; Mrs. L. W. Harrison, 713 Terrace Court, Los Altos, Calif.; Mrs. M. W. Peck, 24040 Spaulding Avenue, Los Altos, Calif.; Albin N. Caldwell, 800 Echo Drive, Los Altos, Calif.; Clara F. Caldwell, 800 Echo Drive, Los Altos, Calif.; James E. Gardner, 650 Covington Road, Los Altos, Calif.; George A. Bustard, Route 7, Box 303, Tully Road, San Jose, Calif.; Al Francis, 141 North Craymont Avenue, San Jose, Calif.; George E. Elliott, 1690 Mount Vernon Drive, San Jose, Calif.; Theodore W. Smith, 13621 Emille Drive, San Jose, Calif.; William T. Harrison, 730 North Second Street, San Jose, Calif.; John H. Brigsberry, 251 Bayview Avenue, San Jose, Calif.; Leonard J. Greeley, 590 Casita Way, Los Altos, Calif.; Jane M. Greeley, 590 Casita Way, Los Altos, Calif.; Robert A. White, 965 Riverside Drive, Los Altos, Calif.; Arthur L. Schnitz, 954 Riverside Drive, Los Altos, Calif.; Alfred P. DeCamara, 962 Riverside Drive, Los Altos, Calif.; Howard Wirth, 944 Riverside Drive, Los Altos, Calif.; Frances I. Mans, 835 Riverside Drive, Los Altos, Calif.; Clayton H. Mans, 835 Riverside Drive, Los Altos, Calif.

The subcommittee received a number of petitions similar to the one following. Because of the difficulty of deciphering many of the signatures it was decided to list only the States represented. Florida signers totaled 186, Pennsylvania 21, Michigan 10, New York 45, New Jersey 13, West Virginia 6, Illinois 11, North Carolina 2, California 53, Delaware 1, Iowa 2, Missouri 1, Ohio 12, Maryland 88, Connecticut 7, Wisconsin 8, Indiana 5, Virginia 2, Minnesota 8, Rhode Island 1, New Hampshire 6, Tennessee 3, Massachusetts 9, Arizona 27, Louisiana 1, Maine 1, Oklahoma 1, Texas 1.

(The petition reads as follows:)

PETITION TO SENATOR JAMES O. EASTLAND, CHAIRMAN, COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE

ST. PETERSBURG, FLA., March 4, 1958.

We, the undersigned, familiar with Senate bill S. 2046 calling for restriction of the appellate jurisdiction of the Supreme Court in respect to State legislatures,

local school bodies, State bar associations, the executive branch of our Government, and the United States Congress, and thoroughly dismayed by the extent to which the Supreme Court, in the past 8 years, has destroyed the structure built by the people to protect themselves against the worldwide conspiracy of atheistic communism, and by the chaos resulting therefrom in the executive branch in Congress, in the judiciary, and among our citizens, and aware that our Constitution gives to Congress not only the full and unchallengeable power but also the responsibility to regulate, by law, the appellate jurisdiction of the Supreme Court, hereby petition your Committee on the Judiciary to take speedy affirmative action upon S. 2046.

COURT DECISION

A very important point about the recent decisions of the present Supreme Court, which many people seem to have overlooked although it seems obvious, is this:

First, in a decision based on a Pennsylvania case, the Court ruled out the sedition laws of the several States on the ground that the Federal Government, through the Smith Act and others, had preempted to itself all such cases—thus depriving the States of their right to prosecute under their own laws those who conspire to overthrow our Government by force and violence.

Second, in a later decision involving the 14 Communists from California who had been convicted under the Smith Act in a Federal court, the Supreme Court virtually nullified the Smith Act itself.

The effect, therefore, is to leave the Nation, to all practical purposes, defenseless against the machinations of the Communist conspiracy, since, as matters now stand, (a) the States are powerless to proceed against it, and (b) so is the Federal Government.

Congress has constitutional authority to remedy this situation by appropriate legislation, which it could specifically remove from the jurisdiction of the Supreme Court.

JOHN ALLAN.

LOS ANGELES.

MARCH 5, 1958.

Your committee is strongly urged to favorably report S. 2046 in order to protect our country from further misconceptions of the Supreme Court.

COURTS FLAYED

The question that arises in my mind, as I'm sure it is arising in the minds of millions of thinking persons throughout the country, is: Along what path are our Federal and State courts leading us?

In a series of infamous decisions at both National and State levels, the courts have freed convicted Communists to once again perform their work of undermining our way of life, and our very freedom.

These men and women were convicted in a fair trial at great expense and sacrifice by the American public, but they are now set free because of minor technicalities of law.

The Supreme (supreme what?) Court has further hamstrung the successful prosecution of subversives by their insidious ruling that opens the files of the FBI to the defenders of such persons. Truly, Moscow must have great regard indeed for our courts.

Let us sincerely hope there will be an awakening in the judicial minds, and that the people never have to feel compelled to take the law into their own hands. I don't believe that our laws and Constitution were meant to be against the people of the United States.

LEWIS S. HAYES.

LAGUNA BEACH.

MARCH 3, 1958.

Let's be sure to favorably report S. 2046 to the full committee.

SANTA BARBARA, CALIF., March 5, 1958.

Hon. JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SENATOR: I was very glad to receive a copy of Senator Jenner's bill to curb the jurisdiction of the Supreme Court. I hope your committee will give its support, and I think it is vital for the security of our country.

Sincerely,

ISABEL I. ADAMS.

CHARLESTON, W. VA., March 5, 1958.

Hon. JAMES EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: I wish to express my gratitude to you and to Senator Jenner for drawing up a bill to curb the lawmaking powers of the Supreme Court. You are certainly correct in stating that they have far exceeded their authority, and that their jurisdiction over State laws, etc., should be removed.

Again thanking you for what you are trying to do to preserve our liberties.

Sincerely yours,

DOROTHY H. HORN.
Mrs. T. L. HORN.

CHARLESTON, W. VA., March 4, 1958.

Senator JAMES O. EASTLAND,
Washington, D. C.

DEAR SIR: As an individual, I can do little or nothing about the actions of the Supreme Court. But, with your help and other Senators, I know Senate bill 2646 will become a reality. This bill can control and restrain the Supreme Court and I am very much in favor of such. Please support bill 2646.

By the way, I heard you on TV last Sunday and I think you were and are, correct concerning the statehood of Hawaii.

Thanking you.

Sincerely,

Mrs. HELEN M. DUDUIT.

BICKLEY MANUFACTURING Co.,
Bala-Cynwyd, Pa., March 5, 1958.

Senator JAMES O. EASTLAND,
Chairman, Judiciary Committee,
United States Senate, Washington, D. C.

DEAR SENATOR EASTLAND: We urge your committee to vote in favor of the Jenner bill, S. 2646.

My attorney advises me that the Supreme Court is already limited by the Constitution of the United States on what they should do but they are paying no attention to the Constitution. It may be possible that this bill will bring them to time and put them in their place.

Please do whatever you can to bring this matter to the other members of the committee to obtain passage of the bill S. 2646.

Yours truly,

EVERETT H. BICKLEY.

DALLAS, TEX., March 4, 1958.

Senator JAMES O. EASTLAND,
Chairman, Senate Committee on Internal Security.

DEAR SENATOR EASTLAND: I am writing to add my name to those who are backing you in your fight for Senate bill 2646 offered by Senator Jenner. If this bill could be passed it would be a big step to save America for Americans. I pray you may be kept well and strong to carry on the fight.

Yours sincerely,

MARTHA SIMKINS.

QUAKERTOWN, PA., March 4, 1958.

Hon. JAMES O. EASTLAND,
Washington, D. C.:

Help prevent the Supreme Court from nullifying our Constitution completely. Why spend billions to defend against foreign Communists while giving aid and comfort to domestic ones which are more dangerous? Support S. 2040. I am not one of your constituents, but they will have no opportunity to vote for it unless your committee passes it.

Yours truly,

T. ALVA POTTS.

JAMAICA, N. Y., March 4, 1958.

Hon. JAMES O. EASTLAND,
United States Senator,
Washington, D. C.:

We most sincerely hope that you will succeed in securing the passage of S. 2040, relating to the Supreme Court.

Respectfully,

GEORGE W. WINANS.
JESSIE R. WINANS.

PHILADELPHIA, PA., March 4, 1958.

Hon. JAMES O. EASTLAND,
Chairman, Senate Judiciary Committee,
Washington, D. C.

DEAR SENATOR EASTLAND: I plead with you for you to plead with the members of your committee to vote "yes" on Senator Jenner's bill, S. 2040.

To my mind, it is the most important bill before the Congress at this session. The Supreme Court has proven that they are bowing to the will of the hidden government. They are traitors.

May I remain your admirer and supporter?

HANNAH B. CUMMINGS.

SANTA BARBARA, CALIF., March 4, 1958.

Senator JAMES O. EASTLAND,
United States Senate,
Washington, D. C.

DEAR SIR: Please do all you can to pass the Supreme Court bill, Senate bill 2040. It is imperative we have the protection of this bill.

Very truly yours,

Mrs. DAVID J. THOMAS.

SHERMAN, TEX., March 3, 1958.

Senator JAMES O. EASTLAND,
Chairman, Senate Committee on Internal Security,
Senate Office Building, Washington, D. C.

DEAR SIR: As a taxpayer, citizen, and a voter of this community I wish to declare myself in favor of and urge passage of Senate Resolution 2040 as proposed by Senator Jenner. I believe the people should have a voice in redefining the power of the Supreme Court.

If possible, I would also like to see some provision included in S. 2040 which would correct or reverse the Supreme Court's recent Mallory decision. This decision, as I understand it, ties the hands of the police and courts in combatting the activities of young thugs.

Your earnest consideration of my beliefs will be appreciated.

Your respectfully,

O. LESLIE JONES.

DALLAS, TEX., March 5, 1958.

DEAR SENATOR EASTLAND: I would like to state that I am very much in favor of Senate bill No. 2040 as proposed by Senator Jenner. I hope that I am not too late in writing you about this as I understand that the hearings on this bill were started on February 19 and would continue for several weeks.

We feel like the women of Texas and in fact the whole country should support this bill and try to wake the people up to the fact that Communists who have already been convicted of conspiracy are now allowed to teach and advocate the violent overthrow of the United States Government.

We would also like to include in S. 2646 provisions for correcting the dangerous situation which now exists where peaceful citizens are afraid to walk the streets in some of our larger cities due to the weakening of the police and the courts in combating senseless beatings by young thugs. We feel that the recent Mallory decision has tied the hands of the police and the courts to where this situation will become worse.

The women of Dallas and also the men that I have had a chance to talk to about this bill are greatly in favor of it.

Yours very truly,

Mrs. SAM P. HURFORD.

NEW ORLEANS, LA., February 4, 1958.

DEAR HON. JAMES EASTLAND: I would like you to support the Jenner bill to curb the Supreme Court.

I believe the Congress of the United States should make the laws of the land and not the Supreme Court.

Sincerely,

Mrs. C. G. DESORRY.

NEW ORLEANS, LA., March 5, 1958.

HON. JAMES EASTLAND,
Senate Office Building, Washington, D. C.

DEAR SENATOR EASTLAND: I would like you to support the Jenner bill to curb the Supreme Court and strengthen the Government efforts against communism.

Sincerely,

LUCY S. GAUDET.

NEW ORLEANS, LA., March 5, 1958.

HON. JAMES EASTLAND,
Senate Office Building,
Washington, D. C.

DEAR SIR: I am writing to ask your support for the Jenner bill to curb the Supreme Court which I feel has gone beyond its jurisdiction.

Sincerely,

MARY D. MCCARDELL.

NEW ORLEANS, LA., March 6, 1958.

HON. JAMES EASTLAND,
Washington, D. C.

DEAR SENATOR EASTLAND: We in New Orleans appreciate the work that you have been doing. Most of us here are in favor of the Jenner bill, and we want to thank you for supporting it.

Sincerely yours,

SARAH T. RYAN.

St. LOUIS, Mo., March 5, 1958.

DEAR SENATOR: Please support Jenner's S. 2646. We can't stand many more Red Monday decisions.

Yours very truly,

C. F. JACOBS.

WHEELING, W. VA., March 5, 1958.

HON. JAMES O. EASTLAND,
Washington, D. C.

DEAR SIR: I would suggest that you use your influence to get your good bill No. S. 2646 out of the Judiciary Committee, and work for passage of same.

Yours truly,

Mrs. LOUIS W. EARNEST.

PORT WORTH, TEX., March 6, 1958.

Senator JAMES O. EASTLAND,
Senate Office Building, Washington, D. C.:

We urge you to work and vote for the Jenner bill to restrain the Supreme Court. If this bill is not passed it will be to the eternal discredit of our Democratic Party.

Mr. and Mrs. W. D. WALTMAN, JR.

NEW ORLEANS, LA., March 6, 1958.

Senator JAMES EASTLAND,
Washington, D. C.:

Please do everything possible to get the Jenner bill to pass. We must somehow curb these particular dictatorial powers of this Supreme Court.

Mrs. MAE T. WALKER.

DALLAS, TEX., March 5, 1958.

Senator JAMES O. EASTLAND,
Committee on Internal Security,
Senate Office Building, Washington, D. C.

DEAR SIR: Because of what seems to be a deliberately false interpretation of the wording of our Constitution and the flagrant misuse of judicial power, it is desperately important that some quick and definite action must be taken to curb this misused power of the present Supreme Court. A redefinition of such power as is, and has always been intended by the Constitution is now needed.

The very existence of our beloved free country as we have always known and cherished it is at stake—that I believe and fear—so it is with utmost concern that I write to you approving and urging the passage of Senate bill 2046 (proposed by Senator Jenner).

The Supreme Court should have done all possible to strengthen the Smith Act as a safeguard to this country's welfare—rather it has chosen to weaken it and make it possible to have known subversive characters turned loose to work their havoc here. I cannot measure my fear of the results.

I am appalled at the thought of the possible results, also, of the recent Mallory decision of the Supreme Court. Soon a peaceful free citizen will rightfully be afraid to venture on street or highway, as this decision has certainly been in favor of the unlawful element. In order to combat this dangerous situation I gravely urge you to see that drastic and necessary provisions be included in bill S. 2046 to so do. The time is now or never.

My faith in the judgments of some of our lawmakers has been jolted severely on occasions, yet I do believe that the majority are patriotic, intelligent citizens and will "see the light" and arise to vote affirmatively on these bills. This is my frevent hope, in order to stem the advance of the subversive trend.

Yours, with hope and confidence (even yet),

ALETHA L. KEY
Mrs. Homer D. Key.

ORLANDO, FLA., February 19, 1958.

Hon. WILLIAM E. JENNER,
Senate Office Building, Washington, D. C.

DEAR SENATOR: As an ordinary workingman, may I commend and congratulate you for presenting a bill, S. 2046 so right and so needed for the internal protection of this great Nation of ours.

From the correspondence I have had with our Florida Senators, Hon. Spessard Holland, Hon. George Smathers, and my able Hon. Syd Herlong, Fifth District Congressman, I am of the opinion they will support your bill.

Toward that end I propose to write them concerning.

We have too many rulings along the line of the Jencks case by the United States Supreme Court for the good of this Nation.

Appreciating your consideration, I am

Very respectfully,

M. H. WEAVER.

KANSAS CITY, Mo., February 24, 1958.

DEAR SENATOR: Many in my neighborhood are amazed at the actions of the Supreme Court, how it has usurped powers it has no right to do. We are in favor of your attitude and your resolution, S. 2040.

Would like to see those members who favored integration displaced. We want States' rights on this.

JAY WOOLBRIDGE.

WOODBURY, N. J., February 20, 1958.

Senator WILLIAM E. JENNER,
Senate Office Building, Washington, D. C.

DEAR SENATOR JENNER: First, I want to thank you for the fine address you made on January 30 before the Conference of Patriotic Women.

I wish everyone in New Jersey could have heard you. I hope it was read into the Congressional Record. Are there reprints?

Second, I want to express my approval and support of S. 2040. I have written to Senator Eastland, and the members of the Internal Security Subcommittee.

Third, can you send me the directory of the Senate committees for this session? We wish to write to the members of the Judiciary Committee who are not on the subcommittee.

With appreciation of all of your efforts,
Sincerely,

MARION B. S. WEATHERILL.

BRONX, N. Y., February 12, 1958.

Senator WILLIAM E. JENNER,
United States Senate, Washington, D. C.

HONORABLE SIR: Congratulations with your bill S. 2040, to limit the appellate jurisdiction of the Supreme Court in certain cases. I believe that most loyal Americans approve, and feel as I do, especially since it seems like there are too many plinks, with funny ideas in office, and are surely impairing the security of our Government. If the Supreme Court continues at the rate it's going, our Congress can one day fold up and go home to await the end of our once-powerful Nation.

All seems quiet on the plight of our missing sons of the Korean war, and very few of our leaders even bother to answer our letters, our one hope is that some brave man assassinate Chou and Mao, the people are hungry and sick, it can happen, as long as we do not allow them a seat in the U. N. or do any business with them. Can we hope for some real action on the parts of our leaders? Are our beloved sons worth it? Or is money and appeasement more important? It's hard for me to realize already 5 long years have passed and I still don't know what became of my only son Ronald. I know the over 3,000 other parents feel the same.

I wish you great success in all you do. It's wonderful to know that we have such great Americans such as you, who can see the evil among us, and really take action to cut some of the tentacles off the octopus. More power to you, and God bless you.

With my best wishes.

Respectfully yours,

Mrs. RITA VAN WIES.

NASHUA, N. H., February 18, 1958.

Senator JENNER,
Senate Office Building,
Washington, D. C.

DEAR MR. JENNER: I have just read an article comparing you with Daniel Webster, and I deeply agree with it. Without you the United States Senate will have no other fighter for the America I was born in nearly 80 years ago. I deeply hope, however, that before you leave the Senate your bill (S. 2040) will have become law. As a lawyer I am deeply ashamed of our Supreme Court, not a member of which is fitted by experience for that bench. For Eisenhower to put Warren, a politician with no real legal background and certainly un-American, not only on the Supreme Court but on it as Chief Justice shows that he is

not fitted to be President. I have wondered if the Supreme Court is not probably run by the law clerks they employ and who may have a procommunism slant. As I see, and have since Roosevelt seen, our country sink into socialism, big Government in Washington, excessive taxation, and operating over 700 businesses, which it has no right to do, I am very seriously worried about the future for my children. I shall this year attempt to start some sort of an organization in New Hampshire to fight our way back to real Americanism. I only wish you lived in this State so we could have your powerful voice to lead us on.

With deep respect for your Americanism, I am,

Sincerely,

ALBERT TERRIEN,
Counselor at Law.

IRVING, TEX., February 26, 1958.

SENATOR WILLIAM JENNER,
*Senate Office Building,
Washington, D. C.*

DEAR SENATOR JENNER: It is my understanding that hearings on Senate bill 2646 are now in progress and I wish to express my support of your bill, which proposes to return to the States the right to regulate subversive activities.

I urge you to make provisions in this bill to correct the dangerous decision rendered recently by the Supreme Court in the Mallory decision, which ties the hands of the police and courts in combating muggings and beatings.

Very truly yours,

EDITH T. STARRETT.
Mrs. Donald O. Starrett.

KNOXVILLE, TENN., February 27, 1958.

Hon. United States Senator JENNER,
Washington, D. C.

DEAR SIR: The writer noticed in one of our newspapers where the American Bar Association at its recent meeting in Atlanta, Ga., passed a resolution unfavorable toward curbing the United States Supreme Court.

It seems rather strange that this same body would cross the Atlantic Ocean to meet in England and condemn this body of men for their legislative actions. You recall this was done just a few months back. Earl Warren was at this meeting, but did not show up at the one which condemned him and his associates for their many decisions. He could not face it.

We also know that the attorney generals of the 48 States have asked them curbed. What magic is Earl Warren working now? If they get by with what they have been doing, we may expect them to legislate any and all laws they may wish.

It should be remembered by the American Bar Association that the people of this country do not have a chance to vote on these nine men. They are appointed through politics and they are using politics in their decisions. What is coming next?

The time has come for action against these men. Some day if the present body does as they choose, we may have a full house of Reds in this chamber, then the people will think why something was done. It is now time to let vicious men know they don't have full reins to guide this Nation into what suits their whims. People appointed to positions of theirs is too dangerous under present circumstances.

President Eisenhower, Attorney General Rogers, and many others of the Cabinet may do anything they choose and ask the present Court to declare it constitutional, and if it suited a political purpose they perhaps would do it. Remember the majority is obligated to President Eisenhower for their appointments. This is very dangerous as we have already experienced.

Let's do something, and quickly, to keep this body where it belongs, in the field of judges, not legislators.

Yours truly,

C. V. SMITH.

SLAY & Co.,
Dallas, Tex., February 27, 1958.

Hon. WILLIAM JENNER,
Senate Office Building,
Washington, D. C.

DEAR SENATOR JENNER: I am heartily in favor of the passage of Senate bill No. 2648 as proposed by you redefining the power of the Supreme Court.

Instead of interpreting our laws which is the fundamentals of the Supreme Court, it has been virtually an enforcement body.

This change has been needed for a long time. In fact, we need a definite whittling down of Federal power and spending, and the return of more and more power and jurisdiction to the States. This, as you know, was the purpose of our Constitution and our Bill of Rights, both of which, for the last few years, have been delegated to the background.

Yours very truly,

FRANK C. SLAY.

LEBANON, IND., February 19, 1958.

Re S. 2648.
Hon. WILLIAM JENNER,
Senate Office Building,
Washington, D. C.

MY DEAR SIR: Mrs. Slagle and I read and studied the comments of Holmes Alexander in the Indianapolis Star on above numbered bill. We wholeheartedly endorse it. It is needed badly. I hope you have little opposition in its enactment.

Yours respectfully,

L. O. SLAGLE.

SIMMONS COTTON OIL MILLS,
Dallas, Tex., February 28, 1958.

Senator WILLIAM JENNER,
Senate Office Building,
Washington, D. C.

DEAR SENATOR: I should like to strongly support your resolution, S. 2648. I should further like to see the provisions included in S. 2648 correcting the recent Mallory decision.

It is certainly a crime and a shame for the Supreme Court to pass decisions which enable notorious Communists to go free even though they have been convicted of conspiracy to teach and advocate the violent overthrow of our Government.

Yours very truly,

JAMES W. SIMMONS, Jr.

JAMAICA, N. Y., February 28, 1958.

DEAR SIR: I assume you are heartily in favor of enacting bill S. 2648 into law. Many of us feel that it is imperative.

Respectfully yours,

HOWARD J. SHANNON.

PHOENIXVILLE, PA., February 28, 1958.

Hon. WILLIAM JENNER,
Washington, D. C.

DEAR SENATOR: I am all for curbing the Supreme Court, but I do not think your bill goes quite far enough. They should not have appellate jurisdiction over any case tried under a State law, except to determine the constitutionality of the law itself. All such cases should stop at the State's highest court.

There should also be a method of overriding a constitutional decision of the Court by Congress, say a three-fourths majority.

Yours truly,

A. P. SCULL.

ATTICA, IND., *February 5, 1958.*

DEAR SENATOR JENNER: I am in favor of your bill S. 2040, and many thousands more would be if they'd know about it. I read it in a magazine (no advertising), not in our newspapers.

Prayers and kind wishes.

Mrs. ALBERT SCHUPP.

KANSAS CITY, MO., *February 25, 1958.*

Senator WILLIAM JENNER,
Senate Office Building, Washington, D. C.

DEAR SENATOR JENNER: We endorse the Jenner bill S. 2040 and want to see it adopted.

Sincerely,

Dr. and Mrs. H. E. SCHOEN.

BALTIMORE, MD., *February 25, 1958.*

SENATOR JENNER: I want you to know I am in complete accord with your proposed bill, S. 2040, which would limit the jurisdiction of the Supreme Court. Many Americans are alarmed at decisions of the High Court which bring more comfort to the Communists and only dismay and frustration to Americans.

I read with regret your decision not to run again for the Senate. We do so need men of your convictions and the courage to state them and work for them. I hope for the sake of your fellow Americans that this decision doesn't mean a termination of your services to your country.

Very sincerely yours,

Mrs. FLOYD SAXTON.

MESQUITE, TEX., *February 26, 1958.*

Senator WILLIAM JENNER: I am writing to let you know I am heartily in favor of Senate bill No. 2040 and will do all I can to support it. I also resent the Supreme Court's recent Mallory decision and ask the inclusion in S. 2040 provisions to correct this very bad and dangerous decision.

I am a member of a woman's group who are tirelessly at work in behalf of better government.

Sincerely,

Mrs. ROY RUPARD.

CHARLESTON, S. C., *February 26, 1958.*

Senator WILLIAM E. JENNER,
Senate Office Building, Washington, D. C.

DEAR SENATOR JENNER: I wish to thank you very much for sending the reports of the hearing of the subcommittee on bill S. 2040 held on August 7, 1957.

Like any native-born American, reared in the pre-New Deal principles of American government, I am like you, very much concerned with the anti-American ideologies that are wrecking the Constitution. I would like to make some comments on the excellent statement which you made to the committee.

I refer to page 13, section 2, paragraph 2, article 3 of the Constitution which definitely gives the Congress the power to make regulations as to the jurisdiction of the Court. Let me point out that this provision, in addition to giving authority to the Congress, imposes on the Congress the solemn duty to act if the oath of office is to be upheld. On page 2 you frankly admit that the Court instead of interpreting law is making law. Here again is a violation of the Constitution and disregard of oath of office that Congress can and should remedy. The FBI being a creature of the Congress, the Congress is to be blamed for permitting the Court to interfere with the operations of the FBI in accord with the will of Congress.

In fact, all the evils of bad government are on the shoulders of Congress because the Congress—and only the Congress—having the power to legislate and make appropriations, has the constitutional power and duty to correct the evils. On page 8 you mention the physical impossibility of Congress to keep currently informed of the branches of government. Am I correct in assuming that this also includes all boards and commissions created by the Congress? I mention

that because the ICC, CAB, FCC, et al., have overstepped the respective fields of action intended by the Congress. The remedy lies in the Congress by legislation and by curtailment of appropriations to correct the wrongful acts of "other branches of government"; and the same applies to boards and commissions which can also be abolished.

It is true that it is difficult for the Congress to know all that branches and boards are doing, so let me make a suggestion: Let the Congress create a standing committee to "police" the activities of all branches, boards, commissions, etc., and to notify the Congress of wrongful acts and policies. This committee could be composed of 4 Senators, 4 Congressmen, and 1 or 2 constitutional lawyers appointed or recommended by the American Bar Association, with ample funds and powers to operate. Also, that all legislation enacted by Congress and every board and commission created have a penalty clause specifying punishment by forfeiture of funds, salaries, or discharge for violation contrary to the intent of Congress and the Constitution. It must always be remembered that the Federal Government is a creature of the States.

Congress is the guardian of the American Constitution and the people. The Congress was created by the Constitution for that purpose, and I, with millions of others, hope that Congress will, like the Founding Fathers, show the courage and integrity to act accordingly.

Very sincerely yours,

HARRY M. RUBIN.

EWING MILL Co.,
Bedford, Ind., February 12, 1958.

DEAR BILL: Hope you are feeling better by now. I received the mimeo re your bill S. 2646. I like items 2, 3, 4, and 5 very much. I also know why you are so interested in item 1 and of its importance to you but I am afraid it might conceivably result in "ins" persecuting "outs" at certain times, or in subjecting individual liberty to possible temporary congressional or popular thinking.

Would also like for you to keep an eye peeled for any legislation further limiting truck transportation of exempt agricultural commodities. Don't permit the big fellows to further limit the trucking of chickens, hogs, corn, wheat, etc., by trying to fix truck rates for these items to freight rates.

Also, anything you can do to put the skids under Uncle Ezra Benson will be appreciated. He has been so wrong about so many things—about lower prices curtailing production, about lower prices broadening markets, about driving the farmer into town jobs. He has now forced the small farmer into town right into the arms of Beck, Hoffa, Anastasia, etc., or into the army of the unemployed. Give him a ribbon for righteousness, a medal for meritorious service, give him anything, but above all, give him a ticket to Utah.

I suppose Janet told you I called while you were home—shortly before you left. I only wanted to repeat what you have probably been told at least 10,000 times—"I don't blame you, but I hate to see you leave."

I know you are very busy. This note requires no answer.

Best regards.

Respectfully,

JOE E. ROBERTSON.

Arlington, Va., February 26, 1958.

CHAIRMAN, SENATE JUDICIARY COMMITTEE,
Senate Office Building, Washington, D. C.

DEAR SENATOR JENNER: It's my opinion that all patriotic Americans should support your bill, S. 2646.

Frankly, those men on Supreme Court should be tried for treason if they get what they deserve. I'm sure our country is in real trouble and am thankful for the few Congressmen like yourself who have the courage to speak against the Communists and their workings.

Sincerely,

Mrs. THOMAS ROBERTS.

STERLING BREWERS, INC.,
Evansville, Ind., February 13, 1958.

HON. WM. E. JENNER,
United States Senate,
Senate Office Building, Washington, D. C.

DEAR BILL: I read with interest your notice of your public hearing on Senate bill 2646. It is very essential that we have the legislative, judicial and administrative branches of our Federal Government and I know that you fully concur in this. It appeared to me as though the judicial decision on the antisubversive movement has been too much in favor of the accused. It is hard to get a conviction that will stick, which we both know will eventually destroy us if we don't control it.

The intent of the law according to my layman's understanding has a lot to do with how it should be interpreted and enforced and the legislative body must have intended to have certain curbs on these subversive activities.

Apparently the old thought of money or capital being able to defend itself has been carried too far in all our courts. On the other hand, we must remember that the accused must have his day in court. I don't think that should cover the man's trying to destroy the basis making it possible for him to have his day in court. This type of legislation, if properly applied, could be a good protective measure.

Best of wishes to you.

Yours very truly,

R. T. RINEY.

HOUSTON, TEX., February 21, 1957.

Sen. WILLIAM E. JENNER,
United States Senate,
Washington, D. C.

DEAR SENATOR JENNER: We are behind you 100 percent. We are sorry that you are not going to run for reelection. You are a great American. There are so few left.

Your proposed bill S. 2646 is a good, sound bill, and I hope and pray that it is passed. This bill is needed very much. We stand behind you and will try to make our State Senators support it.

We have been following your movements for many years and we are very proud of you.

We are trying to continue your fight. We have been members of the States Rights or Constitution Party for 4 years. We are followers of Dan Smoot, Dean Manion, Fulton Lewis, Jr., and the late Joseph McCarthy.

We thank you for being such a brave fighter. May God bless you make your remaining years happy ones.

Sincerely,

MRS. LUKE PERRICONE,
LUKE PERRICONE,
MR. AND MRS. LYLE BAER.

YONKERS, N. Y., February 19, 1958.

DEAR SENATOR JENNER: I am writing these few lines to let you know that I am behind you in the new bill you are introducing regarding the Supreme Court. It isn't that I have anything against them, but the only thing I know is that I work for the telegraph industry and the Communists are quite numerous here. Their attitude is one of contempt for the country, Congress, and everyone who opposes them. This, I think, is the result of all the favorable legislation they have received from the Supreme Court. Their arrogance knows no bounds. Thank you and God bless you.

Sincerely,

MARY PERRICELLI.

COLUMBUS, IND., February 14, 1958.

Senator WILLIAM E. JENNER,
Senate Chamber, Washington, D. C.

DEAR SENATOR JENNER: Referring to the notice of hearing on Senate bill 2646, to limit appellate jurisdiction of Supreme Court, I am decidedly in favor of

the passage of this bill 2646. Since I cannot appear in person, I trust this letter may be used as my approval. I have been in a wheelchair since 1954.

I am enclosing a clipping from the Indianapolis News, dated Monday, February 10, 1958, which you may have seen. This letter has caused me to wonder if some of our schools are teaching dual citizenship.

I have felt for some time that something should be done about the rulings of the Supreme Court. Each one took an oath to uphold the Constitution of the United States. It seems to me that some of them have not done so. I particularly dislike Earl Warren. I know they are elected for life, but if they fail to live within the Constitution why can they not be tried for treason?

I hope your amendment carries. Best wishes.

Sincerely,

LULA J. PATTERSON.

CHATTANOOGA, TENN., February 19, 1958.

HON. WILLIAM E. JENNER,
United States Senate, Washington, D. C.

DEAR BILL: I have been very interested in the bill you introduced, S. 2646. Naturally, being in the area dominated by the New York Times subsidiary, the Chattanooga Times, we have received less than any information about the bill. Will you be good enough to have Nyle send me a copy of the bill together with any remarks you may have made about it?

We are thinking of having our congressional candidate this year make support of your bill one of his main platform planks.

With kindest personal regards, I am,

Cordially yours,

LUPTON PATTEN.

DALLAS, TEX., February 27, 1958.

HON. WILLIAM JENNER,
*Senator of the United States From Indiana,
Senate Office Building, Washington, D. C.*

DEAR SENATOR JENNER: My attention has been called to a hearing on the resolution, S. 2646, and I want to indicate to you as strongly as I know how my full approval and endorsement of each of the issues presented by the resolution, S. 2646.

The powers of the Supreme Court must be curbed or we shall lose our liberties and the ideal of States rights will have vanished.

The recent decisions of the Supreme Court have encouraged the Communists, the subversives, and every Red element of this country to violate the law with impunity.

The juries of our country have done their full duty and have convicted the Communists and the subversives and the lower courts have sent these enemies of our country to be confined in penitentiaries. The Supreme Court has turned them loose. This must be stopped. The power to preserve law and order and protect the people of the several and separate States must be returned and vested in the courts of our separate and respective States.

The influence and the usefulness of the Federal Bureau of Investigation must be protected and preserved. The committees in the Senate and the House on un-American activities must be continued. Thorough and exhausting investigations must be carried on through the Senate and the House committees to protect our country from our enemies.

In my humble opinion the resolution, S. 2646, is just as necessary to protect the welfare of our country as is the missile program. What would it profit America if we gained supremacy in the air—in space—and lost our liberties through the operation of the enemies of this country protected by the decisions of the Supreme Court.

The members of the Senate may not know it, but the citizens—the common people—are way ahead of their demand for something to be done immediately to curb the power of the Supreme Court to destroy this Republic.

With every good wish for your success in your patriotic endeavor and with warmest personal regards,

Sincerely,

ALVIN M. OWSLEY.

Senator: We recall with so much pleasure your visit to us in Dallas.

ALVIN.

DALLAS, TEX., March 2, 1958.

Senator WILLIAM E. JENNER,
Senate Office Building, Washington, D. C.

DEAR SIR: I have just learned that the Senate Committee on Internal Security, of which Senator Eastland is chairman, is now holding hearings on Senate bill No. 2646—which was prepared by you. I wanted you to know that I, and many of my friends, are in complete accord with this proposal.

We also deplore the weakening of the Smith Act by the Supreme Court. We also resent the Supreme Court's recent Mallory decision—which has made it dangerous for peaceful citizens to walk the streets in some of our larger cities. Would it be possible to include in S. 2646 provisions for correcting this dangerous situation?

Thank you for your kindness.

Sincerely,

Mrs. JULIA O'CONNOR.

ST. PETERSBURG BEACH, FLA., February 28, 1958.

Re Senate bill S. 2646.

HON. WILLIAM E. JENNER,
*Senate Judiciary Committee,
Senate Office Building, Washington, D. C.*

DEAR SENATOR JENNER: You must know that Americans are slow to awaken. They are awakening now to the realization that leftist groups of all kinds are pressurizing to gradually remove the freedom guaranteed by our wonderful Constitution. Undoubtedly they are flooding your committee with propaganda, while working feverishly behind the scenes to stop the Jenner bill.

Pressurizing 48 States toward the left will not be as easy as worming into one all-powerful Federal Government.

We urge you to put all of the fight you possess into the passage of the bill, and more like it, we are to survive.

We also request this letter to go into the record.

Yours very truly,

CARL A. NORBERG,
MARIE C. NORBERG.

BYRNE COMMERCIAL COLLEGE,
Dallas, Tex., February 26, 1958.

Senator WILLIAM JENNER,
Senate Office Building, Washington, D. C.

DEAR SIR: My husband and I are greatly in favor of Senate bill No. 2646 as proposed by you.

We deplore the weakening of the Smith Act by the Supreme Court. Also, we resent the Supreme Court's recent Mallory decision.

Yours very sincerely,

CORRALEE B. NOYLIETT,
Mrs. EDWIN W. NOYLIETT.

FORT PIERCE, FLA., February 27, 1958.

HON. WILLIAM JENNER,
Senator from Indiana, Washington, D. C.

DEAR SIR: It is my hope that your bill S. 2646 will become law just as it has been prepared by you. That will start this country back on the road from which it was detoured by the Supreme Court some time ago.

If this bill becomes law your name certainly should be posted in a prominent place in the Hall of Fame.

Respectfully,

HARLOWE B. NEAR.

WABASH, IND., *February 19, 1958.*

HON. WILLIAM E. JENNER,
United States Senate, Washington, D. C.

DEAR BILL: I have been pleased with the many favorable comments I have read in the press concerning your legislative effort to curtail the appellate jurisdiction of the Supreme Court of the United States, and I trust that you will be successful in accomplishing the purpose for which the legislation is designed.

I hesitate to think what will happen when gentlemen like Senator Byrd and Senator Jenner no longer are available in the United States Senate to protest against the present drift and trend of our Government. I have hoped, and I continue to hope, that you may change your mind about being a candidate. However, I cannot feel it within my heart to urge you to do so.

With best wishes for your speedy recovery from your present illness.

Cordially yours,

DONALD R. MOTE.

CHARLESTON, Mo., *February 17, 1958.*

HON. WILLIAM E. JENNER,
United States Senator, Washington, D. C.

DEAR SENATOR JENNER: I have heard many expressions of condemnation of the United States Supreme Court since its shift toward ultraliberalism dating back to 1954.

Were you to poll the leading citizens of this community, I believe you would find that they are in unanimous agreement that the edicts of the Supreme Court have not only thrown a shield of further protection around the corrupt, but have virtually deprived the States of the rights to self-government as provided in the Constitution.

Before policy and law making becomes increasingly vested in our nine-man ruling body, and before our States become no more than satellites, it is hoped that in your forthcoming drive against the Supreme Court, the support that you have from thinking people throughout the Nation will bring success to you and your colleagues.

Borrowing an expression from "a man from Missouri," I hope you pour it on.

Respectfully,

PAUL H. MOORE.

DALLAS, TEX., *February 28, 1958.*

HON. WILLIAM JENNER,
Senate Office Building, Washington, D. C.

DEAR SENATOR JENNER: The Senate bill No. 2046, as proposed or as might be amended, is undoubtedly a constructive move, which could not be harmful to our country, and in all likelihood would prove very helpful.

I sincerely hope that such action will receive favorable consideration.

Yours very truly,

GILES E. MILLER.

PALATKA, FLA., *February 21, 1958.*

In re S. 2046, 85th Congress, 2d session, a bill to limit the appellate jurisdiction of the Supreme Court in certain cases.

HON. SPENCER L. HOLLAND,
Senate Office Building, Washington, D. C.

DEAR SENATOR: The facts marshaled and produced by Senator William E. Jenner in support of the passage of Senate bill 2046, as disclosed by the pamphlet of August 7, 1957, printed for the use of the Committee on the Judiciary, by the Government Printing Office, force the conclusion that the Congress of the United States, as the representatives of the people of the United States, should, with all convenient speed, exercise the power and authority vested in such Congress by the Constitution, and limit the appellate jurisdiction of the Supreme Court in the manner and in the cases set forth in said Senate bill 2046, without a single exception.

The conduct of the Court, as evidenced by its decisions referred to in the material furnished in support of the bill, shows beyond doubt that the Court, in the last few years, has entered upon a fixed course, design, intent, and purpose

to alter, amend, and change the Constitution by destroying the 10th amendment; and so reduce, limit, and curtail the legislative powers of Congress that all powers of the Government, Federal and State, will be assumed, regulated, and exercised as functions of the Court, and promulgated as judicial bulls embodied in its decisions.

Such course of judicial decisions, if persisted in, will change the form of our Government from that of representative government to that of dictatorship, with all power usurped and exercised by the Court.

The plain duty of the people of the United States and of the Congress is to halt and arrest such assumption of legislative power by the Court; and, if necessary, to remove the members of the Court who persist in such judicial misbehavior, and thereby limit the tenure of office of the members of the judiciary during good behavior, as provided by the Constitution.

Very truly yours,

H. E. MERRYDAY.

WALTHAM, MASS., *February 21, 1958.*

Senator WILLIAM E. JENNER,
Senate Office Building, Washington, D. C.

DEAR SENATOR JENNER: May I congratulate you? It is a great relief to me, as well as countless thousands of other citizens, to at last have a Member of our legislative body stand up to the Supreme Court.

Your bill (S. 2040) will be of great benefit to the Nation and help us in our struggle to return to constitutional rule.

If I may be of any help to you, especially as pertains to petitions or campaigning here in Massachusetts, please let me know. I, too, would like to help in some way.

I would also like to have additional information on this bill or something from the Congressional Record.

In any event, I would like to thank you for your trouble and wish you success in both this and further campaigns.

Yours for Christ and country.

LAWRENCE T. MAY, Jr.

FORT WORTH, TEX., *February 18, 1958.*

Senator WILLIAM JENNER,
Senate Office Building, Washington, D. C.

DEAR SENATOR JENNER: May I express my complete approval of your bill, S. 2040 which redefines the powers of the Supreme Court.

It is high time we began to demand the return to the privileges and the limitations set out in our Constitution.

Please bend every effort in getting this bill S. 2040 passed.

Sincerely,

GLADYS SCALING MARTIN.

INDIANAPOLIS, IND., *February 28, 1958.*

Hon. WILLIAM JENNER,
Senate Office Building, Washington, D. C.

DEAR MR. JENNER: I think you have the right idea in your bill to curb our so-called dictatorial Supreme Court. I was always of the opinion that Congress and Senate were supposed to pass our laws. And laws to benefit the American people as a whole and not just the big boys and Ike's friends.

Mr. Jenner, the American people are slow thinking and slow to anger but look out when they do get enough of this hogwash that is going on at Washington. I think Ike would make a good Democrat. We need more men like you in Congress and Senate who have the American people's welfare at heart and not try to give all our hard-earned money to parasites. I wish God would give us a leader to get us out of this mess the Democrats started, and the so-called Republican administration is going overboard to outdo the Democrats who they knocked so loudly. Best of luck and health to you and may God bless and keep you for that good old United States of America.

Yours truly,

DR. A. W. MARTIN.

WEST HARTFORD, CONN., March 4, 1958.

Hon. WILLIAM E. JENNER,
Senate Judiciary Committee,
Senate Office Building, Washington, D. C.

DEAR SENATOR JENNER: I am writing this note to the members of the sub-committee:

This is to let you know that I earnestly hope that you will support and vote for the Jenner bill.

Sincerely,

(Mrs.) O. E. MARSHALL.

ED MAHER, INC.,
Dallas, Tex., February 24, 1958.

Hon. WILLIAM JENNER,
Senate Office Building,
Washington, D. C.

DEAR SENATOR JENNER: I am firmly of the opinion that resolution S. 2610 should by all means be adopted. I sincerely hope you will pursue it vigorously to its ultimate successful conclusion.

It is high time indeed that not only the Supreme Court but that the other bureaus be estopped from making flat laws. I want to congratulate you on your stand in regard to this matter.

With kindest regards, I am,
Sincerely yours,

EDWARD R. MAHER.

TAMPA, FLA., February 28, 1958.

Senator JENNER,
Washington, D. C.

SIR: I was so glad to see that our people are beginning to realize that our Supreme Court is about the biggest bunch of no-goods in all America. I know many people who have no respect whatsoever for one single one of them.

Throw them out for all our sakes before it's too late, and may God bless you.

MRS. C. W. McLENDON, Sr.

PHILADELPHIA, PA., February 24, 1958.

Hon. WILLIAM JENNER,
United States Senate,
Washington, D. C.

DEAR SENATOR JENNER: I am 100-percent back of your bill to limit the powers of the Supreme Court, who, I am afraid, are being pressured by the pro-Communists or leftists. This is the United States of America and the American people want it kept that way. We depend on you Senators to take care of it for us. Thank you.

Very truly yours,

MISS AGNES R. MCINTYRE.

WICHITA, KAN., February 21, 1958.

Hon. WILLIAM E. JENNER,
Senate Office Building, Washington, D. C.:

I am in accord with purposes of S. 2610 to limit review of certain cases in Supreme Court and urge adoption of the bill.

S. S. McDONALD, Jr.

SAN ANTONIO, TEX., March 3, 1958.

Senator WILLIAM JENNER,
Senate Office Building, Washington, D. C.:

Use every effort to pass your bill 2610. People greatly disturbed over decisions of the Supreme Court. It would help right some of its mistakes. Senator Jenner you are a valued Member of the Senate. We would hate for you to retire.

MRS. MARRS McLEAN.

THE KNOXVILLE JOURNAL,
Knoxville, Tenn., February 20, 1958.

Hon. WILLIAM E. JENNER,
Senate Office Building, Washington, D. C.

DEAR SENATOR JENNER: When I received the National Republic lettergram from Walter Steele, announcing the scheduled hearings on your resolution to clarify the powers of the Supreme Court, I sent it to Mr. W. E. Michael, requesting that he take steps to be heard.

Enclosed herewith I send his reply, manifesting his happiness in appearing as a witness.

I feel that together with his profound knowledge of our Constitution and his intimate association with the Federal court procedure here, after the Clinton, Tenn., debacle, and his tremendous interest, his testimony would be valuable.

The passage of your resolution is a must, for at present our Nation is governed by the majority members of the High Court.

With my best regards,
Very sincerely yours,

Mrs. ROY N. LOTSPEICH,
President and Publisher.

DALLAS, TEX., February 27, 1958.

Hon. WILLIAM E. JENNER,
Senate Subcommittee on Internal Security,
Senate Office Building, Washington, D. C.

MY DEAR SENATOR: Since you are the author of Senate bill 2640, to limit the appellate jurisdiction of the Supreme Court, it is hardly necessary to request your support of it in the hearings now in progress. However, I endorse this bill to the fullest and hope that you will spare no effort to see that it is reported favorably back to the full Committee of the Judiciary.

Unless this session of the 85th Congress is able to place some restraint upon the Supreme Court, it is improbable our Nation can survive.

Respectfully,

JAMES N. LANDRUM.

DALLAS, TEX., February 27, 1958.

Hon. WILLIAM JENNER,
Senate Office Building, Washington, D. C.

DEAR SENATOR JENNER: Senate bill 2640 as proposed by you is a bill that I think the majority of the thinking people of the country would like to see passed.

It is my hope, as well as the hope of numerous acquaintances of mine, that this bill is passed in the light of the past events, and I sincerely hope that you will do everything within your power to effect passage.

Yours sincerely,

HARRY H. LACEY, Jr.

INDIANAPOLIS ALLIED POSTAL COUNCIL,
Indianapolis, Ind., February 20, 1958.

Senator WILLIAM E. JENNER,
Senate Office Building, Washington, D. C.

DEAR SENATOR: I received under date of February 10, from your office a notice of hearing on Senate bill 2640 to limit appellate jurisdiction of Supreme Court.

We have read and studied this bill carefully and we wish to inform you and your committee that we endorse this bill. Personally I may have had some reservations but when I read in the paper last evening that the ADA had testified so strongly against it I am convinced now that it must be a good bill.

It is our opinion that the courts did a serious disservice to their country in their recent rulings on the actions of various Government bodies in the function of controlling subversive activities and employees whose retention in service is a security risk.

We do however recommend that no individual be designated a responsibility of making a ruling on the subject. We therefore recommend that—

Paragraph (3), strike out, "executive regulation";

And that no misunderstanding be possible that—

Paragraph (4), add the words "of any State" after the words "similar body".

Paragraph (3) would then read: any statute of any State the general purpose of which is to control subversive activities within such State;

Paragraph (4) would read: "Any rule, bylaw, or regulation adopted by a school board, board of education, board of trustees, or similar body of any State concerning subversive activities in its teaching body;"

We hope that action be speeded on this needed legislation before the subversives gain too much while free to act without restraint.

Sincerely yours,

NEIL T. KERSHNER, *President.*

UPPER DARBY, PA., *February 25, 1958.*

Senator WILLIAM F. JENNER,
*Senate Office Building,
Washington D. C.*

DEAR SENATOR JENNER: Your bill to curb the powers of the Supreme Court should be passed immediately. The American people should be informed as to the nature of the enemy. But instead we are to have swarms of Red agents visit our shores in the guise of "cultural" exchanges.

It just doesn't make sense to hear Ike being alarmed about the Communists in Europe while at home they are made out to be respectable people.

The American people want an explanation as to whether or not the President fully understands the conspiracy. If communism is evil then why exclude the American branch?

Congratulations to you for your vallant fight to preserve the United States of America.

Sincerely,

ANNA M. KELLEY.

BALTIMORE, Md., *February 22, 1958.*

DEAR MR. JENNER: I have just written the following letter to all the members of the Judiciary Committee:

Because I feel so strongly that passage of the Jenner bill, S. 2640, must be achieved to safeguard our heritage of constitutional government, I am writing to each member of the Judiciary Committee.

Certainly the liberal Judge Hand has proved both objective and courageous in the attached statement wherein he says "that each was responsible to that sovereign (the people of the United States) but not to one another."

It is my earnest hope that your committee will adopt a favorable report on this bill.

If Judge Hand has the courage to face facts—surely the members of the committee can do no less.

Sincerely yours,

HELEN WALKER JENKINS.

Supreme Court: Judge Learned Hand has told his Harvard Law School audience: "When the Constitution emerged from the convention in September 1787, the structure of the proposed government, if one looked to the text, gave no ground for inferring that the decisions of the Supreme Court—were to be authoritative upon the executive and the legislative. Each of the three departments was an agency of a sovereign, the people of the United States. Each was responsible to that sovereign but not to one another; indeed their separation was still regarded as a condition of free government, whatever we may think of that notion now."

SAVANNAH, TENN., *February 14, 1958.*

Hon. WILLIAM E. JENNER,
*United States Senate,
Washington, D. C.*

DEAR SIR: In reading the paper, I see that you and other Senators are preparing or have prepared bills calculated to curb the reckless disregard for the Constitution and their oaths to uphold same.

Article 1, section 1, clause 1: All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article 10 amendments: The power not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Article 14, section 1, amendment: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Before any State is admitted to the Union it shall have formulated a State constitution that conforms to the provisions of the Constitution of the United States. North Carolina, the State from which the case was carried to the Supreme Court of the United States and upon which the infamous desegregation decision was based, had violated no Federal law.

Congress had not passed any law touching on the question of segregation, so the State of North Carolina and North Carolina only had jurisdiction over matters purely of a local nature.

Nowhere in the Constitution of the United States is any provision authorizing the Court to enter the legislative field and by Court order enact a law, but that is what it did in the 1954 decision.

The Court had no authority to enact a law, nor did the President have authority to send troops to Little Rock to enforce the Court's order. The Court has handed down other decisions, the effect of which deprives the States of their rights guaranteed to them under the Constitution. If this constant usurpation of power is not checked and that soon the freedom of which we have so proudly boasted will be only a memory. Earl Warren and his Communist sympathizers should be impeached.

I am, very respectfully,

ROBERT HURST,
(An 80-year-old southern-born Republican—not a modern.)

NEW RICHMOND, IND., February 25, 1958.

WILLIAM E. JENNER,
United States Senate,
Washington, D. C.

DEAR MR. JENNER: I was so pleased when I read that you were sponsoring a bill to curb the Supreme Court. They shouldn't be allowed to make any laws or change or do away with laws that are already made. They seem to be turning us over to the Communists as fast as they can.

There are other things I should like to express an opinion on. Am not in favor of summit talks because it will only give Russia a chance to spread her influence. And especially since she has planned for China to take over Formosa while she keeps the Western World busy.

Am not in favor of giving money or weapons to any of the Russian satellites. In fact, am not in favor of giving money to any government. Only food to the people and send someone to teach them how to do the things which will help them feed themselves.

We went into the administration with the understanding that the Federal-held businesses and properties were to be disposed of to private persons. It hasn't been done. If it were done there would be money to cut down on the debt.

We believe the farmer should be let alone to farm to the best advantage of the land with no Government controls or subsidies.

We do not believe in Federal help for the bright child or have any say in the school program. Each State should take care of its own bright children and its own school system as it always has.

We think the appropriation should be cut down.

Yours truly,

MARY HORMELL.

DALLAS, TEX., February 20, 1958.

Senator WILLIAM JENNER,
Senate Office Building,
Washington, D. C.

DEAR SIR: This is to advise you that I am in favor of Senate bill No. 2048 as proposed by you and I would like to ask you to include 8, 2040 provisions for correcting the dangerous decision made by the Supreme Court weakening the Smith Act.

I hope that you are successful in passing these bills.

Yours truly,

MARIE HELMBROCHT,
Mrs. William C. Helmbrecht.

DETROIT, MICH., February 21, 1958.

HON. WILLIAM E. JENNER,
Senate Office Building, Washington, D. C.

DEAR SENATOR JENNER: I wish to express my wholehearted support of your bill to limit the appellate jurisdiction of the Supreme Court. This legislation is a must if our country is to survive.

May I ask if this legislation would nullify any of their past decisions that have done so much to help the Communists?

With deep gratitude for your work in behalf of our country.

Mr. and Mrs. A. R. HELLWORTH.

MADISON, IND., February 27, 1958.

Senator WILLIAM E. JENNER,
Washington, D. C.

DEAR BILL: Thanks for sending me a copy of Senate bill 2040, "to limit the appellate jurisdiction of the United States Supreme Court." Regardless of the ultimate fate of the bill it is good to know that someone had guts enough to introduce such a bill to curb the un-American decisions recently handed down by the Court. These decisions were decried by Americans such as J. Edgar Hoover and others who condemn the pampering of Communists and their ilk. When will we wake up to the fact that we are vulnerable both from without and within?

Along with a million other Hoosiers and the scattered remnants of other old-line Republicans, I was extremely sorry to learn that you would not be a candidate for reelection; you were a thousand percent certain of being nominated and elected, but you have your own life to live. I do resent the statements made by the opposition that "you did not choose to run" because of this uncertainty. Nuts.

Meanwhile the stalwarts in the Senate have almost reached the vanishing point. I know you have taken full cognizance of this matter, and where do we go from here? First there was Bob Taft, then Welker, McCarthy, Knowland, Byrd, and Jenner, others of course. Wonder what kind of country my grandchildren will live in?

Hope you can put this bill over; if that is impossible, then thanks for trying.

Sincerely,

(Signed) Dick.
(Typed) RICHARD C. HECK.

FORT WORTH, TEX., February 23, 1958.

Senator WILLIAM JENNER,
Washington, D. C.

DEAR SENATOR JENNER: We wish to express our hearty approval of your Senate Resolution No. 2046 redefining the duties of the Supreme Court.

Recent decisions of the Supreme Court have greatly endangered the safety and security of our country, and we hope you can restrict their authority.

We would also like to see the term of office of the Justices be either reduced or that they be subject to reconfirmation every 4 to 6 years.

Yours truly,

Mrs. T. B. HART.
T. B. HART.

WESLEY HARRIS REALTY AGENCY,
Bicknell, Ind., February 19, 1958.

HON. WILLIAM E. JENNER,
United States Senate Post Office,
Washington, D. C.

GREETINGS: Thanks to you, Bill, for copy of notice of hearing on Senate bill 2040.

I am enclosing for your information clipping from the Evansville Courier of even date.

It is my personal belief that the Supreme Court, as presently constituted, has in fact usurped authority that is, under the provisions of our Constitution; the prerogative of the legislative branch, and that this action by the Court is in fact a most serious matter. It is, also, my personal belief that the said Court does not at present command the respect of our citizenry that it once did, and that this is the result of the so-called liberalism of some of its members.

I am frank to say, however, that the respect formerly inherent in the Court will have the effect of causing hesitancy in remedial legislation, even though it may be most urgently needed.

Your efforts are respectfully commended. I can only hope and trust that your bill may be effective in producing beneficial results.

It is my hope that you have completely recovered from your recent illness.

Most cordially yours,

WESLEY HARRIS.

A. C. HAMILTON & Co.,
Dallas, Tex., February 25, 1958.

Re S. 2040
Senator JENNER,
Senate Office Building,
Washington, D. C.

DEAR SENATOR: May I congratulate you on your stand in developing the above-mentioned resolution. Someone must redefine the power of the Supreme Court or those with leftist tendencies will ruin this country.

The weakening of the Smith Act by the Supreme Court is almost suicidal in its design.

Yours for more statesmen and less radicals.

Yours very truly,

A. C. HAMILTON, Jr.

I do hope you will reconsider your withdrawal from the Senate race. The country needs men like you.

A. C. H., Jr.

CHEROKEE, TEX., February 27, 1958.

Senator WILLIAM JENNER,
Senate Office Building,
Washington, D. C.

DEAR SENATOR JENNER: Those of us who believe in redefining the powers of the Supreme Court are encouraged that hearings are being held on the resolution, S. 2040. Many, many people with whom I come in contact, feel strongly that this resolution you have proposed, is needed. We hope that provisions will be included to correct the evils of the Mallory decision and also to combat the weakness of the Smith Act by the Supreme Court.

Sincerely,

VIRGINIA H. GRAY.

DETROIT, MICH., February 14, 1958.

MY DEAR SENATOR JENNER: Seeing, watching, thinking, knowing Americans are greatly disturbed by the developments coming from our Supreme Court.

The American people are more disturbed about our "leadership" now than at any time I have ever seen in my 50 years.

I travel extensively. The knowledge of doubt and uncertainty about our High Court exists everywhere. A halter must be placed upon these far-grazing strays—all nine of them.

The attached is a copy of a letter I sent both of our Michigan Senators, urging their support of your bill.

The great mass of American people look toward Senator Jenner with great hope.

Respectfully,

E. B. GIRDLEY.

DETROIT, MICH., February 14, 1958.

Senator CHARLES E. POTTER,
United States Senate Building,
Washington, D. C.

DEAR SENATOR: I believe that the honorable Senator from Indiana, William E. Jenner, has introduced a bill in Congress (S. 2040) which our respective Senators from this State should support.

Our United States Supreme Court has got out of hand, out of reason.

This Court has found the American people all wrong. They have found our Congressmen, our States, our Constitution, our civic organizations, our way of life—they have found all this wrong.

What have they found right? Those promoting the overthrow of our Government, Communists; those engaging in murder, rape, treason; those harboring a hatred of our country and of our people—the antisocial—of our religion and of our laws in the sickness of their mind: these they have found "right."

We are fully aware that these men sitting in the Supreme Court of our land are legally impractical to perform their duty in line with the thought and action of our fathers of this land, who so established what was to become the greatest nation of the world of all time.

We are aware that these men never sat as Judges prior to their political appointment. Except the last addition.

Who were our Senators who confirmed these men, knowing, as they must have, of their legal inefficiency? Were our Senators sleeping? Or did they care? Do we have Neros in Washington?

Senators are voted in by the people for the sole purpose of maintaining the welfare of the Nation and of supporting the Constitution without stammering. No Senator has been sent to Washington, D. C., with the voters' consent to rewrite or to promote by vote the overthrow of our traditions and laws. Nor are Supreme Court Justices presented for this purpose.

Since the 18th amendment, the people have not clamored for closer attention to our way of life than now. We feel that we are being rigged into a centralized government. A centralized government means dictatorship. Too many lives have been lost by American men fighting such a government here and elsewhere, to let a dictatorship be established unchallenged by nine old men dotting away on the brink of eternity.

We are aware of the social background of these gentlemen. And we are not by any means fond of our finding. They are men of clay. Not gods. They have erred tragically, through ignorance or through intention. The result is the same. They must be checked. The power to do this lies with you, our Senators.

Very sincerely yours,

E. B. GIRDLEY.

WEST NEWTON, MASS., February 15, 1958.

HON. WILLIAM E. JENNER,
United States Senate, Washington, D. C.

DEAR SIR: Enclosed you will find a copy of a letter that I have written to our Representative.

I can assure you there are millions who are willing to back you and your bill concerning the Supreme Court decisions. I know the struggle is great, but the rewards are greater.

Sincerely yours,

EDWARD L. GALLAGHER.

WEST NEWTON, MASS., January 22, 1958.

HON. LAURENCE CURTIS,
House of Representatives, Washington, D. C.

DEAR SIR: As one who has consistently voted for you; as one who has influenced many of my friends to vote for you; as one who filled out your questionnaire, I was very much surprised and chagrined when I read your statement that approved the decisions of this Supreme Court.

You're wrong when you state the heart of this attack comes from those who have a southern point of view on segregation. There are more people than southerners who are against the decisions of this Supreme Court. There are millions, and many of these are your constituents and my friends who feel that the Communists have gained more from the decisions of this Supreme Court than from any Court in past history because of the appointment of Chief Justice Warren. The Communists seem to have sensed this was going to be before the Senate that approved the Chief Justice did. They, the Communists, when the appointment was made came out of the underground and openly stated that there was a different climate now and they felt more safe.

This Court has throttled the Government and the State's right to apprehend Communists, they have freed the culprits from the cells, they have shackled the FBI to the point where it is nothing more than a glorified police force as Mrs. Roosevelt and the leftwing clique have always desired. They are now working, because of this encouragement, to scuttle the Smith Act, to break down the McCarran-Walter Act, to emasculate the investigative powers of the Senate and congressional committees. I think it is time the Members of our Congress and Senate have the vision to see these things and the courage to prevent them before it is too late.

Sincerely yours,

EDWARD L. GALLAGHER.

DETROIT, MICH., February 24, 1958

HON. WILLIAM JENNER,
Senate Office Building, Washington, D. C.

DEAR SIR: We certainly appreciate the wonderful work you are doing for our country. We would like to see Senate bill 2040 favorably acted upon by the Congress.

Hearings should also be heard on House Joint Resolution 355 and receive favorable action.

The people of the United States would like to see a return to constitutional government.

Very truly yours,

PAUL V. FUNK.

NEW ROCHELLE, N. Y., February 26, 1958.

HON. WILLIAM JENNER,
United States Senate, Washington, D. C.

DEAR SENATOR JENNER: I have just written each member of the Judiciary Committee thanking them for consenting to hearings on your bill S. 2040. Also, as our elected representatives to protect the Constitution, I ask they support your bill.

Thank you sincerely for all you are doing in our behalf.

Yours very truly,

MARTHA M. FUHRER
MRS. RAYMOND A. FUHRER.

TRUMAN R. FRIES, INC.,
Bethlehem, Pa.

HON. WILLIAM E. JENNER,
Senate Office Building, Washington, D. C.

DEAR SENATOR: I have written to my Senators from Pennsylvania, asking their support for your bill (S. 2040). Lost of luck. Plenty of people are for it, but don't know or never write to their Senators. Laws are laws as written and should be changed by the people or their representatives, not by different interpretations of any court.

Very truly yours,

TRUMAN R. FRIES.

BRIDGEPORT, CALIF., *February 21, 1958.*

HON. WILLIAM E. JENNER,
*Senate Office Building,
Washington, D. C.*

DEAR SENATOR JENNER: We thank you for sending me a copy of the notice of hearings on Senate bill 2040, and also a copy of the bill, which was introduced by you.

This legislation is seriously needed, as demonstrated by the actions of the apparent dupes of the Moscow Soviet, who have been appointed as members of our once Supreme Court.

We trust and urge that S. 2040, or its equivalent, will quickly be enacted into law, and that if it should be vetoed by Mr. Eisenhower, it will quickly be reenacted by a two-thirds majority vote of both Houses of the Congress.

We sincerely believe that the present members of our once Supreme Court of the United States, merit impeachment, to be followed by trial as traitors and treasonists.

Seriously and sincerely,

MONO COUNTY MINERS ASSOCIATION,
By F. J. YOUNG, *Secretary.*

BENSENVILLE STATE BANK,
Bensenville, Ill., February 14, 1958.

HON. WILLIAM JENNER,
*United States Senator,
Senate Building, Washington, D. C.*

DEAR SENATOR JENNER: Senate bill No. 2040, in my opinion and the opinion of many thinking people in this area, must be passed. No arm of the Government, be it Supreme Court or otherwise, should have the power to upset the purposes of the United States Constitution as evidenced by the present trend of the Supreme Court. You are entirely correct in the theory that the States alone should have the power of control over education, practice of law, and antisubversive control. The undersigned heartily endorses Senate bill No. 2040.

Respectfully yours,

R. A. FRANZEN.

SOUTHPORT, CONN., *February 19, 1958.*

MY DEAR SENATOR JENNER: I am in total agreement with the bill S. 2040 which you introduced, and which would limit the appellate jurisdiction of the Supreme Court in certain cases. Particularly with respect to the security program, also with respect to home rule over local schools.

Very sincerely,

KATHLEEN MACY FINN.

DALLAS, TEX., *February 27, 1958.*

Senator WILLIAM JENNER.
*Senate Office Building,
Washington, D. C.*

DEAR SENATOR JENNER: I am heartily in favor of resolution S. 2040.

Also, I deplore the weakening of the Smith Act by the Supreme Court. Please include provisions in S. 2040 for correcting this dangerous decision.

Sincerely,

ELLEN C. FERGUSON
Mrs. Ted B. Ferguson.

THE FATOUT BUILDING CO.,
Indianapolis, Ind., February 24, 1958.

Senator WILLIAM E. JENNER,
Senate Office Building,
Washington, D. C.

DEAR SIR: Your bill for curbing the Supreme Court is very timely. They should be forced out of the lawmaking business.

Very truly yours,

THE FATOUT BUILDING CO.,
RAY T. FATOUT.

ST. LOUIS, Mo., February 15, 1958.

Senator WILLIAM JENNER,
United States Senate,
Washington, D. C.

DEAR SENATOR JENNER: The attached letter is a carbon copy of one I sent Senator Hennings.

I have long admired your work in the Senate and only wish there were more honorable men to aid you.

Both our Senators from Missouri have very liberal voting records; however, the Republican candidates usually offer almost the same so we really have no choice.

This letter is to let you know there are many people here who agree with you but we are not located so to change things much.

Sincerely,

GORDON EMERSON.

ST. LOUIS, Mo., February 15, 1958.

Senator THOMAS C. HENNINGS, Jr.,
United States Senate,
Washington, D. C.

DEAR SENATOR HENNINGS: I have read where you attack Senator Jenner's bill concerning the Supreme Court.

First, do you accept all the decisions of the Supreme Court? If not, then you offer nothing to cope with the present situation. It usually isn't sensible to attack something unless you have a better solution. Apparently you don't in this case.

Second, if you accept all the decisions of the Supreme Court, then you do not believe in the balance of power held by each, the executive, the legislative, and the judiciary. The Court is far out of balance with the other branches.

I know you have a liberal voting record.

Now, if you are to accept the Supreme Court as the master and obey all decisions without question, then you accept the same system as the supreme Soviet in Russia. No one questions the masters there, I am told.

The just powers of our Government are justly derived from the people, not the Court.

It appears more and more of our elected public servants are becoming our political masters. This trend can destroy our freedom, but some who gain power use it to destroy.

Sincerely,

GORDON EMERSON.

LOGANSPORT CHAMBER OF COMMERCE,
Logansport, Ind., February 27, 1958.

Senator WILLIAM E. JENNER,
Senate Office Building, Washington, D. C.

DEAR BILL: This organization wishes to support unanimously your bill which has been offered to curb the judicial encroachment on the investigating powers of Congress.

In our group discussions we have long since felt that the Supreme Court had carried the powers of Congress and gone into the lawmaking position themselves and this, of course, we unalterably oppose.

We still believe Congress should make the laws.
 If there are others whom we should write to please advise me.
 Sincerely,

H. A. EISENBERG, *Executive Secretary.*

TUESDAY, FEBRUARY 27, 1958.

SENATOR JENNER: Your bill to curb the powers of the United States Supreme Court should receive better publicity than it is getting. For the Court has undoubtedly exceeded its constitutional powers and is becoming, in fact, a semi-legislative body which claims that it is the law of the land.

We Americans will not willingly concede that the edicts of our Supreme Court are the law of the land. We contend that our duly elected representative in the House and the Senate are the supreme law of the land. And we want the Supreme Court to follow its constitutionally decreed limitations, not to assume powers by decree that are in conflict with the United States Constitution.

Integrationists claim that too many of us are intolerant. Many of us so accused insist that the integrationists are intolerant of anything disagreeing with their own preconceived views. Those rock-ribbed integrationists miss the point in their arguments for equality in the races. The point is whether we place forcible integration or whether we want to keep the Supreme Court as a judicial body rather than let it reach out into a field left to a duly elected legislative body.

Intolerance is a two-edged implement.

Respectfully yours,

W. H. EDWARDS, *Montezuma, Ind.*

LUBROCK, TEX., *February 26, 1958.*

DEAR SENATOR JOHNSON: Just a short letter to inform you that we favor the bill recently introduced in the United States Senate, by that very able and excellent American, Senator William E. Jenner. We believe it most imperative for you to support and urge the support of this bill that would prevent the United States Supreme Court from interfering, or the right to hear appeals on committees, executive security programs, State security programs, school boards or admissions to the bar.

For very obvious reasons, any loyal American can see the need to curb the United States Supreme Court, and with all haste. The Supreme Court has destroyed the Smith Act, and it has rendered the FBI almost useless in the effort to fight Communist subversion and activity. The U. S. News & World Report, February 21, 1958, reported that the House Un-American Activities Committee, has exposed the fact that over "1 million Americans have been enlisted by the Kremlin as spies, or potential Communist spies and saboteurs." If the present rate of Supreme Court decisions continue, the Communist will not have to fire a single rocket or drop a single bomb, the Supreme Court will simply hand the United States of America over to the Communists, lock, stock, and barrel.

Also we see, according to the February 28, 1958, issue of U. S. News & World Report, that the President, in his proposed foreign-aid budget, has asked for "\$106.6 million, for the United Nations Children's Fund, certain refugee programs, administrative costs, and \$20 million for a contribution to the United Nations Technical assistance program."

Now Senator Johnson, may we ask, in as much as this is American tax money that is to be spent, what about our own needy children here in the United States? Is nothing to be done to assist loyal, needy Americans? Could not, and should not, this money be spent right here on our own shores, the various American States, on a local level could do much more good with this money and at a great deal less cost. We oppose any aid, in any form, to the very dubious United Nations.

Also could you please explain to us just what the President meant when he asked for \$1.5 million for the contribution to the Organization of American States? Does this mean money to destroy more States rights?

Respectfully,

B. B. DuBois.

FLORAL PARK POST, No. 334,

15 Elizabeth Street, Floral Park, N. Y., February 24, 1958.

Re Senate bill 2646, to limit appellate jurisdiction to the Supreme Court.

HON. WILLIAM E. JENNER,
Senate Office Building,
Washington, D. C.

DEAR SENATOR JENNER: At the last regular meeting of our post, a motion was unanimously adopted authorizing me to write you and the Senators and Congressmen of our area concerning the above numbered bill.

We should like to record our congratulations to you personally and our approval of the bill you have introduced. Like you, we have been increasingly shocked and dismayed by the decisions rendered by the Supreme Court concerning our national security. We feel the trial courts are in the best position to see, hear and evaluate the evidence in such cases and believe that their findings should not be tossed aside by modernistic and tortured interpretations of the first and fifth amendments or by other novel legalistic conclusions, which evidence a total disregard for the safety of our country and, at the same time, an irrational interest in safeguarding the Communist enemy within our borders.

We enclose a copy of letters which we have mailed to Senators Ives and Javits and Congressman Derounian urging the support of your bill.

Respectfully yours,

DONAL A. DONOVAN, *Americanism Officer.*

FLORAL PARK POST, No. 334,

15 Elizabeth Street, Floral Park, N. Y., February 24, 1958.

Re Senate bill 2646, to limit appellate jurisdiction to the Supreme Court.

HON. IRVING M. IVES,
Senate Office Building,
Washington, D. C.

DEAR SENATOR IVES: I have been authorized by our post to write you and our other representatives expressing our approval of the above numbered bill.

We enclose a copy of a letter addressed to Hon. William E. Jenner sponsor of this bill and believe it adequately indicates our regard for it.

We understand that hearings on this bill are now taking place. We urge your support in putting the same into law. We should like to have your comments on the proposed legislation.

Respectfully yours,

DONAL A. DONOVAN, *Americanism Officer.*

(Same letter sent to Senator Javits and Congressman Derounian.)

MRS. J. W. DINSMORE,

Piedmont, Calif., March 1, 1958.

MY DEAR SENATOR JENNER: Thank you for sending your resolution on limiting the appellate powers of the Supreme Court. I and my study group thoroughly approve of your proposed limitations.

We are heartsick that you are leaving the Senate, but realize you have thought over the matter thoroughly. We need your judgment and advice and will always appreciate any suggestion you offer.

Yours sincerely,

ELVA J. DINSMORE.

ST. PETERSBURG, FLA., February 26, 1958.

Senator JENNER,
House Senate Committee,
Washington, D. C.

HONORABLE SIR: I do not know whether 2646 is the correct number for the new law or bill you wish to have passed, but it is designed to restrict the powers of the men who are assigned to the Supreme Court bench.

Considering the type of men assigned to this gravely important post in our Government these past 20 years or so, I would say they certainly need to have their jurisdiction over the welfare of the decent citizenry of these United States strictly outlined and curtailed. While you are about it, they should have to learn loyalty and integrity are not only in the dictionary, as empty words, but should be part of men who can do much harm or good as the case may be, because of their position in the Government of our country.

I admire your courage and farsightedness in this matter. It seems rather late for this law to be passed, but let us hope it is not too late.

If all the Senators do not back you in this, it is because they did not mean their words to be anything, when they swore with their hands on the Bible, to protect the people who voted them into the position they hold, because this is really a good law that is just and needed into our own world of today.

Respectfully yours, Senator,

HERTHA DE FRAN.

INDIANAPOLIS, IND., February 21, 1958.

Senator WILLIAM E. JENNER,
Redford, Ind.

DEAR SENATOR: This is to congratulate you on your effort to keep the Supreme Court in its constitutional bounds. It appears they are trying to rewrite, or scrap the Constitution. All power to you in your effort.

Sincerely,

Mrs. DOROTHY D. DAVIS.

DALLAS, TEX., February 20, 1958.

Hon. WILLIAM JENNER,
Senate Office Building,
Washington, D. C.

DEAR SENATOR JENNER: I want to let you know that I am strongly in favor of the resolution, S. 2040 on which the Senate Committee on Internal Security is now holding hearings. By virtue of your bill, we can return to the States and to the people the right to regulate subversive activities.

It is pitiful that the Smith Act has been weakened by the Supreme Court in such a manner that the lower courts are now forced to free notorious Communists who have already been convicted of conspiracy to teach and to advocate the violent overthrow of the United States Government. I am also shocked at the recent Mallory decision of the Supreme Court which, by tying the hands of the police and the courts in combating rowdiness, muggings, and senseless beatings by young thugs, has made it perilous for peaceful citizens to be on the streets, especially at night, in some of our larger cities.

I would, therefore, like to suggest that you include in S. 2040 some provision for correcting this intolerable situation.

Yours very truly,

C. G. DAHM.

DALLAS, TEX., February 27, 1958.

Senator WILLIAM JENNER,
Senate Office Building,
Washington, D. C.

DEAR SIR: Senate bill 2040 must be passed if our country and its Constitution are to be saved.

I wish to tell you of my appreciation for introducing such a bill and hope for its passage without delays.

Sincerely yours,

J. C. CURRAN.

S. 2040—A DANGEROUS BILL.

By John K. Crippen, Park Ridge, Ill.

The Chicago Tribune—usually preponderantly rightwing—in its editorial of February 24, sounds almost like the defunct Daily Worker. It has labeled S. 2040, the Jenner bill, "a dangerous bill." It editorializes: "The remedy proposed by

Mr. Jenner is imprudent if only because it invites confusion. If he has his way, a statute may be interpreted in a dozen ways in a dozen jurisdictions and there will be no Supreme Court to set the same course for all." And, "Who, in these circumstances, can favor sacrificing the protection of the final appeal to the Supreme Court?"

The Tribune roundly condemns the bill on these grounds, but does not satisfactorily answer its own two major theses that the bill "invites confusion," and that it would "sacrifice the protection of the final appeal to the Supreme Court." First of all, no series of incidents in the history of the United States has caused so widespread a confusion as the 10 pro-Communist decisions in the past 2 years. Second, what protection of the final appeal to the Supreme Court? The Jenner bill involves exclusively criminal or alleged criminal acts of subversion. The Court has reversed the lower courts in many decisions, or even rewritten the Constitution in leaning over leftward. So, where is the logic of providing protection, except for the Communists?

The Tribune editorial eliminates three major considerations in its condemnation of the Jenner anti-Communist measure: (1) It does not take into consideration the fact that the Jenner bill is simply directed against criminal communism, that the Supreme Court has ruled exclusively in favor of the Communist viewpoint, and that this bill would simply erase this leftwing exclusivism in eliminating from jurisdiction of the "one-world Warren court" consideration of (a) State antisubversive measures, (b) Federal security programs, (c) prosecution for contempt of Congress, and (d) measures involved with subversion in the schools.

(2) The Supreme Court may, and often does, refuse to review those cases which it does not wish to review, having often failed to review decisions of the lower courts favoring anti-Communists, while often reviewing cases, and passing favorably upon, decisions affecting pro-Communists or Communists. (3) If at some future date the Congress wishes to repeal this law, feeling that it is no longer needed, it may readily do so. It is true, that if the Supreme Court's majority were a truly constituted body, and followed its only duty, of interpreting—not amending—the Constitution, the Jenner bill would not be needed.

The three factors named above demonstrate the need for the Jenner bill, S. 2616. The excellent article by L. Brent Bozell (National Review, March 1, 1958), sums it up neatly with the sentence: "The Supreme Court has taken to making political decisions; it has done so in every one of the cases to which the Jenner bill is addressed."

No, the Jenner bill is not a dangerous bill. Our country is in dire peril not because with S. 2616 "there will be no Supreme Court to set the same course for all," but because this Warren court has "set the same course for all"—and that course, decidedly to the left.

The country is not in danger because the Jenner bill, if passed, will sacrifice "the protection of the final appeal to the Supreme Court," but because the Supreme Court has demonstrably shown that protection applies exclusively to "the pro-Communist viewpoint." These are the very causes of confusion which the Jenner bill will eliminate, not cause.

Many members of the Warren court should be impeached. That is a long, difficult process. In its absence, let us have S. 2616.

SAN LEANDRO, CALIF., February 24, 1958.

Senator WILLIAM JENNER,
Republican, Indiana, United States Senate,
Washington, D. C.:

In full agreement with your bill to curb Supreme Court. Their decisions on Communists and communism is destroying American peoples' trust in law and courts. The Supreme Court is disregarding the basic principle no people or ideology has a right legal or otherwise to destroy America. The United States soldier fought for the common good of the United States. The Supreme Court decisions are fighting for the common denominator to destroy our country, communism.

DUANE V. COLOSIMO.

FORT WORTH, TEX., February 26, 1958.

Senator WILLIAM JENNER,
Senate Office Building,
Washington, D. C.:

DEAR SENATOR: Just to assure you of my interest in resolution S. 2046. We must redefine the power of the Supreme Court and restore to Congress its powers.

I deplore the weakening of the Smith Act; the Mallory decision; enforcement of integration.

Let's restore a few States' rights anyway—and have a Nation once more "of the people, by the people, and for the people."

Regret exceedingly that you are retiring—we need men of your integrity and ability.

Most sincerely

Mrs. JAMES A. COKER.

DETROIT, MICH., February 24, 1958.

DEAR SENATOR JENNER: May your efforts to bring out a bill that will prevent our Supreme Court from selling our liberties to the Communists and weakening our trust in the integrity of our whole legal system be successful and we shall be most grateful to you and Senator Eastland.

We are opposed to the wasteful administration of much of our so-called foreign aid since we apparently have few honest and capable men to manage that.

Let us regard the Hoover Commission findings and refuse to bankrupt our land by deficit spending.

Yours sincerely

H. G. CONNOR.

NORMAN, OKLA., February 20, 1958.

Hon. Senator WILLIAM E. JENNER,
Senate Office Building, Washington, D. C.

DEAR SENATOR JENNER: My Human Events came this afternoon and I was so pleased to read of your bill (S. 2046) that is coming up for debate the 19th. Have been wanting and wishing for a bill to curb the high court would be introduced. So I say, thanks a million. I still can not understand why men like you are quitting this fall, the fight to try and save America. God bless and help men like you.

Sincerely,

Mrs. J. O. CLAPHAM.

TERRELL, TEX., February 28, 1958.

Hon. WILLIAM JENNER,
Senate Office Building, Washington, D. C.

MY DEAR SENATOR: I am in favor of bill No. 2046 proposed by you in Senate, as it advocates the return to the States the right to regulate subversive activities, home rule over local schools, and admission to the bar in individual States.

Very truly yours,

EMIL R. CARTWRIGHT.
Mrs. M. CARTWRIGHT.

ARLINGTON, VA., February 28, 1958.

Hon. W. E. JENNER,
Chairman, Senate Subcommittee on Internal Security,
Senate Office Building, Washington, D. C.:

Please lend your fullest support to Senate bill 2046 and help us protect our State rights.

LOUIS O. CARL.

BATON ROUGE, LA., February 24, 1958.

Senator WILLIAM E. JENNER,
Senate Office Building Washington, D. O.

DEAR SENATOR JENNER: I have received from you the letter containing an announcement of the public hearings to be held on your bill (S. 2646) to limit the appellate jurisdiction of the Supreme Court of the United States, by the Senate Internal Security Subcommittee.

After reading the text of the proposed legislation, it appears to me that the scope of the bill is too narrow, since it would only limit the appellate jurisdiction of the Supreme Court of the United States. To be truly effective it should limit or prohibit jurisdiction not only of the Supreme Court but of any Federal court of the matters covered in subsections (1) through (5) of No. 1258, chapter 81, title 21, United States Code.

It would be my opinion that in order for subsection (4) to be effective to correct the conditions and circumstances that have occurred in the past, that it should be rewritten to read as follows:

"(4) Any law or executive rule or regulation of any State; or any rule, bylaw, regulation, action, policy, or practice of any school board, board of education, board of trustees, or similar body concerning (a) subversive activities in its teaching or administrative staff or other employees or among its students; or, (b) curriculums, financing, appropriation of funds, or qualification, discipline, or assignment of teachers, employees, or students; or (c) construction of buildings or facilities or selection of textbooks."

Trusting that these comments may be of some assistance, I am,

Very sincerely yours,

RICHARD C. CADWALLADER.

ST. PETERSBURG, FLA., February 22, 1958.

Hon. WILLIAM E. JENNER,
*Senate Judiciary Committee,
Senate Office Building, Washington, D. O.*

DEAR SENATOR JENNER: Without taking your time to read a lengthy letter, I desire of you that proposed bill S. 2646 have your unfailing attention. It will be the biggest and most important opportunity and responsibility that you have ever had to do something toward preserving the United States freedom and prevent us from becoming a vanishing race and committing national suicide.

If we destroy State sovereignty we shall lose the Republic of the United States of America. Our enemy has made the claim that they cannot take over America as easily if they have to combat the sovereignty of 48 States. Why hand our country over to our enemy?

Get the bill S. 2646 enacted into law. This is your responsibility to God.

I request that this letter go into the record.

Very truly yours,

J. BALDWIN BRUCE, M. D.

GENERAL ASSEMBLY,
STATE OF ILLINOIS,
February 19, 1958.

Hon. WILLIAM E. JENNER,
Senate Office Building, Washington, D. O.

DEAR SENATOR JENNER: I note by press reports that you are considering retiring from the United States Senate. Your retirement is very much regretted by those of us who have followed your career as one of the few statesmen who have had the intelligence and intestinal fortitude to stand up and fight all elements that have proven, and are proving, detrimental to the welfare and well-being of our Nation.

Your retirement will definitely, and without question, be a loss to the country. Men of your ability and stature, men who are willing to make the personal sacrifice for the good of the country and fellowman, have always been in a minority.

When I received my March Mercury I was very encouraged to read your article and to find that you are introducing legislation to spell out the power and function of the United States Supreme Court. While all points of the five-point program are of great importance, the returning of States rights to deal with subversive problems within their own borders is exceptionally important. I contend that any Member who would not restore the States rights as laid down

In the Constitution should never be returned to Washington. If you can just accomplish this five-point program, it will be added to the many great things you have accomplished while representing the people of America. It is beyond my conception that any Member of the Senate or House would refuse to restore the right of our United States Congress to deal with unquestionable traitors and to restore the right of the State to deal with the same problem within its own border. In my opinion, any Member who refuses to give proper protection to his State and Nation is on a lower level, if possible, than a traitorous Communist.

Senator Jenner, the people of the Nation know that you have more than earned your retirement and all of us are greatly appreciative of the many fine things you have accomplished and we do hope that somehow, someday, you will remain in a strategic position to offer your counsel and guidance.

Wishing you the best of everything, I am

Sincerely yours,

PAUL W. BROYLES,
State Senator.

DALLAS, TEX., February 27, 1958.

Senator WILLIAM JENNER,
Senate Office Building, Washington, D. C.:

We urge passage of Senate bill No. 2040, proposed by Senator Jenner. We deplore weakening of the Smith Act. Please include provisions in 2040 to correct recent dangerous decisions of Supreme Court.

Mr. and Mrs. CURIS R. BRIGHT.

HIG WELLS, TEX., March 3, 1958.

Senator WILLIAM JENNER,
Senate Office Building, Washington, D. C.:

Bill No. 2040 is of great importance to the future of this Nation. Your efforts are appreciated by every real American.

JACK BOWMAN.

O. T. BOES,
Indianapolis, Ind., February 22, 1958.

DEAR SENATOR: Thanks for sending us a copy of Senate bill 2040—needless to say as Americans and Hoosiers—we are for it.

We are also against ruthless foreign aid. We are against Federal aid to education. We are against throwing money away on H.O.

Now we are for Senator Jenner and most sorry to hear that you find it necessary to retire—but we believe we understand and welcome you back to Hoosierland.

Our very best wishes.

O. T. and LENORA BOES.

INDIANAPOLIS, IND., February 25, 1958.

Senator WILLIAM E. JENNER,
*Senate Office Building,
Washington, D. C.*

DEAR SENATOR JENNER: Nothing which has originated in Congress in years has encouraged us as much as your bill 2040. With its passage this country just might have a chance of survival.

I am wondering if you can send us 50 copies of the bill or of the mimeographs sent in your last mailing. We are ordering an equal number of the pamphlet *Nine Men Against America* to send out with it. About 6 weeks ago, we distributed over the country a number of the booklet *The Star*, published reprinting its editorials on the Supreme Court and a number of newspapers said they intended to use them. We will try now to get them to urge passage of 2040.

It is probably unnecessary to tell you how Fred and I feel on these other items, but please add two more names to your constituents opposing foreign aid or "loans." With the obvious business recession, surely Members of Congress can see that Americans need help too. The ridiculous spectacle now taking place in Washington to influence their votes should anger them. No money should be appropriated this year and the spenders can still do very well with

the backlog. The old made work, WPA, sort of thing could quickly send us into the economic collapse the Russian leaders have predicted. There should be a sharp curtailment of all domestic spending and a sizable tax cut should be made to encourage buying and production. And no summit meeting.

You have given so much time to fighting this frustrating battle that we cannot criticize your decision not to run again, but we are very unhappy about it; there are so few left in Congress who really represent Americans.

Sincerely,

CHARLOTTE G. BALLWEG.
Mrs. Frederick S. Ballweg.

SOUTH ORANGE, N. J., February 20, 1958.

HON. WILLIAM E. JENNER,
Senator from Indiana,
Senate Office Building,
Washington, D. C.

MY DEAR SENATOR JENNER: I have read with considerable interest the statements made by you in connection with Senate bill S. 2646 introduced for the purpose of limiting the appellate jurisdiction of the United States Supreme Court. I refer particularly to the pamphlet, dated August 7, 1957, containing your remarks at the hearing before the subcommittee to investigate the administration of the Internal Security Act and other internal security laws of the Committee on the Judiciary of the United States Senate. If it will not inconvenience you too greatly, I shall appreciate your sending me 6 or 7 copies of the printed statement, dated Wednesday, August 7, 1957.

Like many Americans with whom I have discussed the situation, I am deeply distressed at the position taken by the United States Supreme Court in many recent cases involving internal security measures. Like many others with whom I have talked, I cannot understand what is motivating the Court in taking the position it has unless there are reasons known only to the members of the Court and at which others can only guess.

To a certain extent, of course, appointments to the United States Supreme Court have always been dictated by political considerations. However, I believe that since 1933 the United States Supreme Court has been nothing but a political football, and the quality of the appointees to the Court since President Roosevelt's time has been deteriorating so steadily that today the average American has little or no respect for the Court, although as an inherently law-abiding people they continue to obey the decisions handed down by the Court. How long they will continue to do so, however, is anybody's guess. Nor is that the final stopping point. Disrespect for the Supreme Court, or its members, breeds contempt for all other courts. It is only a short step from that to a complete breakdown of respect for any law and order.

Very truly yours,

JAY E. BAILEY.

DETROIT, MICH., February 24, 1958.

SENATOR WILLIAM E. JENNER,
Senate Office Building,
Washington, D. C.

DEAR SENATOR JENNER: I understand your bill to curb the jurisdiction of the Supreme Court of the United States is coming before the legislature this week. These Justices are nine men working against our country. The passage of this bill is vital to the existence of our land. Its importance cannot be overemphasized. I do hope this bill passes.

Yours sincerely,

Mrs. ELNA AMBROSE.

PHILADELPHIA, PA., February 21, 1958.

HON. WILLIAM E. JENNER,
United States Senate.

DEAR SIR: I just want to tell you that I have written to Senator Eastland to ask him to have his committee approve your S. 2646 and send it to the floor of the Senate as quickly as possible. It is vitally important.

Sincerely,

ELIZABETH S. ABBOT.

SALEM, IND., February 28, 1938.

SENATOR WILLIAM E. JENNER,
Washington, D. C.

DEAR MR. SENATOR: Advise I think your bill to curb the Communist-loving Court should be the first act of Congress.

I suggest to those wild-eyed so-called liberals to read the Bill of Rights, which says the people only can change the rules and policies of the Government. I further suggest that most people are conservative and regular, and to my knowledge oppose protecting Communists with the Court and paying taxes to feed, clothe, and arm them.

What we sorely need is more Senators and Representatives to work for us.

Yours truly,

W. P. ALLEN.

ADVERSE LETTERS

The following letters express opposition to the bill. They are not a selection but constitute ALL the adverse letters that were received:

WHITE SULPHUR SPRINGS, MONT., February 18, 1938.

HON. JAMES O. EASTLAND,
Senate Office Building, Washington D. C.

DEAR SENATOR EASTLAND: By courtesy of your office a copy of the notice dated February 6 1938 relative to hearing on Senate bill 2040, has been placed in my hands. I thank you for bringing this hearing to my attention.

While I am not in a position to appear at the hearing, there are some things I should like to say about the bill.

I have followed with interest the discussion of various proposals brought forward during the last few years with a view to curbing the Supreme Court. One which I recall was a measure which would limit confirmation of appointments to 5 or 10 years. At the expiration of such period the name of the incumbent would be again brought before the Senate and unless his appointment were reconfirmed his tenure of office would cease upon the expiration of such limited period.

In my own thinking, I rejected this proposal as being contrary to the letter, spirit, and manifest intent of the Constitution, which is to provide for a Federal Judiciary completely insulated at every contact point from political or economic pressure.

The proposal embodied in this bill is certainly less objectionable than the one I have chosen for purposes of illustration. It is objectionable because in cases falling within any of the classifications Nos. 1 to 5, inclusive, the Supreme Court would be ousted of jurisdiction to review and to correct errors. If there were conflicting decisions in circuit or State courts, no way would be open by which to have the law finally settled and clarified. Conceivably, also, cases falling within the enumerated categories might arise involving constitutional violations of a very serious nature, in addition to and wholly unrelated to the specific questions which this bill would deprive the Court of power to review. Under the wording of the opening paragraph of the bill, the Supreme Court would be deprived of jurisdiction to review such errors because of the presence in the case of one or more of the questions specified by the statute.

I sincerely believe, sir, that no effective method of curbing the Supreme Court will ever be found, except the one way prescribed by the Constitution—impeachment. It is quite consistent with human frailty and the softness of our times that Congress should seek correctives which will not seriously hurt anybody or arouse bitter opposition. Our national dilemma has reached a stage at which it is probably true that not only the Justices of the Supreme Court but many high executive officers and Members of Congress have in one way or another violated their oaths of office. In such a state of affairs it seems to me a pitifully weak gesture to spend time in consideration of a bill which at best is no more than a manner of hitching the trouble on behind. To me it seems obvious that unless and until the American people can place in Congress dominant majorities with the plain, old-fashioned guts to bring impeachment charges and prosecute them vigorously, the Congress will never reclaim its rightful place in our political system and the Supreme Court will not be curbed.

Very respectfully yours,

JOSEPH T. WILSON.

(GREENCASTLE, IND., March 1, 1958.

SENATE INTERNAL SECURITY SUBCOMMITTEE,
Washington, D. C.

DEAR SIR: If it is true that, of more than 150 letters and postcards you have received concerning the Jenner bill to curb the powers of the Supreme Court, only 1 has been against it, you may add 1 more.

I enclose an editorial that exactly expresses my position. If you consider the St. Louis Post-Dispatch too liberal, please read the opinion quoted from the Chicago Tribune.

Very truly yours,

ERMINA MILLER,
1000 South College Avenue, Greencastle, Ind.

EDWARD K. HOWE,
Santa Barbara, Calif., March 5, 1958.

Reference: Bill S. 2046

Senator JAMES O. EASTLAND,
Chairman, Senate Committee on Judiciary,
Senate Building, Washington, D. C.

DEAR SENATOR: Merely proposing bill S. 2046 is prima facie evidence certain Members of Congress are either unaware or carelessly ignoring the historic discussions and events out of which our Constitution emerged. It might, therefore, be a good idea for these certain Members of Congress to go back to high school and take a refresher course in American history to learn all over again why Washington, Franklin, Madison, and the rest of the boys believed in a Supreme Court undiluted by your bill S. 2046. It was to keep in order the executive and legislative divisions of government from going on the wild and doing anything they damn well pleased.

This being an election year, when many Members of Congress will be busy making their promises to the electors, the suggestion to go back to high school, while constructive and might do them some good, is not practical at the moment. Animated by the desire to enlighten Congress and perhaps thereby preserve our freedoms, some associates of mine have requested that I take you boys on a jaunt in the time machine back to Philadelphia in the year of our Lord 1787.

When those wise statesmen met there to formulate a Constitution to replace the inadequate Articles of Confederation, they had the objective to create an instrument making possible "a supreme law of the land" for a powerful central government, yet restrained by this same instrument from usurping the "inalienable rights of the people" and rights of the respective States of the Union. The solution was the creation of three separate divisions of government, each with its own powers, legislative, executive, and judicial.

Checks were provided to prevent exceeding their respective powers; the judicial division "was vested in one Supreme Court and inferior courts that Congress would ordain and establish." The judicial powers granted by the Constitution extended to all cases in law and equity arising under the Constitution and are spelled out in the Constitution in understandable language and detail.

The powers vested in the judicial division gave it the last word on laws passed by Congress and the conduct of legislative and executive divisions, to be exercised to prevent acts of Government not granted by the Constitution. Thus it became the heritage of future generations protecting them from the illegal onslaughts of Presidents, legislators, big government, and bureaucrats. Preventing them individually and collectively from impairing the rights and freedoms of the people, the setting up in its place the rule of one man or set of men outside the Constitution.

Since 1787 this country has been afflicted with periodic breakdown of political verity, when expediency of men or parties became the guiding consideration of our rulers, when politicians loving themselves more than their country "mouthed their petty part and then were heard no more", when statesmen were conspicuous by their scarcity. Today we are in such an era.

In these debased periods of our political history Presidents or Members of Congress, resenting restraints of the Supreme Court, or as in the present reason for bill S. 2046 disliking for vote-catching purposes decisions of the Court, have attempted to emasculate the judicial division by whittling down its corrective

powers: powers granted for the preservation of our freedoms, to curb the ambitions of would-be dictators or the whims and unlawful desires of legislators.

In the past these raiders of our freedoms have been thwarted by the voice of an alerted people. We hold that bill S. 2010 should likewise be rejected, thereby defeating an attempt to undermine the very foundation that has sustained and made possible the survival of the democratic form of government. It should be defeated as another attempt to dilute the powers of the Judicial division, to weaken the guard at the gate.

Very truly yours,

EDWARD K. HOWE.

BRADFORD, PA., February 26, 1958.

HON. JAMES EASTLAND,

*Chairman, United States Senate Judiciary Committee,
United States Senate, Washington, D. C.*

DEAR MR. EASTLAND: Recent news reports stated that a bill proposed by Senator Jenner is before a Senate Judiciary Subcommittee for consideration. The bill in question would reduce the powers of the Supreme Court to entertain appeals in cases involving subversion.

I note also that various organizations, in addition to the Veterans of Foreign Wars (VFW), have gone on record in favor of the bill.

May I point out, as one veteran belonging to the Veterans of Foreign Wars, that I am strongly opposed to the proposed bill, and sincerely hope your committee will consider very seriously, and oppose, any limitation upon the Supreme Court.

History shows that many periods in the past have seen the Supreme Court junking unpopular decisions. If they had been limited, many of the protections afforded citizens today would be lost. I believe all three branches of our Government must be strong, but none at the expense of the others.

Sincerely yours,

JOHN H. MEZLER.

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